

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113

- by -

Grant B. Murray  
operating as GMX Express Courier Service  
("GMX")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Michelle Alman

**FILE No.:** 2000/524

**DATE OF DECISION:** October 6, 2000

## DECISION

### OVERVIEW

This decision addresses an appeal filed pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by Grant B. Murray (“Murray”), operating as GMX Express Courier Service (“GMX”), from a Determination issued July 7, 2000 by a delegate of the Director of Employment Standards (“the Director”). The Determination concluded that GMX had contravened sections 17(1) and 18(2) of the *Act* by failing to pay in a timely fashion wages and vacation pay owed to its employee, Gregory Auld (“Auld”). The Determination actually contained a calculation of severance pay, and vacation pay for that amount, owing to Auld pursuant to section 63 of the *Act*, plus statutory interest further to section 88(1) of the *Act*.

GMX appeals from the Determination, alleging that the Determination was in error in stating that wages and vacation pay were owed. GMX also appeals on the ground that Auld was an independent contractor and not its employee, hence the contractual relationship was not covered by the *Act* and no severance pay is owed. GMX further alleges in its appeal that Auld was “dismissed for work that was substandard.”

The parties made written submissions in this appeal. GMX offered no reply submissions further to the Director’s and Auld’s submissions.

### ISSUES

The issues to be decided are whether Auld was an employee of GMX or an independent contractor, and if so, whether he is owed wages, or severance pay, and vacation pay by GMX.

### THE FACTS AND ANALYSIS

GMX is a bicycle courier business owned by Murray and operating in downtown Vancouver. Auld made deliveries for GMX as a bicycle courier from November 16, 1998 until December 17, 1999. In GMX’s appeal submissions Murray states that “Auld was paid for each delivery” he made, that Auld “was not required to complete any pre-determined amount of work,” and that GMX guaranteed pay to Auld as a sub-contractor in the amount of \$75.00 per day. GMX further states in its submissions that Auld “was asked to be ready for work” between 8 a.m. and 5 p.m. “because those were the hours when the work was available,” and that Auld was “paid for his statutory holidays and vacation pay as a bonus for doing good work.” GMX denies that Auld was required to wear a uniform at any time. GMX also states in its appeal submissions that Auld was “dismissed for work that was substandard,” but gives no detail whatsoever in this regard.

Auld states in his initiating complaint letter dated May 2, 2000 to the Employment Standards Branch (“the Branch”) that he believed he was an employee of GMX for thirteen months, and that he was entitled to two weeks’ pay as compensation for length of service because he had not been given written notice prior to his termination. Auld also states in his complaint letter that he

was paid a guaranteed minimum amount of \$75.00 per day regardless of the number of deliveries he made, that he was paid regularly on the 5<sup>th</sup> and 20<sup>th</sup> day of each month, and that he was paid either his commissions on his deliveries or \$75.00 per day, plus 4% vacation pay. Auld said he was also paid \$75.00 for statutory holidays without being required to work on those days, and that GMX paid Workers' Compensation contributions on his behalf. Auld stated that he was given uniform T-shirts to wear and was not required to pay for radio rentals. Further, Auld stated that he was required by Murray to be in downtown Vancouver between 8:00 a.m. and 5:00 p.m., and to check in with Murray "from every stop so that he could control the direction of my activities." Auld said that at no time was he allowed to give his delivery assignment to someone else, and that Murray had, "on multiple occasions," refused to give Auld the day off in advance, even with the option of Auld's providing competent replacement workers.

The Determination recites that Auld owned his own bicycle and paid for its repairs, that GMX made no deductions from Auld's pay for income taxes, Canada Pension Plan contributions or Employment Insurance contributions, and that Auld was paid either commissions of 55% from fees for each delivery, or \$75.00 per day plus vacation pay. The Determination also notes that in a March 21, 2000 letter GMX claimed that Auld worked on an "on-call basis doing temporary assignments which he could accept or reject."

Section 1(1) of the *Act* states in relevant part:

*Definitions*

(1) *In this Act:*

***"employee" includes***

- (a) *a person...receiving or entitled to wages for work performed for another,*
- (b) *a person an employer allows, directly or indirectly, to perform work normally performed by an employee,*

...

***"employer" includes a person***

- (a) *who has or had control or direction of an employee, or*
- (b) *who is or was responsible, directly or indirectly, for the employment of an employee;*

...

***"work"*** *means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.*

Section 17(1) of the *Act* states:

***Paydays***

- 17 (1) *At least semimonthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by the employee in a pay period.*

while section 18 of the *Act* states in relevant parts:

***If employment is terminated***

- 18 (1) *An employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment.*
- (2) *An employer must pay all wages owing to an employee within 6 days after the employee terminates the employment.*

Section 58(3) of the *Act* dictates that vacation pay owing at an employee's termination must be paid within 48 hours after the employer terminates the employment. Relevant portions of section 63 of the *Act* address severance pay as follows:

**Liability resulting from length of service**

- (1) *After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.*
- (2) *The employer's liability for compensation for length of service increases as follows:*
- (a) *after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;*
- ...
- (3) *The liability is deemed to be discharged if the employee*
- (a) *is given written notice of termination as follows:*
- ...
- (ii) *2 weeks' notice after 12 consecutive months of employment;*
- ...
- (b) *... is dismissed for just cause.*

Section 63(4) of the *Act* dictates the mathematical formula by which severance pay is to be calculated. The Director's delegate applied this formula in the Determination, and GMX takes no issue in its appeal with the amount of the calculation.

The question of whether someone is an employee or an independent contractor can be determined in part by reviewing the following common law factors noted in the *Larry Leuven* decision, BC EST #D136/96:

- control by the employer over the work;
- ownership of tools;
- chance of profit/risk of loss;
- remuneration of staff;
- discipline/dismissal/hiring;
- perception of the relationship;
- intention of the parties; and
- integration into the employer's business.

The Director's delegate fully amplified upon these factors in the Determination. Indeed, the Director's delegate went at length into the common law's four tests for determining whether there is an employment relationship in a given situation. I can find no error in the Determination's recitation of the tests or appropriate factors for finding Auld was an employee of GMX between November 16, 1998 and December 17, 1999. GMX guaranteed Auld a minimum payment, thereby eliminating the risk of loss to Auld from earnings based solely on commissions as a sub-contractor. GMX also paid Workers' Compensation contributions on Auld's behalf, unlike the situation of a truly self-employed sub-contractor. Moreover, GMX controlled Auld's attendance at work and directed him closely concerning his deliveries, without allowing him the liberty to turn over to another courier any assignment he had received. While Auld did supply one of the basic tools of a bicycle courier, the bike, GMX supplied another vital tool, the courier radio. It is obvious that a bicycle courier is an integral part of the business of a bicycle courier service. Taken as a whole, the facts and the common law tests clearly support the conclusion reached in the Determination that Auld was an employee of GMX.

The Determination did, however, err in the finding that GMX was in violation of sections 17(1) and 18(2) of the *Act*. GMX instead violated sections 18(1), 58(3), and 63(2)(a) of the *Act* by failing to pay Auld two weeks' wages as compensation for length of service and vacation pay owing on that amount.

GMX offered no evidence to support its bald assertion that it dismissed Auld because his work became substandard. I find, therefore, that GMX failed to meet its burden of proving that there was just cause for its dismissal of Auld. Accordingly, Auld is owed the amount of \$1,092.40 as compensation for length of service, plus statutory interest.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination issued July 7, 2000 be varied to state that GMX violated sections 18(1), 58(3), and 63(2)(a) of the *Act*, and to reflect the correct additional amount of statutory interest now owing. I otherwise confirm the Determination's finding that Auld is owed the amount of \$1,092.40 as compensation for length of service, inclusive of vacation pay, plus statutory interest.

***Michelle Alman***  
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**Michelle Alman**

**Adjudicator**

**Employment Standards Tribunal**