Employment Standards TRIBUNAL

An appeal

- by -

Carolyn Irene Lombnes
("Lombnes")

- 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.: 2001/624

DATE OF HEARING: November 30, 2001

DATE OF DECISION: December 13, 2001

DECISION

APPEARANCES:

on behalf of Carolyn Irene Lombnes	In person
on behalf of the individual	In person
on behalf of the Director	Ken Copeland

OVERVIEW

This is an appeal pursuant to Section 112 of the Employment Standards *Act* (the "*Act*") brought by Carolyn Irene Lombnes ("Lombnes") of a Determination that was issued on August 10, 2001 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Lombnes had contravened Part 3, Section 18, Part 4, Section 40, Part 5, Sections 44, 45 and 46 and Part 7, Section 58(3) of the *Act* in respect of the employment of Clifford D. Richardson ("Richardson") and ordered Lombnes to cease contravening and to comply with the *Act* and to pay an amount of $4,304.85.

Lombnes says the Determination is wrong because the arrangement between her and Richardson was not an employer/employee relationship, but was a barter arrangement and, even if Richardson was an employee, the delegate unreasonably accepted the hours Richardson claimed he had worked. The appeal also raised a concern that Lombnes' witnesses, whose names had been given to the delegate during the investigation of the complaint, had either not been cont*Act*ed or were not asked the right questions. A hearing on the appeal was conducted by the Tribunal conducting and Lombnes was able to call and question several witnesses relative to the matters of concern raised in the appeal.

Richardson attended by telephone from Tumbler Ridge. His attendance in this manner was at his request and was allowed because of his recent involvement in an automobile accident and a resulting difficulty in travelling the distance from Tumbler Ridge to Kamloops.

ISSUE

The issues in this case are whether Lombnes is able to show the conclusion that Richardson was an employee is wrong and is able to show the calculation of hours worked is incorrect, unreasonable, manifestly unfair or not rationally grounded in the material and information available to the delegate during the investigation.

THE F*ACT*S

The basic f*Act*s are outlined in the Determination and have not been contested in this appeal.

Lombnes owns a property near Clinton, B.C. called the Water Wheel Restaurant/Pine Mountain Resort. During a period from May 5, 2000 to July 21, 2000, Richardson worked at the property. Lombnes engaged him, primarily, to paint the restaurant.

In addition to the basic f*Act*s, the following information was set out in the Determination or came out through the evidence provided at the hearing.

During the investigation, Lombnes asserted the arrangement she had Richardson was a 'barter' arrangement, where Richardson agreed to paint the restaurant in return for living accommodation for he and his wife, utilities, food and phone. She also said she paid $1600.00 for a truck for Richardson and his wife. Lombnes said there was no arrangement with Richardson that he do anything other than painting and in performing that task, Richardson was free to set his own hours. She claimed that when the arrangement ended on July 21, 2000, some of her tools were missing and broken. She also alleged that the painting work was not completed and some of the 'unauthorized' work done by Richardson had created a potential fire hazard in the restaurant building, which had to be repaired at a cost to her. These same assertions were reiterated at the appeal hearing.

In his complaint, Richardson said he had been hired by Lombnes to participate in the renovation and repair of the inside and outside of the restaurant and to supervise other workers on the property. He denied any 'barter' arrangement and claimed the agreement was that he would be paid $18.00 an hour for his work. He said he asked to be paid on July 18, 2000 and three days later, on July 21, 2000, was asked to leave the property. Richardson said he had kept a daily record of hours worked, which he provided 'almost every week' to Lombnes. During the investigation he provided a list of hours worked, which he said had been transcribed from a calendar on which he had kept his daily hours worked.

The Determination concluded Richardson did perform work on the property. The evidence confirmed this conclusion. Most of the work performed was painting and work associated with painting, such as pointing, taping and repairing drywall and preparing surfaces for painting. The evidence also established that Richardson performed work other than painting and painting related work.

The Determination found no support for Richardson's claim that he would be paid $18.00 an hour, but found he was an employee for the purposes of the *Act* and was entitled to be paid minimum wage for all hours worked. Coincidentally, he was found to be entitled to the benefit of other minimum statutory requirements, specifically those found in Parts 4, 5 and 7 of the *Act*. That conclusion has not been appealed. In the absence of any material or information to the contrary, the delegate accepted the record of hours worked provided by Richardson on the basis

that the record was the best evidence, having been created contemporaneously to the work and, according to Richardson, given to Lombnes on a regular basis.

At the appeal, Lombnes called Lydia Grimkowski, Valmont Boucher, Jacques Beriault and Robert Brook. She also testified on her own behalf. Mr. Boucher testified with the aid of an interpreter, and I take this opportunity to thank the interpreter for her assistance to myself and Mr. Boucher.

The evidence provided by most of the witnesses was helpful. The evidence of Mrs. Grimkowski was interesting, but for reasons that will follow had no effect on the outcome of this appeal. The evidence of Mr. Boucher, Mr. Beriault and, to some extent, Mr. Brook provided some useful information concerning the work done by Richardson. That evidence did not, however, accomplish what I perceived to be its two main objectives, to discredit the record of hours worked provided by Richardson and to support the suggestion that Richardson was not 'authorized' to do any work other than painting.

Mr. Boucher confirmed that he and Richardson had worked together for a day burning grass on the property and for a few hours on or about July 14 and 15, when Richardson helped Mr. Boucher with some plumbing. Mr. Boucher was asked to provide some general observations of Richardson's work habits, but declined to do so as his ability for such observation was limited to only the few days he spent at the property during the relevant period.

Mr. Beriault worked at the restaurant for two months, 8 hours a day, 5 days a week, most of which coincided with the time Richardson was there. While most of the work done by Mr. Beriault did not require the assistance of Richardson (or any other person), he did confirm that Richardson had helped him with some electrical wiring, plumbing and drywall work. He said Richardson seemed to be easily distr*Act*ed from his painting work and often stopped his painting work to observe and make comments on the work Mr. Beriault was doing. Otherwise, Mr. Beriault said he was too busy doing his own work to be much concerned with what Richardson was doing or where he was, although he did recall that Richardson left the property for periods of time. He was not specific, however, about when these occurred or for how long Richardson was away from the property. He also noted that Richardson had spent several hours setting up a display of lights and stuffed animals in an upstairs area and setting up another area, which he understood would be operated as a 2nd hand shop by Richardson and his wife.

Mr. Brook helped Lombnes organize the renovations on the property. He was at the property, on average, every second day. He identified a document that had been provided during the investigation as a "to-do list" he and Lombnes prepared every day. The list set out work that Lombnes wanted done on that particular day. Mr. Brook said that usually such lists were not addressed to any particular person and the tasks listed could be performed by several different people. Occasionally, a task, even though listed, was not able to be done at all. He did confirm, however, that the particular list in question, which was addressed to Richardson specifically, indicated that Richardson was being asked to perform the identified tasks. He could not say how

many of those tasks were completed by Richardson. Mr. Brook acknowledged he had sometimes seen Richardson doing painting and other tasks in the restaurant in the evening.

All of the witnesses spoke to their knowledge of the 'barter' arrangement between Lombnes and Richardson, but, as I will outline further in this decision, the issue in that regard is not whether such an arrangement was in place, but whether such arrangements are allowed under the *Act*. As a result, there is no need to review the evidence of the witnesses in that regard.

As I have noted above, Richardson provided to the delegate a record of hours worked and that record was a transcription of information he claimed had been maintained on a daily basis on a calendar. A photocopy of the relevant parts of the calendar was produced at the hearing. It was the first time Lombnes had seen that material. I requested the original be delivered to the tribunal and have now received and reviewed it. The original does not add anything to the copy provided at the hearing.

ARGUMENT AND ANALYSIS

The Determination found Richardson was an employee for the purposes of the *Act* and the relationship between he and Lombnes an employment relationship. The Determination referred to on the definition of "employee" in Section 1 of the *Act*, and relied on that part of the definition in paragraph (b), which states:

> "***employee***" includes
>
> . . .
>
> (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee, . . .

Although not referred to in the Determination, the definition of "employer" is also relevant:

> "***employer***" includes a person
>
> (a) who has or had control or direction of an employee
>
> (b) who is or was responsible, directly or indirectly, for the employment of an employee.

As the Tribunal has pointed out in many decisions, the definition of employee in the *Act* is inclusive, not exclusive, and, bearing in mind that the *Act* is remedial legislation, has been given such large and liberal interpretation as will best ensure the attainment of its purposes and objects, see *Machtinger v HOJ Industries Ltd*., (1992) 91 D.L.R. (4th) 491 (S.C.C.) and *Helping Hands v. Director of Employment Standards*, (1995) 131 D.L.R. (4th) 336 (B.C.C.A.). The following comment from *Machtinger v HOJ Industries Ltd*., supra, has been consistently approved and relied on by the Tribunal:

> . . . an interpretation of the *Act* which encourages employers to comply with minimum requirements of the *Act*, and so extends its protection to as many employees as possible, is favoured over one that does not.

There is no evidence to support a conclusion that Richardson was anything other than an employee or that Lombnes was anything other than an employer. There was some suggestion in the appeal that Richardson was an independent contr*Act*or, but no evidence or argument developed in respect of that suggestion.

I am not persuaded there is any error in the conclusion that Richardson was an employee for the purposes of the *Act* and that Lombnes was the employer. It is, on the f*Act*s, the only possible conclusion.

In response to the position taken by Lombnes that the *Act* should not apply because Richardson had agreed with her to barter his services in return for accommodation and other items of value, the Determination properly concluded that such arrangements are given no effect by application and operation of Section 4 of the *Act* , which says:

> 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.

Lombnes' argument on this appeal, in effect, asks the Tribunal to allow the barter arrangement to determine whether the *Act* should apply. That is, however, much like the proverbial tail wagging the dog and would render Section 4 meaningless. The correct approach is the one taken in the Determination - decide whether the relationship is one which is properly governed by the requirements found in the *Act* and, if so, whether the parties to the relationship have run afoul of Section 4. No error has been shown in the Determination on the issue of whether Richardson was an employee for the purposes of the *Act* and that Lombnes was his employer. The delegate made no specific finding that there was a 'barter' arrangement, but concluded;

> . . . it is not possible for the Carolyn Lombnes, the employer, to have an exchange or barter system, even if there was evidence to support her allegation, the answer is no. Section 4 prohibits any agreement to waive the minimum requirements of the *Act*.

The delegate was not wrong to conclude the barter arrangement, if there was such an arrangement, was rendered void by operation of Section 4.

Turning to the second issue, Lombnes contends that the hours Richardson claimed to have worked are suspect and the delegate was wrong to have accepted them. She claims there is something inherently unfair in accepting a recording of hours worked that has been kept by an employee who has been able to set his own hours of work. She says the record should be rejected and a finding that Richardson performed no more than 2 ½ weeks work (the amount of

time she calculated the painting would have taken Richardson had he diligently applied himself) should be substituted. The difficulty for Lombnes on this ground of appeal is that there is no evidence from which I could conclude the record of hours worked provided by Richardson should be varied in the manner suggested. In her appeal, Lombnes stated:

> . . . I had hired self-contr*Act*ors to do this work. Witnesses will show that Cliff Richardson would often leave his painting and interfere with their work. Witnesses will how for days, instead of doing his painting, he played upstairs with the displays, setting up toys and messing with electrical lights . . .

Such evidence did not materialize. That is not to say, however, that the evidence provided did not have any imp*Act* on the accuracy of the record of hours worked provided by Richardson.

Mr. Beriault testified that Richardson spent several hours during the relevant period working on the display upstairs; that he worked on setting up the 2nd hand shop; and that he frequently walked around the property looking at the work that had been done. That evidence was unchallenged and uncontradicted. The evidence also indicated that the work on the display was not part of the work for which Richardson was engaged by Lombnes. In light of the evidence, I am troubled by two aspects of the record of hours worked provided by Richardson. First, that almost every normal working hour (7:30 am to 5:00 pm) spent on the property during a normal work week (Monday to Friday) was claimed as time worked (lunchbreak excluded). That is unlikely considering the uncontradicted evidence of Mr. Beriault. Second, that the record does not make any adjustment for the probability that some hours claimed as time worked was personal time spent setting up the display upstairs and in the 2nd hand store.

Neither of those concerns, however, justify a total rejection of the record of hours worked in favour of Lombnes' view. Overall I am satisfied the decision by the delegate to accept the record provided by Richardson was not entirely unfair, unreasonable or not rationally grounded in the information and material made available during the investigation. There was evidence which clearly supported a conclusion that Richardson worked on all of the days identified in the record as being days on which work was performed and, contrary to the assertion made by Lombnes, that he worked (at her instruction and with her knowledge) at tasks other than painting and painting related work. The list, which Mr. Brook testified was probably prepared by he and Lombnes for Richardson, shows Richardson was being asked to lay tiles in the bathroom, seal the baseboards in the kitchen, place end pieces on the hood above the grill and fix a leak in the drain pipe at the prep table sink, as well as finish the painting. This evidence negates her contention that Richardson was told to do only painting. The was also evidence, once again contrary to the assertions made by Lombnes, that Richardson did work with both Mr. Boucher and Mr. Beriault. There was evidence that Richardson worked some evenings, providing f*Act*ual support for the conclusion he worked overtime hours. Mr. Beriault talked about he and Richardson stopping for lunch at the same time. Mr. Beriault said Richardson was usually present on the property for 8 hours a day, leaving the inference that while he was present for a normal working day, he was not working for all of the 8 hours. This was not denied or

contradicted by Richardson. Even though much of the evidence was anecdotal and lacking in specifics, it is nonetheless evidence, which, unless I have reason to reject it, should be given some consideration.

I find that the weighing of the totality of the evidence does show there is justification for intervention by the Tribunal in the calculation of the amount owed in the Determination. It is not a decision that is lightly made. In Mykonos Taverna operating Achillion Restaurant, BC EST #D576/98, the Tribunal said:

> After the Director has determined that a person has lost wages because of a contravention of the *Act*, the task of establishing what amount of wages are payable can be a difficult one. That task can be made more difficult where the information necessary to determine the amount owed by reason of the contravention is unavailable or incomplete. Consistent with the statutory objective of achieving "efficient" resolution of disputes, the Director has considerable latitude in deciding what information will be received and relied upon when reaching a conclusion about the amount of wages that may be owing. If that decision is sought to be challenged on its f*Act*s, the burden on the appellant is to show either that the decision was manifestly unfair or that there was no rational basis upon which the conclusions of f*Act* relevant to the decision could be made. This is consistent with the statutory and legal obligation of the Director to adhere to the principles of fairness and reasonableness when exercising her authority under the *Act* (see *Shelley Fitzpatrick operating as Docker's Pub and Grill*, BC EST #D511/98). In this case, the question is whether the appellant has shown the decision is unfair or unreasonable.

Lombnes has failed to meet the burden of showing the Tribunal would be justified in rejecting the record of hours worked in its entirety, in favour of her view. The evidence does, however, support a finding that some adjustment to the hours Richardson claimed he worked is fair and reasonable. I conclude that the hours worked should be reduced to reflect the evidence that Richardson frequently avoided his own work in order to observe what was being done by others and that he recorded time spent setting up the upstairs display and the 2nd hand shop as time worked. That is not to say he did anything wrong. He set his own work schedule. It is that I can find nothing to show these *Act*ivities were part of his working responsibilities and Lombnes should not be required to pay for them. The hours of work credited to Richardson shall be adjusted by a total of fifty straight time hours - represented by approximately one hour for each day on which Richardson recorded 8 or more hours worked and another 12 hours for work done setting up the upstairs display and the 2nd hand store. I do not consider it reasonable, based on the evidence I heard, to make any different adjustment.

While it is not raised directly as a ground of appeal, Lombnes has asked that the Tribunal consider monetary claims she has against Richardson, including the value of room and board, the truck, utilities, phone and the additional costs Lombnes says were caused by Richardson's poor

workmanship. It is well established, however, that items such as room and board, the cost of food, utilities and even the cost of the truck (which I accept was bought by Lombnes for the Richardsons) cannot be considered wages under the *Act* nor can their value be set off against wages owed under the *Act*, see *Heichman (c.o.b. Blue Ridge Ranch)*, BC EST #D184/97, *Seel Forest Products Ltd.*, BC EST #D233/99 and *Skeena Valley Guru Nanak Brotherhood Society*, BC EST #D361/00 (Reconsideration of BC EST #D470/99 and BC EST #150/00). In *Skeena Valley Guru Nanak Brotherhood Society*, the Tribunal said:

Having considered carefully the submissions of the parties and having reviewed the legislation and the Tribunal jurisprudence we conclude that the line of decisions which specifically considered section 20 and those decisions which deal with payments "in kind" are to be preferred over the Khalsa Diwan and Gateway decisions. We find that section 20 does not contemplate the payment of wages "in kind"; as a result, we find that "free room and board" cannot per se be considered "wages" within the meaning of the *Act*. It is not appropriate to convert free room and board into a dollar value and then to consider it a wage.

Section 21(1) of the *Act* operates to prohibit an employer from making any deductions, not authorized by law, from the employee's wages:

> *21. (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.*

Accordingly, none of the matters claimed may be used to adjust the amount owed under the *Act*.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated August 10, 2001 be varied by deducting the equivalent of 50 straight time hours from the amount found to be owed in the Determination, together with appropriate adjustments to annual vacation entitlement and the interest payable under Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal