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 -

Graeme Connor
operating as Absolutely Hardwoods
(the "Appellant")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE No.: 1999/612

DATE OF HEARING: January 7, 2000

DATE OF DECISION: February 4, 2000

DECISION

APPEARANCES

Mr. Carlton R. Charles	on behalf of the Appellant
Mr. Peter M. Kistchouk ("Kistchouk" or the "Employee")	on behalf of himself
Mr. James Smith ("Smith" or the "Employee")	on behalf of himself
Mr. Dave MacKinnon	on behalf of the Director

OVERVIEW

This is an appeal by 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 September 17, 1999 which determined that Kistchouk and Smith were owed $4,004.44 on account of wages. The Appellant appeals the award and says that Kistchouk and Smith were not his employees and that is the only issue before me.

FACTS AND ANALYSIS

Before turning to the merits of the appeal before me, whether or not Kistchouk and Smith were employees of the Employer at the material time, I propose to deal with three preliminary issues brought up at the commencement of the hearing.

First, the delegate explained that it was his understanding that the only issue before me was the employee-employer relationship between the two complainants and the Employer. The Employer agreed that this was the only issue. The Appellant did not take issue with the amount of wages or the hours of work set out in the Determination. As the Appellant pointed to another company, Kindred Construction Ltd. ("Kindred") as the "de facto" employer, the delegate was concerned that I do not make a decision that Kindred is the employer without notice to it. Having heard from the parties, I decided to proceed with the hearing, and if, it appeared to me that there was any merit to the Appellant's argument I would adjourn the hearing and arrange for notice to be given to Kindred.

Second, the delegate also raised the issue that the Appellant never suggested to him that someone else was the employer prior to the Determination being issued on September 17, 1999. Rather the Appellant took the position that he was unable to pay Kistchouk and Smith due to a dispute with the general contractor, Kindred. The delegate argued that the Appellant should not be permitted to sit in the weeds, failing or refusing to participate in the investigation, and then later file an appeal when the decision is not in the Appellant's favour. In the result, I should not consider the argument that someone else was the employer and thus dismiss the appeal. I intend to deal with this argument below.

Third, the Appellant took the position that the matter before me is covered by the principles of *res judicata*. The basis, as I understand it, was that the Appellant had settled its dispute with Kindred. This dispute between the Appellant and Kindred was the subject of an action in the Provincial Court of British Columbia which was settled in December 1999. The settlement record indicated that the matter was settled for $7,000, payable by the Appellant. The Appellant argues that the bulk of this claim--$6,000--was for "wages". In my view, *res judicata* does not apply here. My understanding of that principle is that it precludes a person from bringing an action against another person when the issue has been determined between the parties by an earlier proceeding. Kistchouk and Smith were not parties to the action in Provincial Court and, in my view, they are not bound by whatever settlement was reached between the parties to that action. If one of the terms of settlement was that Kindred pay Kistchouk and Smith (and there was no evidence that it was), then the Appellant would have to pursue that issue elsewhere. As well, as pointed out by the delegate, the Appellant's Reply (in the court action) alleging that part of the claim between him and Kindred was for wages was filed subsequent to the September 17, 1999 Determination. I note, in addition, that the settlement was entered into well after the Determination was issued and served. In other words, the Appellant was clearly aware of the wage claim against him at the time he entered into the settlement with Kindred. If, as he says, the settlement included the wage claim by the Employees, it is not unreasonable that the settlement would have expressly provided for this. In my view, there is no merit to this argument and I dismiss this ground of appeal.

As mentioned above, the delegate argued that the Appellant should not be permitted, at this stage, to argue that he is not the employer. I agree with the delegate. The Determination clearly states the Appellant's position to be the following:

> "The employer admits that all wages have not been paid but claims that he is unable to pay as a result of a failure on the part of the general contractor to fully compensate him for the contract.
>
> Mr. Connor agrees that the hourly rate for each employee was $20.00 per hour. He questions the hours and days worked by the complainants but does not have any payroll records in relation to the Bridges Restaurant project. Mr. Connor was not personally at the site due to an injury he had sustained and was therefore relying on the record of hours kept by the complainants."

At the hearing, the Appellant did not deny having told the delegate that the basis for opposing the wage claim was that he was "unable to pay". Prior to the Determination, during the investigation, the Appellant did not dispute being the employer. I agree that an appellant should not be permitted to sit in the weeds, failing or refusing to participate in the investigation, and then later file an appeal when the decision is not in the appellant's favour. Whether or not the complainant employees were, in fact, employees of the Appellant, is a fundamental issue which, if it had any merit to it, one would have expected the Appellant to bring to the attention of the delegate. On that ground alone I dismiss the appeal.

In any event, even if I consider the merits of the Appellant's argument that he is not the employer, I would nevertheless still dismiss the appeal. Graeme Connor ("Connor") testified for the Appellant In April 1998, Absolute Hardwoods Inc. ("Absolute Hardwoods"), of which

Connor is the principal, entered into an agreement with Kindred for the construction of a deck at Bridges Restaurant on Granville Island in Vancouver. Connor explained that he supplied the wood and that he recommended someone to "put the wood down". In his testimony, he sought to limit his involvement in the project to the supply of wood. However, it is clear from the agreement with Kindred that it included the installation of the deck, and the work associated with that installation, as well as the supply of wood. Connor explained that he completed the agreement with a couple of employees (not the complainants). In his direct evidence, he explained that he did supervise "some" of the work done at the site. Kindred, he said, supervised "some" of the work. It was not clear from his testimony exactly what work he did--or did not--supervise. It turned out that Kindred was not satisfied with the work done and did not pay the entire amount provided for in the agreement. Connor explained that he was only paid $5,800 for "material and wages" out of some $12,000. As the work was not completed to the satisfaction of the customer, Absolute Hardwood had to redo the work. For this purpose, Connor testified, he hired Kistchouk, who in turn hired Smith as his helper, because Kindred wanted two workers to work on the site. Kistchouk testified in cross examination that he was hired by Connor who advised him to "do whatever to ensure that the job was done". Connor explained that he "was paying the wages" but that his understanding was that Kindred ultimately was responsible. He did agree to the rate of pay for Kistchouk and Smith, $20.00 per hour "just to get the job done". Both Kistchouk and Smith agreed that they were, in fact, paid $1,000 each by Kindred a few days before their work was completed. They explained that they told Kindred that they would walk off the job unless they got some money. In my view, there is little in the Appellant's evidence to support an argument that he is not the employer of Kistchouk and Smith. In my view, the Appellant has failed to satisfy me that the Determination is wrong and, in the result, I would dismiss the appeal on this ground as well.

The Determination identified the Employer as "Graeme Connor operating as Absolute Hardwoods". At the hearing, Connor did not take issue with this and I do not propose to deal with the issue of whether the employer is a corporate entity.

In the result, the appeal is dismissed.

ORDER

The Determination dated September 17, 1999 is confirmed.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal