

An appeal

- by -

1 Cellular Group Inc.
 (“# 1 Cellular”)

- of a Determination issued by -

The Director of Employment Standards
 (the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: M. Gwendolynne Taylor

FILE No.: 2002/383

DATE OF DECISION: October 23, 2002

DECISION

OVERVIEW

Pursuant to section 112 of the *Employment Standards Act*, #1 Cellular Group Inc. (“#1 Cellular”) filed an appeal from a Determination by the Director dated July 11, 2002. The Director found that Darrel Hamilton (“Hamilton”) was an employee of #1 Cellular and that #1 Cellular contravened the Act and the Regulations by failing to pay wages, annual vacation pay, statutory holiday pay, and compensation for length of service. The Director ordered #1 Cellular to pay \$1,190.61, which included interest.

On July 16, 2002, #1 Cellular appealed the Determination. The grounds of appeal are that Hamilton’s evidence was not truthful, and the Delegate misunderstood the evidence, did not consider #1 Cellular’s position and did not do a thorough investigation. #1 Cellular argued throughout the Director’s investigation that Hamilton was not an employee.

ISSUE

Does the evidence support the Director’s Determination that Hamilton was an employee rather than an independent contractor and that #1 Cellular owes Hamilton the sum of \$1,190.61?

BACKGROUND

#1 Cellular is a business that sells cellular telephones, telephone accessories and air time packages. Hamilton was attending College. He took a part time position with #1 Cellular as a sales associate from October 5, 2001 to January 13, 2002, on a commission basis of 50% of the profit on each sale. The parties disagree on the nature of Hamilton’s contract.

Hamilton maintains he was an employee entitled to receive minimum wage if his commissions were not equal to or greater than minimum wage. He submitted that he reported to work at the times set, sold the products and plans at the prices #1 Cellular set and that although there was some room to negotiate on the prices of accessories, he was limited in his ability to reduce a price to make a sale.

Hamilton submitted that the payment he received in December 2001 was less than minimum wage and when he confronted #1 Cellular he was told he was not an employee and minimum wage was not guaranteed. He continued to work but asked that his hours be reduced. #1 Cellular would not agree to the reduced hours. As of January 13, 2002, #1 Cellular terminated his contract.

#1 Cellular maintains that Hamilton was an independent broker or contractor, not an employee, and that the working conditions were guidelines only, not instructions. Further, the brokers were able to set their own prices and were paid a percentage; if there was a loss, the brokers absorbed it. #1 Cellular submitted that out of 100 brokers over the past 6 years, only 3% made a claim and two of those were settled as contractors, with no minimum wage or holiday pay. According to #1 Cellular, Hamilton’s contract provided in the first month for commission payment to equal minimum wage, but after that he was “on his own.” #1 Cellular stated that Hamilton’s request to change his days of work was denied because “we had too many volunteers for those days already.”

The Director's Delegate reviewed the evidence from both parties and applied the "four fold test" in determining whether Hamilton was an employee or a contractor. The Delegate found that #1 Cellular exercised control over the hours of work and did not permit Hamilton to change them, that Hamilton was hired on an on-going basis, was expected to report for work each shift and was an integral part of the operation, that Hamilton did not own a business, that #1 Cellular established the business, provided the tools for the job, and set the prices, that Hamilton had some flexibility on the selling price of accessories, but not for the main products. The Delegate found that when the evidence was applied to the tests, it clearly indicated that Hamilton was an employee.

The Delegate also analyzed the evidence provided on the hours Hamilton worked and the payment he received and applied the statutory provisions. #1 Cellular did not provide any time records and the Delegate relied on, and accepted as correct, evidence provided by Hamilton. In December 2001, #1 Cellular deducted \$200 for a contract that had been cancelled. The Delegate found that this was an unauthorized deduction. The Delegate found that #1 Cellular owed Hamilton compensation for wages, annual vacation, statutory holiday pay, the unauthorized deduction, compensation in lieu of notice and interest, in the total amount of \$1,190.61.

ANALYSIS

The onus is on the appellant in an appeal of a Determination to show on a balance of probabilities that there is an error in the Determination, which ought to be varied or cancelled. When an appeal comes before the Tribunal an adjudicator will not disturb a finding in the Determination unless there is new evidence that was not available at the time of the investigation, or there has been a fundamental error in law or a breach of the rules of procedural fairness.

#1 Cellular submitted that the Delegate was expressing his personal opinions, not facts, that the evidence is based on hearsay, that the Delegate should have contacted the other workers to confirm their view that they are self-employed contractors, and that the Tribunal should conduct an oral hearing, with all individuals testifying under oath. The Tribunal determined that the appeal would be decided based on the written submissions.

The primary issue in this appeal is whether Hamilton was #1 Cellular's employee or if Hamilton was an independent contractor. The Tribunal has applied the statutory definitions and long established common law criteria in many situations to analyze similar relationships. The common law criteria have variously been referred to as the "four fold test", "the integration test", "the economic realities test", "the specific results test" or "the control test."

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,
- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
- (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 indirectly, for the employment of an employee.

"wages" includes

(a) salaries, commissions or money, paid or payable by an employer to an employee for work,

...

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

As can be seen from the definitions, whether someone is hired on commission is not conclusive of the nature of the relationship. It is necessary to look at various factors to weigh how independent the worker is in reality, who has control of the employment conditions, etc. In this case, it is clear that the Delegate looked to the four fold test: degree of control, ownership of tools, risk of loss and chance of profit as determining factors. The Delegate determined that in applying the test to the evidence, the scales tipped in favour of Hamilton being an employee rather than an independent contractor.

#1 Cellular has not provided any new evidence. It submits that the Delegate gave too much weight to Hamilton's evidence and no weight to #1 Cellular's evidence. It submits that the Delegate stated he relied on Hamilton's time records, but Hamilton did not submit any. The issue of time records in large part affects the monetary calculation, not the determination of whether Hamilton was an employee or an independent contractor.

I have reviewed the evidence presented in the appeal, that was before the Delegate, and I find that the Delegate did consider #1 Cellular's evidence on the factors relating to the nature of the employment relationship. I am satisfied that the Delegate applied the correct legal test and that the Delegate's findings and determinations are consistent with and well supported by the evidence and are rational.

The Delegate referred to Hamilton's time records and noted that #1 Cellular did not submit any. Hamilton had stated in his evidence that he submitted time sheets in December when he realized he was not paid full wages. Other than that, it appears the records the Delegate relied on relate to the commission sales, as stated by #1 Cellular. The Delegate noted that according to the statutory requirements, Hamilton would be entitled to minimum wage and a minimum 4 hour call out. I have looked closely at this issue and the evidence and find that the Delegate's determinations are well founded. I see no reason to disturb the Delegate's findings or determinations.

ORDER

Pursuant to section 115 of the *Act*, I confirm the Determination issued July 11, 2002.

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal