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 -

Charles Neil operating as Chuck's Window Cleaning
("Neil")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: April D. Katz

FILE No.: 2000/609

DATE OF HEARING: November 30, 2000

DATE OF DECISION: December 13, 2000

DECISION

APPEARANCES:

Peter Tarnowski and Charles Neil	on behalf of Neil
Stephen Peers, Darla Jean Weymes, Tien Nguyen Randolph John Peers, Allan Naharmiak, Lynn Peers, and John Alexander Peers	on behalf of Stephen Peers

OVERVIEW

The Employer, Charles Neil, appealed the conclusion in the Director of Employment Standards' Determination issued on July 14, 1999 that Stephen Peers, the Employee, ("Peers") was an employee as defined under the *Employment Standards Act* ("*Act*"). The Determination found that Peers was an employee not an independent contractor and that Neil had failed to pay Peers for all his hours worked. The difference owed including overtime and vacation pay was $4910.78 plus $259.06 in interest.

The Determination also found that Neil had contravened Part 3, 4, 5 and 7, Sections 16, 18(1) 40(1), 44 and 58 of the *Employment Standards Act* ("*Act*").

ISSUE

There are two issues arising in this appeal.

1. Did the Director error in finding that Peers was an employee and not an independent contractor?

2. Did the Director error in finding that Neil owed Peers wages, overtime and vacation pay?

ARGUMENT

Neil was starting a new business in Victoria and the work was not steady. He entered into an agreement with the son of his neighbours, Peers, that if there was enough work Peers would be hired as a subcontractor to work with him. Neil allowed Peers to spend non-productive time with him at his home and trying to find work or delivering invoices but he had no intention of Peers considering this time as work time.

Secondly even if Peers were found to be an employee of Chuck's Window Cleaning, Neil argues the hours submitted by Peers represents all the time they spent together and is unrelated and far in excess of work hours.

Peers argues that he is an honest hard working employee as indicated by his current co-workers and employer's evidence. He does volunteer to do extra work to help out from time to time but the hours in this claim were all hours worked. He kept records as he was taught at school and told to do by his father. He submitted those hours with his complaint to the Director. He supports the findings in the Determination.

THE FACTS

In January 1998 Peers was a high school student and his neighbour Neil had recently started a window cleaning business. Peers' parents had years of military experience as mechanics. Neil had a vehicle, which needed a lot of work. The Peers family, including Peers, helped Neil with his vehicle to get it roadworthy. Peers worked on the vehicle without compensation. Peers continued to work on Neil's vehicle without compensation during his period with Chuck's Window Cleaning.

Neil offered Peers the opportunity to earn some money helping him out. Peers' mother wanted him to finish his studies and not work too many hours. Peers spent a lot of time with Neil working on his vehicle and driving around with him to deliver invoices and try and find work. Neil was primarily interested in commercial buildings.

A Work Agreement was prepared by Peers' father. Neil and Peers signed the Work Agreement and dated it April 1, 1998.

Clause B provides

> "To be **gainfully employed** in all aspects of Chucks window cleaning business as required/requested by the owner, as an **independent contractor** to the business."

Clause C provides

> "That a flat rate of 200$ cdn. per week after deductions be paid by-monthly on or about the 15 and 29 of every month, This amount is the min. take home amount as the amount may be increased with experience in high-rises, time expended, and mutual agreement."

Clause F provides

> "that Stephen Peers be **gainfully employed** with Chucks window cleaning with allowances for 2.5 sick a month and 10-15 days considered paid leave a year"

Clause H provides

> "That vehicle transport to and from the work site be made available. All related expenses regarding transport to be born by the company. A company vehicle to be provided at a later date, until such time to use a privately owned vehicle."

Clause J provides

> "That Stephen will document all pertinent documentation as he will be responsible for all taxes, E.I. and such, as required. As a subcontractor to an existing business."

Neil had articulated that he did not want to be responsible for an employee and wanted the arrangement to be on an independent contractor basis. Peers wanted to work and make money.

Peers kept track of his hours with Chuck's Window Cleaning on his calendar. He counted the beginning of the workday from the time the truck was ready to leave Neil's driveway. Peers counted his time until he arrived at Neil's home. Some days Neil spent his time delivering invoices and approaching potential customers about possible future work.

During the spring of 1998 Neil moved about 20 minutes away from the Peers family. Peers would start his day by walking or driving to Neil's home. He would load the needed supplies and equipment on the truck and make sure it would start. On the occasions that the vehicle was not working arrangements were made to use an alternate vehicle. Sometimes that vehicle was Peers' vehicle. Neil and Peers would leave together from Neil's home and drive into Victoria, pick up the third member of the team in Victoria if the job was in Victoria. Sometimes they met the third person at the site. Most days it took at least 1/2 an hour to get to the first work site. Some days it took 45 minutes. It took a similar amount of time to return home at the end of the workday.

Peers did most of the driving. Peers was under the impression that Neil's driver's licence was suspended as a result of an impaired driving charge in 1997. Peers thought Neil needed him to drive because he was prohibited from driving. Neil's evidence was that his licence was not suspended until October 1998. Peers agreed that some of the driving around was to see customers not to clean windows or gutters. He thought he needed to do the driving because Neil's licence was suspended. It was usually a fair distance to go home from the work site if he did not ride with Neil.

Peers' evidence was that, while Neil preferred commercial work, that 60% of the work they did was on residential properties. The customers would pay Neil in cash and there was no accounting for the income. Peers was not paid regularly or in full as proposed in the Work Agreement. Peers worked many long days. He kept the calendar for June, July, August, September and October. He complained to Neil about not being paid and finally the employment ended after October 4, 1998. Peers tried to resolve the outstanding salary with Neil unsuccessfully. He filed this claim in 1999.

Neil's evidence was that the primary work he did was reflected in invoices issued to customers and copies of which he supplied. When he filed his appeal he added estimates of the hours worked on the invoices. His records indicate that the first day of work was June 1, 1998 and the last day of work was September 8, 1998.

Neil calculated that Peers worked 73.25 hours in over 3 months. He calculated that at $25 per hour Peers was entitled to $1831.25. Peers claim was for 745.5 hours from April 1, 1998 to October 4, 1998.

Peers reported that Neil rarely stopped for a meal break except to go through a drive through restaurant. Peers would eat his lunch on route to the next job.

According to Peers' calendar he worked 22 days in June. He worked 23 days in July plus 4 days babysitting Neil's children when Neil and his wife were out of town. Peers did not claim wages for the week he was babysitting. Peers worked every day from Monday July 6, 1998 until Saturday July 25, 1998 without a day off. On Saturday, July 18, 1999 he worked from 6AM until 1:30 AM and Sunday July 19, 1998 from 7AM until 2PM. He worked 23 days in August. He worked 15 days in September and one day in October for a total of 84 days.

The evidence from Peers parents and his brother was that he was exhausted every day. His father said it was Peers first job and he was concerned about him. His mother said he had two hollow legs until this period when he was too tired some nights to eat anything at all.

Peers younger brother, with whom he was in conflict a significant amount of the time, conveyed his disdain for the amount of time Peers was working. He did not think Peers was smart to be working so hard.

Peers' other witnesses were current co-workers and his two bosses. Peers current employer is in the window cleaning and janitorial field. The witnesses all described Peers as diligent and hard working. He was variously described as reliable and an independent worker. Each person conveyed their confidence in allowing Peers to work on his own to complete a job thoroughly.

Neil paid $2995.00 to Peers from April 1, 1998 to October 4, 1998. Based on Peers records the Delegate found Peers should have been paid $7601.71 at minimum wage plus overtime.

ANALYSIS

The onus is on the appellant in an appeal of a Determination to show on a balance of probabilities that the Determination ought to be varied or cancelled. To be successful the evidence from the appellant must demonstrate some error in the Determination, either in the facts accepted, the factual conclusions reached or in the Director's analysis of the applicable law.

Employee or Contractor

This appeal is based on Neil's assertion that Peers was an independent contractor. If Peers was an independent contractor and not an employee, then the *Act* has no application and the Tribunal has no jurisdiction.

The Tribunal has had many appeals where the issue is whether the claimant is an employee. The Tribunal has reviewed many court decisions to develop criteria for anaylzing this question.

The first place to look is the definitions the *Act* Section 1 of the *Act* defines the terms "employee", "employer", and "work". Those definitions are 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 the work normally performed by
>
> an employee, ...

"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.

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

Section 8 of the British Columbia *Interpretation Act* requires that the definitions be given a liberal interpretation which was confirmed in the B. C. Court of Appeal 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."

In *Castlegar Taxi v. Director of Employment Standards* (1988) 58 BCLR (2d) 341, the B.C. Supreme Court noted:

> "The courts, in determining the nature of a labour relationship, have looked beyond the language used by the parties in the contract and have, instead, assessed the nature of their daily relationship."

Section 4 of the *Act* specifically prohibits any attempt to waive the minimum requirements of the *Act* through or by agreement.

> 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.

Various tests have been developed as an aid to deciding whether a person is or is not an employee. There is "control test", the "Four-fold" test (also known as the "four-in-one test") applied by *Lord Wright in Montreal Locomotive Works Ltd*., (1947) 1 D.L.R. 161 (P.C.), the "organizational test" (also known as the "integration test") of Lord Denning, as he later became, the "economic reality test" and the "specific result test", to name some of the more important ones.

> "The observations of Lord Wright, of Denning, L.J., and of the judges of the Supreme Court of the U.S.A. suggest that the fundamental test to be applied is this**: `Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question is `yes', then the contract is a contract for services. If the answer is `no' then the contract is a contract of service.** No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors, which may be of importance, are such matters as whether the man (or woman) performing the services provides his (or her) own equipment, whether he (or she) hires his (or her) own helpers, what degree of financial risk he (or she) takes, what degree of responsibility for investment and management he (or she) has, and whether and how far he (or she) has an opportunity of profiting from sound management in the performance of his (or her) task. The application of the general test may be easier in a case where the person who engages himself to perform the services does so in the course of an already established business of his own; but this factor is not decisive, and a person who engages himself (or herself) to perform services for another may well be an independent contractor even though he (or she) has not entered into the contract in the course of an existing business carried on by him (or her). *Market Investigations Ltd. v. Minister of Social Security,* (1968) 3 All E.R. 732 (Q.B.D.) at 737 –738.

The Tribunal has through *Larry Leuven*, (1996) BCEST No. D136/96, and other decisions, has said that it will consider any factor, which is relevant. In *Cove Yachts* (1979) Ltd., BCEST D421/99 the Tribunal set out the following factors.

- The actual language of the contract;
- control by the employer over the "what and how" of the work;
- ownership of the means of performing the work (e.g. tools);
- chance of profit/risk of loss;
- remuneration of staff;
- right to delegate;
- the power to discipline, dismiss, and hire;
- the parties' perception of their relationship;
- the intention of the parties;
- the degree of integration between the parties; and
- if the work is a specific task or term.

The language of the Work Agreement is not helpful. Clause B refers to both independent contractor and gainful employment in the same clause. Clause C sets a salary, which is to be increased with experience. The sick days and vacation periods are set out as in an employment agreement. It reads like an employment contract with the employee being responsible for

remitting his own deductions and the employer assuming responsibility for workers compensation.

The fact, which is most relevant in this situation, is that this was Peers' first job. Peers was not an independent business person who had contracted with Neil in the course of his own business. Nor was he a partner entering into the business as a joint venture.

Peers relied totally on Neil to direct his daily activities. Neil controlled exactly what Peers and the other member of the team were to do. Neil described in his evidence how the jobs would work and how one job would be distributed amongst the team. Neil took all the risks. In fact on July 18, 1998, when Peers fell and caused damage to a food market they were cleaning, Neil paid the damage and suffered the loss of future business with that market. On any form of the control test, Neil was the employer and Peers was an employee.

Peers had no one reporting to him and did not direct how any of the work would be done. He relied totally on Neil for the tools until he started to supply a few of his own. Peers thought of himself as Neil's employee and Neil controlled everything Peers did. The work was totally integrated into Neil's business.

There was no independent business of a contractor. Peers did not take work from anyone else unless Neil directed him to do so. I conclude that Peers was an employee within the meaning of the *Act* and confirm the Determination is this respect.

Hours of Work

Having concluded that Peers was Neil's employee, it is necessary to look at the claim for hours of work. Neil did not keep any records of hours worked based on his interpretation that he did not have any employees. His evidence that Peers worked less than a 10^{th} of the hours submitted in Peers' claim is unbelievable.

On the other hand his assertion that Peers came early and had coffee before leaving for a job could have happened. His submission that he could not have worked on residential condominiums, school residences or residential properties at 7:30 AM on weekends or week days, when Peers records shows the day started, does make sense. People would not be happy with someone hanging outside their bedroom and bathroom windows at that hour.

Peers evidence was forthright and sincere. His co-workers and current employer spoke very highly of his integrity and work ethic. I accept that he is a very good employee. I also accept that he does work beyond the call of duty and without seeking compensation. This was his first job, however, and he may have taken everything he was told literally in keeping track of his hours. He seems to have recorded almost all the time he was away from home each day.

He definitely misunderstood the need to drive Neil's vehicle. He could have made his own way to the work sites each day. Going with Neil saved money but it probably extended his day unnecessarily as he was not required to deliver invoices or develop new work places.

There was no agreement that Peers would be paid for travel time to the first work site of the day or home from the last work site. The time to go from one to the other during the day was work time but not to the first workplace and home from the last.

When asked, how long it took to get to the sites normally, Peers acknowledged readily that most days at least an hour sometimes 75 minutes were taken getting to and from work. He also agreed that some time was lost when they were eating, even if it was a short stop to pick up food.

I find that at least an hour and on half of every workday was taken in going to or from work and eating. Peers was not entitled to be paid for those hours. I reduce the total hours claimed by 126 hours based on 84 days of work.

I also allow a reduction of 48 hours over the 6 months to account for the time Peers was with Neil but not working. I accept that some of the time Peers was away from home he was along for the ride and not at work.

I cannot assess what effect this change has on the calculation of overtime and therefore the total wages owing to Peers. I refer this matter back to the Director to make these calculations.

CONCLUSION

Based on the evidence presented I confirm the Determination finding that Peers was an employee. I find that an error was made in calculating the hours of work and reduce the total hours worked by 174 hours. I refer the matter back to the Director to calculate the amount owed to Peers after taking into account my findings.

ORDER

Pursuant to section 115 (1)(a) the appeal is varied. Pursuant to section 115 (1) (b) of the *Act*, Determination ER: 054-999 dated July 14, 1999 is referred back to the Director to calculate the amount owing to the employee, Peers from the employer, Charles Neil operating as Chuck's Window Cleaning.

April D. Katz

April D. Katz
Adjudicator
Employment Standards Tribunal