



An appeal

- by -

Auto-Gard Protection and Appearance Centres Ltd. -and- Auto Pride 2000
Total Appearance Center Ltd. -and- Lawrence Carl Huth operating as Auto
Pride 2000 Detail Centre, Auto.Fx Detail Centre, Auto Gard Appearance Centre
Ltd., Auto.Fx Detail Centre Ltd. (Auto Pride), Auto Pride Details N Glass Ltd.,
and Auto Pride Total Appearance Centre Ltd.

("Auto Pride")

- 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: David B. Stevenson

FILE No.: 2001/548

DATE OF DECISION: October 2, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Auto-Gard Protection and Appearance Centres Ltd. -and- Auto Pride 2000 Total Appearance Center Ltd. -and- Lawrence Huth operating as Auto Pride 2000 Detail Centre, Auto.Fx Detail Centre, Auto Gard Appearance Centre Ltd., Auto.Fx Detail Centre Ltd. (Auto Pride), Auto Pride Details N’ Glass Ltd. and Auto Pride Total Appearance Centre Ltd. (“Auto Pride”) of a Determination that was issued on June 29, 2001 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Auto Pride had contravened Part 3, Sections 16, 17(1), 18(1) and (2), Part 4, Sections 40(1) and (2), Part 5 Section 46(1) and (2), Part 7, Sections 58(1), (2) and (3) and Part 8, Section 63(2) of the *Act* in respect of the employment of Shannon James (“James”) and Stephen McCaskie (“McCaskie”) and ordered Auto Pride to cease contravening and to comply with the *Act* and to pay an amount of \$32,895.79. All but \$297.05 relates to the complaint filed by James.

Auto Pride says the Determination is wrong because James was not an employee, but an independent businessman who ran his own business. Auto Pride also says that McCaskie quit of his own accord and left town. The appeal asks that Auto Pride be completely absolved from the Determination.

ISSUE

The issue in this appeal is whether Auto Pride has shown the Director wrongly concluded James was an employee of Auto Pride for the purposes of the *Act* and whether Auto Pride has shown any error in the Determination in respect of the complaint of McCaskie.

FACTS

The Determination set out the allegations made by James and McCaskie as follows:

James alleges that he was an employee of Auto Pride Detail Centre and was hired as a Labourer/Detailer on November 1, 1998 and terminated October 30, 2000. James claims he was hired on a piecework rate of pay and he did not receive minimum wage, overtime, statutory holiday pay, vacation pay and compensation for length of service.

McCaskie alleges that he was an employee of Auto Pride and was hired as an Auto Detailer on April 11, 2001 and terminated on April 25, 2001. McCaskie claims he was hired at a rate of \$10.00 and he did not receive all his wages, overtime, statutory holiday pay, and vacation pay.

Auto Pride is a vehicle cleaner and detailing centre operating in Penticton, B.C.

In response to the complaint filed by James, Auto Pride took the position that James was not an employee, but an independent business subcontracting for Auto Pride. In support of that position, Auto Pride stated that James had his own business licence, Visa and bank account and rented space from Auto Pride for his business. On December 5, 2000 Auto Pride provided some supporting documentation for their position. The documents included copies of rent receipts, a letter to Revenue Canada, a bank account statement and an ad placed in the local newspaper.

The Director issued two Demands for Records during the investigation of the complaint by James. On March 16, 2001 a Demand was issued to Lawrence Carl Huth operating as Auto Pride 2000 Total Detail Centre and was delivered by registered mail. Mr. Huth responded to the Demand by letter dated March 20, 2001, stating, in part, that any inquiries should be forwarded to the lawyer for Auto-Gard Protection and Appearances Centres Ltd. On April 11, 2001 a Demand for Records was issued to Auto-Gard Protection and Appearances Centres Ltd. Both Demands requested the following information concerning James:

1. all records relating to monies earned, whether paid as wages or as a result of a contractual arrangement, all hours of work, whether as an employee or under a contractual arrangement and conditions of employment or conditions applying to a contractual arrangement.
2. all records an employer is required to keep pursuant to part 3 of the *Employment Standards Act* and Part 8, Section 46 and 47 of the *Employment Standards Act Regulation*.

There was also a letter sent to the lawyer for Auto-Gard Protection and Appearances Centres Ltd. to ensure an understanding of the information required to be provided. There was no response to either Demand.

On May 4, 2001, two Demands for Records were issued in respect of the complaint by McCaskie, one to Lawrence Carl Huth operating as Auto Pride 2000 Total Detail Centre and the other to Auto-Gard Protection and Appearances Centres Ltd. In response to the Demands, the Director was given a one page typed summary of hours worked by and wages paid to McCaskie, with the comment added by Mr. Huth that “when Mr. McCaskie received his cheque he informed me he was leaving town. I said to him he still owes me \$70.00 from advances. He said he would mail it back to me.” In a letter dated May 9, 2001, the Director advised Mr. Huth he had not submitted enough information and asked that Mr. Huth provide additional information. The letter was sent to the lawyer for Auto-Gard Protection and Appearances Centres Ltd. and to the employer. The copy sent to the employer was returned by Canada Post, marked “refused”. No further information was provided in response to the claim by McCaskie.

James provided the following information:

- he began working for Auto Pride in November, 1998. He began to keep daily time records December 1, 1998. He kept no record of the money he was paid.
- from November 1, 1998 until late 1999, he was paid by cheque made payable to him personally. In late 1999, Mr. Huth told him he would need to form his own company, set up a bank account in the name of the company and take out a business licence in the name of the company. Auto Pride 2000 Detail Centre was created and James' paycheques were made payable to that entity.
- for the most part, the only persons who worked at the business were James and Mr. Huth. From time to time other people were hired, but none lasted very long.
- James was instructed by Mr. Huth when to commence work and when to end work. Mr. Huth was usually at the business for only one or two hours a day and sometimes did not come in for two or three days running.
- James was instructed where to leave cash or cheques received from customers for Mr. Huth to pick up.
- James used the tools and supplies provided by Mr. Huth and had no financial investment in the business.
- in response to the letter of May 20, 2000 to Revenue Canada, James said that Mr. Huth prepared it and required him to sign it under threat of termination.
- James said the newspaper ad was placed and paid for by Mr. Huth.
- James never paid any rent to Mr. Huth, as was alleged by him, all the rent receipts provided to the Director were prepared at the same time and James was required to sign them.
- James said he was instructed by Huth to open the bank account as Mr. Huth could not. When customers paid by Visa, James was required to sign the Visa deposit and give Mr. Huth the cash.
- James was required to wear an Auto Pride shirt that Mr. Huth provided.
- James said he was fired by Mr. Huth for interviewing for another job.

McCaskie provided a list of hours worked and acknowledged receipt of cheques in the amount of \$320.00 and \$50.00.

The Determination noted that from July 11, 1998 to the Determination date, the business had been licenced with the City of Penticton under eight different names and/or owners and listed the periods covered by the licences.

ARGUMENT AND ANALYSIS

The burden is on Auto Pride in this appeal to persuade me that the Determination is wrong in law, in fact or in some combination of law and fact (see *Re World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96)). An appeal before the Tribunal is not a re-investigation of the complaint. It is a proceeding to decide whether there is any error in the Determination, as a matter of fact, as a matter of law or as a matter of mixed fact and law, sufficient to justify intervention by the Tribunal under Section 115 of the *Act*.

The appeal itself is quite sparse. It reiterates the assertion that James was not an employee, that he had his own business, business account, business licence and paid rent. The appeal complains that all the evidence was interpreted in favour of James and says the investigating officer has been “conned”. Mr. Huth also alleges the investigating officer “slandered” him by speaking to people other than those that needed to be and asks, as part of the remedy, that she be reprimanded for harassment.

In respect of McCaskie, the appeal says only that he quit to leave town. I can find no ground or reasons upon which Auto Pride challenges the Determination as it applies to McCaskie and the appeal, as it relates to him, is dismissed.

The Director and James have filed responses to the appeal. James’ response primarily addresses the personal attack made by Mr. Huth on his integrity. The response of the Director simply raises four points:

1. The investigating officer was aware of the position taken by Auto Pride that James was not an employee. The Demand for Records specifically included a request for any information that would have assisted in the consideration of that issue. There was no reply. As well, Mr. Huth was asked to complete two questionnaires designed to assist in the consideration of that issue and failed to do so.
2. Other opportunities were provided to Auto Pride to respond to the allegations by James and McCaskie.
3. The appeal raises for the first time the argument that James quit on his own.
4. The allegations of slander and harassment are non-specific and cannot be answered.

I shall deal with the allegations by Mr. Huth that he was slandered and harassed by the investigating officer. The Director is correct that those allegations are non-specific, unsupported by any particulars or evidence. My response to this ground is to refer to and adopt the words of our Court of Appeal in *Adams v. Workers Compensation Board* (1989), 42 B.C.L.R. (2d) 228 (C.A.) at p. 231:

An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and the doubt about integrity lingers

even when the allegation is rejected. It is the kind of allegation easily made but impossible to refute except by general denial. It ought not to be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause.

In the absence of some specifics and evidence to support these allegations, I will not address them.

On September 10, 2001, Auto Pride delivered to the Employment Standards Branch Penticton office a letter attaching copies of four additional documents which, it stated, proved James was a sub-contractor and was operating his own business. These documents were conveyed by the Director to the Tribunal, together with a response to each of the documents. I agree with the submission of the Director that even if the Tribunal was inclined to accept that Auto Pride could introduce that information at this stage of the proceedings, keeping in mind their lack of cooperation during the investigation, they do not support a conclusion that James was not an employee for the purposes of the *Act*.

On September 27, 2001, the Tribunal received additional documents from Auto Pride. These documents have not been considered as they have been submitted well outside the deadline set by the Tribunal for filing final submissions and/or documents in this appeal.

In the Determination, the Director provided a comprehensive analysis of the available facts against the statutory provisions and the legal tests used to determine whether a person is an employee or an independent contractor and concluded James was an employee for the purposes of the *Act*.

I am not persuaded that there was any error in the Determination on the question of whether James was an employee under the *Act*. Based on the information provided by James, there was ample foundation for the conclusion made in the Determination. In addition to the information that was available, the refusal or failure of Auto Pride to provide any support for the assertion that James was an independent business sub-contracting to Auto Pride is significant. The Determination made several references to this matter:

. . . there is no evidence that the complainants supplied capital, took financial risk, and have liability regarding the companies business. . . .

No evidence was presented that they ventured capital investment into the business and can expect no return for profit other than that which would come by increasing the number of vehicles detailed, . . .

. . .

. . . the [rent] receipts indicated [James] was paying rent as early as January 1999. No receipts were presented between July 1999 and June of 2000. The receipts began again for July, August and September 2000. There was no indication that any money changed hands between Huth and James.

As well there was no evidence, such as cancelled cheques or a copy of the alleged sub-contracting agreement, to refute the implication of the statements made by James that Mr. Huth was the driving force behind the “sub-contracting” scenario and dictated or controlled all key aspects of it.

It is trite that the absence of evidence demonstrating an arm’s length relationship between two entities or individuals can be as compelling as evidence supporting an employment relationship. The appeal on this point is dismissed.

The Director also concluded that the “true” employer was Mr. Huth and all the companies named in the Determination. The Director applied Section 95 to associate the companies. As noted in the Determination:

I am satisfied based on the evidence that all the companies named in this determination are names used on a regular basis for Huth’s business purposes. Huth personally exerts control and directions [sic] on each of the names.

There is ample support for that decision. The Determination, however, does not indicate on its face that result and should be clarified to show that the named individuals and entities have been associated pursuant to Section 95 of the *Act*.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated June 29, 2001 be confirmed in the amount of \$32,895.79, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal