

An appeal

- by -

Sally Lush operating as Sal's Cleaning Service  
("Sal's Cleaning")

- 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:** Ib S. Petersen

**FILE No.:** 2001/483

**DATE OF HEARING:** October 24, 2001

**DATE OF DECISION:** October 25, 2001



## DECISION

### APPEARANCES:

Ms. Joan Sawchuck	on behalf of Sal's Cleaning
Ms. lynda Schapansky	on behalf of herself

### OVERVIEW

This is an appeal by Sal's Cleaning (also the "Appellant") pursuant to Section 112 of the *Employment Standards Act* (the "Act"), against a Determination of the Director of Employment Standards (the "Director") issued on June 1, 2001 which determined that Lynda Schapansky (also the "Respondent") was an employee of Sal's Cleaning and that she was owed \$1,185.16 on account of wages and vacation pay.

Sal's Cleaning argues that the Determination is wrong because Schapansky was, in fact, an independent contractor. As well, the Appellant takes issue with the number of hours found by the Delegate to have been worked and, in the result, the amount awarded.

### FACTS AND ANALYSIS

The Appellant has the burden to persuade me that the Determination is wrong. For the reasons set out below, I am persuaded that it has met that burden in part.

The basic background facts may be gleaned from the Determination. Sal's Cleaning operates a cleaning business. Schapansky performed cleaning services with the Appellant between June 12, and June 30, 2000. She was paid at the rate of \$7.15.

A hearing was held on October 24, 2001, in Chilliwack, British Columbia. Both Sal's Cleaning and Schapansky were present and participated. The operator of Sal's cleaning, Sally Lush, took issue with a "face-to-face" hearing, with Schapansky present. She indicated to me that she had a medical problem. Initially, she wanted to meet with me privately. I told her that was not possible. In conversations between the parties individually, with their consent, different options were discussed, principally, having her participate via telephone conference. Lush stated that she wanted Schapansky to participate via telephone. Eventually, I ruled that I was not prepared to accede to that request. Subsequently, Lush telephoned her accountant, who came to the hearing and presented the Employer's case with Lush in attendance.

The application of the statutory definitions of "employee" and "employer" is not easy or simple. As I noted in *Knight Piesold Ltd.*, BCEST #D093/99:



“Deciding whether a person is an employee or not often involve complicated issues of fact. With the statutory purpose in mind, the traditional common law tests assist in filling the definitional void in Section 1. The law is well established. Typically, it involves a consideration of common law tests developed by the courts over time, including such factors as control, ownership of tools, chance of profit, risk of loss and “integration” (see, for example, *Wiebe Door Services Ltd. v. Minister of National Revenue* (1986), 87 D.T.C. 5026 (F.C.A.) and Christie et al. *Employment Law in Canada* (2<sup>nd</sup> ed.) Toronto and Vancouver: Butterworth). As noted by the Privy Council in *Montreal v. Montreal Locomotive Works*, [1947] 1 D.L.R. 161, the question of employee status can be settled, in many cases, only by examining the whole of the relationship between the parties. In some cases it is possible to decide the issue by considering the question of “whose business is it”.”

I am not persuaded that the Delegate erred. He applied some of the common law tests applied referred in the quote from *Knight Piesold*. Having heard the evidence and submissions on this point it is clear to me that the business was Sal’s Cleaning’s. She advertised and obtained cleaning contracts. The clients were hers. She supplied the cleaning supplies for the first week and a half. She supplied the vacuum cleaner. She dropped off Schapansky at the clients’ addresses. Schapansky worked with Lush or, on occasion, with a person supplied by Sal’s Cleaning. In short, I am not persuaded that the Delegate erred with respect to his determination that the Respondent was an employee.

I now turn to the issue of hours worked. The Delegate found that Schapansky worked 165 hours in the two and a half weeks she worked for Sal’s Cleaning. The Appellant took issue with that number. Importantly, the Respondent also conceded that the number was not as high as 165.

The Delegate’s calculations are based on invoices submitted to him by the parties. The Appellant says that the invoices in some case are duplicate, have been altered or the original is missing. According to the Appellant’s calculations, submitted to the Tribunal in the course of the appeal, Schapansky did not work more than 68 hours. The Respondent explains that she did not receive the invoice book until a week and a half after she started with Sal’s Cleaning--and to an extent it was filled out from memory--and she candidly accepts that there may be inaccuracies with respect to dates or duplicates of invoices. In her evidence, however, she points out that many of the invoices are written by Lush (and signed by Schapansky). It is clear that some of the invoices have been changed. In one of her submissions, the Respondent indicates that she worked 130 hours, based on her calculations. In her direct testimony, the number was somewhat higher. However, at the hearing, she indicated that she was prepared to accept an estimate prepared by the settlement officer of the Tribunal (submitted by the Appellant) of 114 hours. In all of the circumstances, I find that is a fair and reasonable assessment of the hours worked.

In my view it is appropriate to refer the calculation back to the Director based on 114 hours worked plus vacation pay and interest.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated March 1, 2001 be referred back to the Director for calculation based on 114 hours plus vacation pay and interest.

---

**Ib S. Petersen**  
**Adjudicator**  
**Employment Standards Tribunal**