

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 -

Jerzy Zagrodzki
("Zagrodzki")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No: 1999/608

DATE OF HEARING: December 16, 1999

DATE OF DECISION: December 30, 1999

DECISION

APPEARANCES:

Jerzy Zagrodzki	on his own behalf
Maurice Fai Lam	on his own behalf
No appearance	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Jerzy Zagrodzki (“Zagrodzki”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on September 17th, 1999 under file number ER 94-992 (the “Determination”). The Director’s delegate determined that Zagrodzki owed his former employee, Maurice Fai Lam (“Lam”), the sum of \$374.16 on account of unpaid wages and interest.

Zagrodzki’s appeal was heard at the Tribunal’s offices in Vancouver on December 16th, 1999 at which time I heard the testimony of both Zagrodzki and Lam. In addition, Zagrodzki called Direne Tai Yun Liu as a witness although she had little, if any, relevant testimony regarding the issues in dispute before me. The Director did not appear at the appeal hearing. Lam’s evidence was given via a certified interpreter.

ISSUES TO BE DECIDED

Zagrodzki appeals the Determination on two grounds, namely:

- the delegate erred in finding that there was an employment relationship between Zagrodzki and Lam; and
- in any event, Lam was paid in full for his services.

I shall address each issue in turn.

Employee or Independent Contractor?

The delegate rejected Zagrodzki’s position that Lam was engaged as an independent contractor and determined that Lam was, in fact, Zagrodzki’s employee. I see no reason to disturb this finding.

Lam responded to an advertisement placed on a federal government web-site by Zagrodzki. Zagrodzki did not personally place the advertisement but acknowledges that he directed a friend to do so on his behalf. The advertisement described an available position for an experienced auto body repairer to work weekdays from 9:00 A.M. to 5:00 P.M. The advertisement also indicated that the applicant should have his own tools and be able to work independently. The advertised

wage rate was from \$12 to \$20 per hour “based on exp/qual” which I take to mean “experience” and “qualifications”.

Lam responded to the telephone number for “George” (Zagrodzki’s “anglicized name” and the name he uses on a day-to-day basis) noted in the advertisement, spoke with Zagrodzki, subsequently met Zagrodzki in person and was hired, according to Lam, at a wage rate of \$13 per hour. I reject Zagrodzki’s assertion that their wage bargain was a “piece work” rate ranging from \$800 to \$1,000 (for working on Zagrodzki’s car only) since the advertisement referred to an hourly rate and there were, in fact, several cars to be worked on (this is even acknowledged by Zagrodzki). I do not accept that Lam would have agreed to leave his wage to be determined--at the end of the job--solely by Zagrodzki based on Zagrodzki’s assessment of Lam’s work. Further, the clear intent of the advertisement was to hire for an ongoing position: the advertisement reads, in part, “experience repairing all makes of cars” and refers to various sorts of requisite skills--such experience would not seemingly have been required if, as is asserted by Zagrodzki, Lam was hired to do specific work on only Zagrodzki’s car.

Each day, Lam reported to the repair shop sub-let by Zagrodzki from some other individual(s). Although Lam used many of his own tools, he also used the larger equipment that was available in the shop. Although Lam did work without much supervision, that is primarily because Zagrodzki has little, if any, autobody repair knowledge and experience. Each day Zagrodzki instructed Lam what work was to be done and Zagrodzki checked on Lam’s work from time to time throughout the working day. The owners of the cars that were to be repaired never dealt with Lam. The evidence suggests that Zagrodzki was operating an unlicensed body repair shop in Surrey. Zagrodzki obtained most of the necessary parts (although some were delivered to the shop directly by parts suppliers) and usually personally attended to the pick up and delivery of the customers’ cars. In effect, Zagrodzki was operating a small autobody repair business and Lam was his only employee.

Lam had no opportunity to profit from his labours (other than by being paid his agreed hourly wage) and undertook no risk of loss; although he worked independently Lam was, ultimately, subject to Zagrodzki’s direction and control. I have no hesitation in concluding that Lam meets the statutory definition of “employee” contained in section 1 of the *Act*.

Lam's Unpaid Wage Entitlement

Lam worked for Zagrodzki from January 20th to February 4th, 1999. Zagrodzki, who obviously was in financial difficulty, obtained a cheque for \$819 from his girlfriend, Ms. Liu (she characterized it as a “loan” but knew that the monies were to be given to her boyfriend’s employee--that is why the payee was not identified). Zagrodzki, in turn, gave this cheque to Lam at the end of January 1999. As noted, the payee line on the cheque was left blank when Zagrodzki obtained the cheque from Ms. Liu; Lam filled in his own name prior to cashing the cheque. It should be noted that this cheque was made out for \$819 only because that was the available amount in Ms. Liu’s account; in no fashion did the \$819 purport to represent the monies actually due to Lam. Lam asked Zagrodzki for the balance--some 8 hours’ pay at the time--and Zagrodzki promised to pay him the shortfall but when the monies were not ultimately forthcoming, Lam quit.

When Lam subsequently met with Zagrodzki after having quit, for the purposes of returning the shop key, Lam received an additional \$210 cash payment but still maintained he was owed further

monies based on the \$13 per hour wage rate. In the Determination, the delegate credited Zagrodzki for both the \$819 and the \$210 payments made to Lam--there is no evidence (or, indeed, any assertion by Zagrodzki) of any other payments having been made.

I have reviewed the delegate's calculations as to Lam's entitlement, which were based on Lam's recorded hours of work, and can see no reason to disturb the award made in Lam's favour particularly since the recorded hours are entirely consistent with the hours that Lam was expected to work as set out in the original advertisement for employment (Lam claimed either 7 or 7.5 hours each day--save one 4-hour shift--plus overtime earned on two Saturdays). It should be noted that Zagrodzki did not provide any time records to the delegate during the investigation of Lam's complaint.

Zagrodzki says that Lam was not a properly qualified or experienced autobody repairer and that his work was shoddy. Without commenting on the validity of these assertions, I would only note that these issues stand separate and apart from Lam's claim under section 18 of the *Act* for unpaid wages. If Zagrodzki feels he has some sort of valid claim for damages against Lam (and, based on the evidence before me, such a claim appears to be of dubious merit), Zagrodzki will have to pursue that matter in the civil courts.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$374.16** together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Inasmuch as Zagrodzki's contravention of section 18 of the *Act* has been confirmed, it follows that the \$0 penalty is similarly confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal