

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act RS.B.C. 1996, C. 113

by-

Edward Terrance Lowe, also known as Eddy Lowe, operating as Sweepers
Canada and also known as Sweepers Canada Furnace Cleaners & Gas
Fitters
("Sweepers Canada" or "Lowe")

-of a Determination issued by

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D Collingwood

File No.: 98/341

DATE OF HEARING: September 22, 1998

DATE OF DECISION: October 23, 1998

DECISION

APPEARANCES

Edward T. Lowe	Appellant
Dan C. Freeman	Complainant

OVERVIEW

Edward Terrance Lowe, also known as Eddy Lowe, operating as Sweepers Canada and as Sweepers Canada Furnace Cleaners & Gas Fitters ("Lowe"), appeals, pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), a Determination by a delegate of the Director of Employment Standards dated May 7, 1998. In the Determination, Dan Freeman is found to have been employed by Lowe; Lowe is found to have contravened sections 18,44, 45 and 58 of the *Act*, and owe Freeman wages, statutory holiday pay and vacation pay; and a penalty is imposed, \$0.00, as may be assessed given the *Act* and the *Employment Standards Regulation*.

ISSUES TO BE DECIDED

At issue is the matter of whether or not Freeman was an employee. Lowe claims that the Director's delegate erred in determining that Freeman is an employee under the *Act*. According to Lowe, he hired Freeman as one would engage an independent contractor and Freeman operated a contracting business with his own customers, his own truck and equipment and his own helper .

Should the decision stand, that Freeman is an employee, the amount of wages is then at issue. Lowe claims that he paid \$204 of the \$914 in wages that is said to be owed by the Determination.

FACTS

It was through Whalley Social Services and an organisation called "MECCA" that Dan Freeman learned that Sweepers Canada was looking for a gas fitter. Freeman went to meet Edward Lowe and, on the 4th of May, 1996, he began cleaning heating ducts and cleaning and repairing furnaces for Lowe. As business was conducted, Lowe found the customers and booked appointments for Freeman, and Freeman went out, under the Sweepers Canada name, and physically did cleaning and repairs for Lowe's customers. Freeman's last day of work was June 20, 1997.

While working for Lowe, Freeman was of the view that he was working as a contractor. In a letter dated January 15, 1997, he wrote "I have been working with Sweepers Canada as a subcontractor since late May, 1996".

An agreement sets out terms and conditions of the relationship. It is dated June 4, 1996. The agreement refers to Freeman as "the sub-contractor" and Lowe's company, Sweepers Canada, as "the company". The preamble sets out that the sub-contractor "is an independent contractor" and understands that "he is not an employee of the Gompany". The agreement goes on to provide that the company shall not withhold Income Tax or CPP or ill moneys and that the sub-contractor is responsible for his own remittances to Revenue Canada and the Workers' Compensation Board. The agreement required Freeman to use specialised equipment and, should he not have that equipment, then the company was to provide "a one ton cube van specifically equipped to clean and service furnaces and ducts". The agreement allowed Freeman to undertake work for other companies. It also set out that, in the event that Freeman's work was found deficient in some way, it was Freeman that was expected to address the problem.

Pay was by the job. The rate was set through negotiations between Freeman and Lowe. On completion of a job, Freeman submitted an invoice to Lowe. Lowe would then have a cheque made out to Dan Freeman. On his invoices, Freeman wrote Dan's Furnace Service.

According to Freeman and the Director's delegate, in paying Freeman, Lowe issued two cheques which bounced and \$914 remains to be paid in wages. Lowe accepts that he still owes Freeman \$710 but claims that he paid Freeman the remaining amount along with other moneys. There is no evidence to show that he paid that remaining amount.

Lowe claims that Freeman was just one of several contractors which he used in the relevant period. I am provided evidence that Pacific Gas was used for one job but that is the extent of the evidence that persons and companies beyond Freeman were used in the period May, 1996 to November, 1996. I find that there was an almost complete reliance on Freeman in the period and accept, on the basis of his invoices, that he often worked 12 hour days and 6 day weeks. I find that that all changed in November. At that point, Lowe began to rely on Robert Untermann as well as Freeman for work. Lowe roughly split his jobs between the two men from that point until May of 1997 when Untermann quit. There is no evidence showing that some other person or company was engaged, to any significant extent, for work in the period November, 1996 to May of 1997.

On losing Untermann, Lowe and Freeman explored the possibility that Freeman might work more efficiently if he had a helper. Freeman admits that he entertained the idea that he might employ the helper but, on seeking advice, he decided against it. Nonetheless, Lowe found a fellow named Ken and he performed work in May and June as Freeman's assistant. Lowe's makes much of the fact that Freeman picked Ken up on occasion and took him to work but I am shown nothing which indicates that Freeman was the employer.

Lowe claims that Freeman supplied his own truck and vacuum and that he had his own customers. Freeman says that he neither owed a truck, nor supplied one, and claims that the truck which he used was supplied by Lowe. On the second point, Freeman admits, that when work was split between himself and Untermann, he attempted to establish his own business operating as Dan's Furnace Service. On finding only two customers, one job that paid \$65 and another that paid \$43, he gave up on the idea. There is no evidence to show that Freeman performed any work in the relevant period beyond that performed for Lowe and those two customers, nor am I shown evidence which indicates that Freeman supplied either a truck or a vacuum.

Freeman did pay for gas and he supplied hand tools.

Lowe claims that Freeman had "insurance" as protection against defective work. Freeman What bought was merely the bonding that many tradesmen enjoy.

ANALYSIS

The Act defines employee, employer, wages and work as follows:

"employee" includes:

- (a) a person, including a deceased person, receiving or entitled to wages-for work performed for another. (my emphasis)*
- (b) a person an employer allows, directly or indirectly to perform work normally performed by an employee, (my emphasis)*
- (c) a person being trained by an employer for the employer's business,*
- (d) a person on leave from an employer, and*
- (e) a person who has a right of recall;*

" employer " includes a person:

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

'wages includes

- (a) salaries, commissions or money. paid or payable by an employer to an employee for work, (my emphasis)*
- (b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,*
- (c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,*

(d) money required to be paid in accordance with a determination or an order of the tribunal, and

(e) *in Parts 10 and 11, money required under a contract of employment to be paid; for an employee's benefit, to a fund; insurer or other person,*

but does not include

(f) *gratuities,*

(g) *money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,*

(h) *allowances or expenses, and*

(i) *penalties;*

"work 11 means the labour or services an employee performs for an employer whether in the employee 's residence or elsewhere.

The above definitions are written so that the *Act* will have broad application. And the definition of employee is to be given a liberal interpretation. As the B.C. Court of Appeal has said in *Fenton v. Forensic Psychiatric Services Commission* (1991) 56 BCLR (2d) 170,

"the definitions in the statute of "employee" and "employer" use the word "includes" rather than "means". The word "includes" connotes a definition which is not exhaustive. Its use indicates that the legislature casts a wide net to cover a variety of circumstances."

Yet the matter of whether or not a person is an employee is not the most straightforward of matters [*Hospital Employees' Union, Local 180 v. Cranbrook & District Hospital*, (1975) 1 Can. L.R.B.R. 42 at 50].

The difficulty is that there is no single element in the normal makeup of an employee which is decisive, and which would tell us exactly what point of similarity is the one which counts. Nonnally, these various elements all go together but it is not uncommon for an individual to depart considerably from the usual pattern and yet still remain an employee. ...But while the legal conception of an employee can be stretched a fair distance, ultimately there must be some limits. It cannot encompass individuals who are in every respect essentially independent of the supposed employer.

Consolidating the tests which have been developed in aid of deciding whether a relationship is or is not one of employment, the Tribunal in *Larry Leuven* (1996) BCEST No. DI36/96, has said that there are several factors to consider, including:

- .Control by the employer over the work;
- .ownership of tools;
- .chance of profit/risk of loss;

- .remuneration of staff;
- .who has the power to discipline, dismiss, and hire, .the
- parties' perception of their relationship;
- .the intention of the parties; and
- .degree of integration.

The delegate has considered the above factors as the Tribunal expects each and every delegate to do. On the basis of the evidence before her, she concluded that Lowe engaged Freeman as an employer would hire an employee, and that he had the power to fire Freeman~ that the rate of pay was set by Lowe and that there was little opportunity for profit or loss~ that the work Freeman did for Lowe was an integral, indeed essential, part ofLowe's business~ that it was Lowe that supplied the truck and the most important tools~ that Freeman had no appreciable investment at stake; and that the contract between the two was ongoing in nature, and not for provision of a specific service. The delegate also found that Freeman paid for gas, was to an extent liable for substandard work, worked with really no supervision, and that he was free to hire employees. But all considered, she decided that the relationship was one of employment. I agree with the latter of her conclusions.

Freeman. in the relevant period, earned his living working for Lowe. His contract with Lowe was not for a particular job at a set price but continuing service, at a set rate ofpay. As such he squarely fits the *Act's* definition of employee. Freeman conducted minor business, he thought of himself as a contractor, and he agreed that he was Lowe's subcontractor, but when all aspects of the relationship are considered it is clear to me that it was one of employment. A person can both work as an employee and be in business. Freeman thought of himself as Lowe's subcontractor but nothing turns on that misconception. And the contract into which he entered, like any agreement to waive the requirements and provisions of the *Employment Standards Act* is simply without force or effect, Freeman not being covered by a collective agreement, as it is contrary to section 4 of the *Act*.

4 The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

The Detemlnation provides Dan Freeman with the protections and minimum standards to which he is entitled as an employee in the province of British Columbia. To that extent it is confined.

The Determination calls for Lowe to pay \$914 in wages. Lowe argues that he has already paid \$204 of that but he fails to show that to me. The Determination is confirmed in its conclusion that \$914 remains to be paid in wages.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated May 7, 1998 be confirmed in the amount of \$3,351.02, together with whatever further interest has accrued pursuant to Section 88 of the *Act*, since the Determination's date of issuance.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal