

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-

Leonard Mirecki
("Mr .Mirecki ")

-of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Geoffrey Crampton
FILE No.:	98/439
DATE OF HEARING:	October 9, 1998
DATE OF DECISION:	October 22, 1998

DECISION

APPEARANCES

Leonard Mirecki on his own behalf

Kelvin Mooney on behalf of Howe Sound Timberframe Homes

OVERVIEW

This is an appeal under Section 112 of the *Employment Standards Act* ("the Act") against a Determination which was issued on June 16, 1998 by a delegate of the Director of Employment Standards ("the Director"). The Director determined that no employment relationship existed between Leonard Mirecki and Kelvin Mooney operating as Howe Sound Timberframe Homes and that no wages were owed to Mr. Mirecki.

The results of the Director's investigation and the analysis upon which she made the Determination were set out in the following manner:

Allegations

In your complaint you alleged that between October 29, 1997 and April 17, 1998, you were employed by Kelvin Mooney and/or Howe Sound Timberframe Homes. You claim that Mr. Mooney was building a house that was to serve as the display home for his business, that of selling timber frame houses. You claim that you worked 7 days a week and that you were to be paid at the rate of \$12.00 an hour. You state that you have not received all wages that are owed to you, and that the employer owes you regular wages and overtime.

Evidence

On or around October 28, 1997, you arrived in Vancouver and made contact with Mr. Mooney. Both you and Mr. Mooney agree that you were childhood friends. Immediately thereafter, you went to live at Mr. Mooney's home. It is agreed that you sought Mr. Mooney out. He did not contact you to make any offers to you.

At that time, Mr. Mooney was building a house in Furry Creek, B.C. During the time that you resided with Mr. Mooney and his family, you went frequently to the Furry Creek building site and performed some work

related to the construction of Mr. Mooney's house. On occasion, Mr. Mooney would loan you his vehicle to go to the site alone.

Mr .Mooney states that he is interested in marketing timber frame houses. It is agreed that the house was built as a home for the Mooney family and not for the sole purpose of marketing timber frame houses. Mr. Mooney has full time long term employment with a large utility .The fledgling company Howe Sound Timberframe Homes has no employees.

It is agreed that you received some money from Mr. Mooney between October 1997 and April 1998. It is also agreed that you performed some work on the house.

Analysis

The issue to be determined is were you an employee In an employer/employer relationship.

Your position is that you agreed to become Mr. Mooney's employee at an agreed to rate of pay and that as your employer, Mr. Mooney failed to pay you the wages that you had earned. Mr. Mooney's position is that you arrived in Vancouver with no money, prospects or accommodation, that he took you into his home and provided you with free room and board as well as spending money, including money to go the California for Christmas to see your children. He states that he agrees that you frequently attended the building site with ~m and performed some work. He states that you had no skills as a trades person and that the work that you performed was, due to your inexperience and slowness less than that which would be expected from a wage earning employee. This position is supported by trades person on the site, Mr. Mathias, who states that you would take several weeks to perform a task that would take a qualified trades person only a couple of days to perform. Mr. Mathias states that his impression was that you spent a deal more time standing about talking to people than you did performing work on the house. Mr. Mooney states that he frequently encouraged you to seek employment and stop spending your time at the building site, since your presence, while appreciated, was not required. Mr .Mooney states that your friendship underwent some strain and that you and his children did not get along. He states that you were given money by him to go home to Winnipeg.

After reviewing the statutory definition of "employee- " and "employer", the Director continued:

The situation that is described, and agreed to on many relevant points, is one of a long term house guest helping out his host and hostess. The host

and hostess, in kind responding with gifts of money to show their appreciation of the efforts put forth by the guest. There is no evidence to suggest that Mr. Mooney had control or direction over the work that you performed. There is no evidence that Mr. Mooney was responsible directly or indirectly for employment of you as an employee. Rather, you were Mr. Mooney's house guest who showed appreciation for free accommodation by performing tasks at Mr. Mooney's building site. Mr. Mooney as your long term friend and host showed his appreciation for the help that you had given him by providing you with free accommodation and meals, gifts of spending money and money to visit your children.

I find that no employment relationship exists and that you are not owed wages by Mr. Mooney. Your complaint will now be closed on our file.

Mr. Mirecki's appeal challenges the findings of fact made by the Director and alleges that the submissions made by Mr. Mooney to the Director are a "fabrication". He also submits that the Director made an error in law in determining that no employment relationship existed.

An oral hearing was held at the Tribunal's offices on October 9, 1998 at which time evidence was given under oath by Leonard Mirecki, Kelvin Mooney, Kevin Mathias, Adam Whyto, Harm Oostinde, James Wanthier and Jennifer Mooney.

ISSUE TO BE DECIDED

Did the Director err in determining that there was no employment relationship between Leonard Mirecki and Kelvin Mooney operating as Howe Sound Timberframe Homes?

ANALYSIS

It is trite law that as the appellant Mr. Mirecki bears the onus of establishing that the Director erred and, therefore, that this appeal should succeed.

As noted previously by the Tribunal (*World Project Management Inc.*, BC EST #D 134/97) the appeal process created by way of Section 112 of the *Act* is an appeal from a determination already made and otherwise enforceable in law. As a result, an appellant is required to set out clearly those aspects of the determination which are disputed and to delineate the issues and remedy sought.

Mr. Mirecki submitted a lengthy set of written materials in support of his appeal which I have reviewed carefully. However, the threshold issue which I must decide, before dealing with any other issue, is whether the evidence and submissions establish, on balance, that Mr. Mirecki was offered and accepted employment with Mr. Mooney. Each

party sought to question the credibility of the other party in their submissions and by giving or calling oral evidence which referred to issues that did not assist me in deciding the threshold issue. Nevertheless, this appeal turns on the credibility of Mr. Mooney and Mr. Mirecki as only they were present at the meeting during which Mr. Mirecki alleges he was employed by Mr. Mooney.

Where there is a conflict in the evidence which requires the adjudicator to believe one person as against one or more other person, as is the situation in this appeal, the views of the late Mr. Justice O'Halloran of the Court of Appeal of British Columbia in *Faryna v. Chorny*, (1952) 2 D.L.R. 354 (B.C.C.A.), have been widely accepted. He made the following comments on how the issue of credibility ought to be assessed by an adjudicator, at page 357:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the best test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all elements by which it can be tested in the particular case.

I find that in assessing the credibility of the evidence which her investigation produced, the Director subjected that evidence properly to the test set out in *Faryna v. Chorny*. It is clear that in making the Determination, the Director based her findings of credibility on all of the elements by which it could be tested. She identified, in her analysis, several grounds for preferring Mr. Mooney's evidence that the nature of the relationship was one of "long-term friendship" in which one of the friends was a long-term guest of the other and "showed appreciation for free accommodation by performing tasks at Mr. Mooney's building site."

When I review and consider the evidence given at the hearing and the parties' lengthy written submissions, I am not persuaded that the Director erred in determining that there was no employment relationship between the parties.

ORDER

I order, under Section 115 of the *Act*, that the Determination dated June 16, 1998 be
confiffiled.

Geoffrey Crampton .
Chair
Employment Standards Tribunal