

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 -

Preston Gacki operating as Trimming Landscaping

(the "Appellant")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE No.: 2000/606

DATE OF HEARING: November 17, 2000

DATE OF DECISION: December 6, 2000

DECISION

APPEARANCES:

Preston Gacki	for the employer
Michelen Nicole Roy	for herself
No one	for the Director of Employment Standards

OVERVIEW

This is an appeal by Preston Gacki operating as Trimming Landscaping (the employer) from a Determination dated August 8, 2000 that found the employer liable to pay the complainant, Nicole Roy, wages owed, minimum call out hours for three days, statutory holiday pay, vacation pay and interest on the above in the amount of \$597.91.

ISSUE(S) TO BE DECIDED

1. Is the complainant an employee under the *Act*?
2. Is the employee owed regular wages, pay for minimum daily hours, statutory holiday pay and vacation pay?
3. Is the employer entitled to claim that prior overpayments can be offset against wages owing upon termination?

FACTS

The employer operates a landscaping business. At the material time the employer employed the complainant and two others on a regular basis. The complainant was hired as a horticulturist. Her main duty was to provide fine trimming and pruning of trees, hedges, shrubs, etc. for the clients of the employer.

At the point of hire the complainant and the employer discussed wages. The complainant, who had recently completed a horticulturist course at Capilano College, stated that she felt a wage in the \$12.00 to \$14.00 per hour range was appropriate. The employer informed her that he would pay her \$12.00 per hour, without deductions, and that he would treat her as a sub-contractor. The complainant testified that she had not been hired in such a manner previously but nonetheless was glad to have employment in her chosen field.

The complainant did not possess a vehicle. Therefore the employer, rather than requiring her to report to its "base", agreed that the other members of the crew would pick her up each morning at approximately 8:00 a.m. at a service station not far from where the complainant lived.

The employer would pay for work commencing at 8:00 a.m. Generally the crew worked 8 hours per day Monday through Friday. In order to make use of the time between the main crew reporting to the base and the time that the complainant would be picked up the employer suggested that she could do some work at two accounts the employer held which were adjacent to and across the street from the pick-up point. It was not expected that this work would be extensive as the only tool that the complainant had with her in the morning was a set of hand pruners known in the industry as secateurs.

The complainant commenced work in May 1999. Her last day of employment was August 13, 1999.

The complainant did not bring any customers with her into the employment relationship. The employer provided the customers, the work locations, the job assignments and, aside from the hand pruners, the other tools and equipment to do the job. The complainant worked as part of the landscape crew; however, it must be recognized that her duties were specialized and therefore required her to work alone to complete her tasks at certain locations.

The complainant testified that she kept rough daily records of hours worked. She provided these records to the employer. The employer in turn would write cheques to the complainant but it appears that these cheques did not necessarily accord with the hours that were submitted. Often the sums on the cheques were in even numbers such as \$500.00 or \$600.00. There were no deductions taken from the cheques.

Certain records were submitted at the investigation stage that purported to be a record of hours worked by the complainant. The complainant's testimony was that the documents submitted at the investigation stage were records for work in the month of May, June, July and August, 1999 that were not compiled daily but rather were compiled on a single occasion at the termination of her employment. During the appeal stage the employer entered amended copies of those records which contained further information dealing with specific hours worked on the days listed. I will return to this aspect later.

During the week of August 8 through 15 the employer took some time off. He left one of the workers in charge as a foreman. This period happened to be the last week that the complainant worked for the employer. It was also during this week that one of the claims for minimum daily pay arose. That day was August 11, 2000. The other two days for which minimum daily pay were claimed are August 5 and June 28. The claim for minimum daily pay arose when the complainant reported to the designated pick-up spot but the other crew members did not pick her up. After waiting for periods varying from one half hour to an hour and a half the complainant walked back to her residence.

ANALYSIS

The employer takes the position that the complainant is not an employee. The employer argues that it carefully explained to the complainant at the point of hire that she was not an employee but rather a sub-contractor. He explained to her that she would be responsible for her own income tax and that there would be no deductions from her cheque. The employer stated in its submissions that it does not hire employees and does not have any intention to hire employees.

The test to determine whether a worker is an employee is well established. The test requires an analysis of factors going to control of the work place; the integration of the workers' duties with the employer's business; whether the employee has a chance of profit or a risk of loss; whether the person in question supplies his/her equipment to do the work; and whether the person performing the work also works for other employers, or hires his/her own employees. In this case the employer, Mr. Gacki, controlled the hiring process. The complainant had suggested a wage rate in the \$12.00 to \$14.00 range to which Mr. Gacki responded that he would pay \$12.00 without deductions. I find that the hourly rate was set by the employer rather than the complainant.

The employer supplied the work locations and determined when the work would be done at each location. The crews worked a regular 8 hour shift that was set by the employer. As the complainant was dependent on transportation by the other crew members to the job she had no ability to set her own schedule. The employer supplied all tools except the secateurs.

The work that the complainant performed was wholly integrated into the employer's operation. She was a member of a crew where she performed one aspect of overall work done by that crew. Her work was integral to the completion of the jobs for the employer rather than being ancillary to it. She performed gardening maintenance work that was the exact business that the employer was operating. She worked for no other employers.

For the above reasons I find that the complainant is an employee under the *Act* and is therefore entitled to the statutory protections provided in the *Act*.

I turn now to the issue of wages owing. This issue is troublesome because the records provided by the employer do not adequately reflect the basis of the employer's argument. The records provided are a daily summary for the months of May, June, July and August of the hours worked by the complainant. As stated previously these summaries were not completed on a day by day basis. The complainant testified that she had provided records to the employer but that the records that the employer provided to the delegate were records that were compiled on or about her last day of employment. This is a significant problem because the employer argues that if the sums on the cheques that he paid the complainant are totaled over the course of her employment one will see that she has been overpaid. Therefore no monies are owing for the period of August 9 through 13. The employer does not dispute the complainant's claim that she worked on August 9, 10, and 12 plus the two hours minimum pay on August 11. The employer's argument is that the prior payments became overpayments and therefore the employer should not be liable for wages on those August days notwithstanding the fact that the complainant worked as stated.

To support its argument the employer, on appeal, provided the same set of records that were provided during the investigation stage except that the records contained additional information regarding the actual hours worked. The employer testified that this information was garnered both from the complainant and by reviewing time records submitted by the other employees. The employer argued that since the complainant was part of a crew the hours that she worked could be determined by looking at the hours submitted by the other employees because they all traveled to and from the job sites together. The employer referred to the hours submitted by the other employees as "work sheets". The employer offered to provide these work sheets at the hearing as they were in his vehicle which was parked outside the building.

I am not able to accept this evidence by the employer. On July 7, 2000 the Director's Delegate sent a Demand for Employer Records to the employer. The employer responded to that Demand by supplying the monthly summaries that had been referred to previously. The employer did not include the "work sheets" that had been submitted by the other employees. The employer argues that it did not understand the scope of the Demand nor that it was obliged to supply those records.

I am not prepared to admit this evidence at the hearing. The evidence was available during the investigation stage and was not provided by the employer. The policy of the Tribunal is well established that such evidence is not admissible at the appeal stage. (See Tri-West Tractor Ltd. BCEST #D268/96)

After reviewing the evidence that is before me I am not able to reconcile the employer's argument that there were overpayments in May, June and July that could be off set against the final cheque owed to the complainant. It is clear that the employer did not keep proper payroll records as contemplated by Section 28 of the *Act*. Had these records been kept and had an itemized pay stub been supplied to the complainant with each cheque this dispute may not have arisen. An employee cannot be expected to reconcile his or her pay cheques with hours worked if the employee is not being given any payroll information by the employer on pay day. It is the employer's responsibility to maintain proper payroll records and the failure to do so should not prejudice an employee.

One matter remains outstanding. The Determination awarded 32 hours' pay for the period August 9 to August 13. The complainant did not claim hours for Friday August 13. The Director's Delegate in the Determination found that the employee was entitled to eight hours' pay for August 11 and also determined in his calculations that she was entitled to minimum pay of two hours for the same day. This is an error on the face of the Determination. The complainant was not able to recall where she worked that day or whether in fact she had worked. The employer testified that she could not have worked a full eight hours because the other employees had marked only four hours work that day. I am satisfied that the complainant did not work that day but that she did report to the designated pick-up area. The Determination dated August 8, 2000 should be varied to delete the payment for eight hours on August 11.

I have found that the complainant is an employee and therefore she is entitled to wages, statutory holiday pay and vacation pay. However, as stated above, the Determination is to be varied to delete eight hours' pay from the amount and therefore there must be an adjustment to the wages, vacation pay and interest calculations.

ORDER

The Determination dated August 8, 2000 is varied accordingly.

E. Casey McCabe

E. Casey McCabe
Adjudicator
Employment Standards Tribunal