

**EMPLOYMENT STANDARDS TRIBUNAL**  
In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act S.B.C. 1995, C.38*

- by -

Goldsmith Enterprises Ltd.  
("GEL")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**Adjudicator:** Hans Suhr

**File No.:** 96/613

**Date of Hearing:** January 21, 1997

**Date of Decision:** January 23, 1997

## DECISION

### APPEARANCES

Joanne Goldsmith Ryan Goldsmith	for Goldsmith Enterprises Ltd. for Goldsmith Enterprises Ltd.
Michael Edward Milne	on his own behalf
Cal Mitten	for the Director of Employment Standards

### OVERVIEW

This is an appeal brought by Goldsmith Enterprises Ltd. (“GEL”) pursuant to Section 112 of the Employment Standards Act (the “*Act*”) against Determination No. CDET 004137 issued by the Director of Employment Standards (the “Director”) on September 30, 1996.

The Director determined that GEL had contravened Sections 17(1), 18(2), 21 (1), 27(1) 40(1), 58 (1) and 58 (3) of the *Act* and owed its former employee Michael Milne (“Milne”) the sum of \$2,626.57 representing unpaid wages for overtime hours worked, the appropriate vacation pay and the recovery of an illegal deduction.

GEL has appealed the Determination alleging that the Director erred in determining that Milne was an employee and further GEL alleges that the delegate of the Director exhibited bias during the conduct of his investigation.

An appeal hearing was held in Quesnel, B.C. on January 21, 1997. Ms. Joanne Goldsmith (“Goldsmith”) and Mr. Ryan Goldsmith (“R.Goldsmith”) appeared as the authorized representatives of GEL and were its witnesses. Milne testified as the sole witness called on his own behalf. Mr. Cal Mitten provided information on behalf of the Director.

### ISSUES TO BE DECIDED

1. Was Milne an employee of GEL or a sub-contractor?
2. If Milne was an employee, is he entitled to overtime?
3. Were illegal deductions taken by GEL from Milne?
4. Was the delegate of the Director biased?

## **FACTS**

The parties are in agreement on a number of the key facts in this matter as follows:

- Milne performed work for GEL as a concrete finisher for a total of 18 days during September and October of 1995;
- Milne was paid at the rate of \$25.00 per hour for all work;
- The hours of work by Milne as submitted are correct except for October 12 which should be 6 hours;
- Milne worked in excess of 8 hours per day on a number of occasions;
- Milne invoiced GEL for all work performed;
- GEL paid Milne at the end of September for all work performed in September;
- GEL paid Milne at the end of October for all work performed in October;

## **ARGUMENT**

Goldsmith states that Milne was aware that his rate of \$25.00 was all inclusive and that as Milne did not have a WCB number, GEL would deduct WCB premiums from his total payment. Goldsmith further states that while its employees are given time cards to fill out, are paid vacation pay and provided with a Record of Employment (“ROE”) upon termination, Milne simply invoiced GEL for his work. Goldsmith further states that no vacation pay was paid nor was a ROE issued to Milne upon his termination. Goldsmith further states that Milne provided his own hand tools and was not directed how to perform his work. Goldsmith further states that Milne was treated in all respects as a contractor and not an employee.

Goldsmith states that Milne had been employed in previous years as an employee and was treated as an employee in that he filled out time cards, was paid vacation pay and issued an ROE. Goldsmith further states that Milne was employed for 4 days in June of 1995 for which he was paid \$1,000.00 without any deductions, vacation pay or ROE, without any objection from Milne.

Goldsmith states that Milne was free to perform work for others at the same time as he performed work for GEL.

Goldsmith states that Milne had the opportunity to make a profit by working or the possibility of sustaining a loss due to not working.

Goldsmith states that Milne performed work strictly as a concrete finisher and further that the work performed by Milne was the same as work being performed by Brian Jungwirth (“Jungwirth”) and Mike Cousins (“Cousins”) who were employees. Goldsmith further states that in addition to Jungwirth and Cousins, they had also hired a contractor, Western Concrete Services to perform concrete finishing. Goldsmith states that Western Concrete Services were paid on a “cents per square foot” basis.

Goldsmith states that GEL also had a number of other employees who were utilized as labourers.

Goldsmith states that GEL would be advised when a concrete pour was to be scheduled and as a pour required staggered work, GEL would then in turn contact Milne as to when to report to work.

Goldsmith states that GEL provided a double riding trowel and 2 smaller trowels for use by Milne although he usually only used the double riding trowel.

Goldsmith argues that as Milne had performed work for GEL as an employee in previous years, Milne clearly understood the difference between being an employee versus a contractor. Goldsmith further argues that Milne presented himself as a contractor when he was seeking work and continued to portray himself as a contractor by presenting invoices and agreeing to pay for his own WCB coverage. Goldsmith further argues that as Milne was treated in all respects as a contractor, with no objection from Milne at the time, that any complaint from Milne should be considered as “trivial, vexatious or in bad faith”.

Milne states that the rate of \$25.00 per hour was offered by Ryan Goldsmith, the owner of GEL and further that no mention was made that Milne was to be considered as a contractor.

Milne states that he did request GEL to permit him to “look after” his own taxes and not to take any taxes off at the source.

Milne states that he was directed by Ryan Goldsmith when to report for work and how to do the work.

Milne states that he was not permitted to seek work with anyone else during this period of time as GEL informed him he was to be available when called.

Milne states that he had his own hand tools which is not uncommon amongst concrete finishers.

Milne argues that he never portrayed himself as a contractor and the only issue he raised with GEL prior to being hired was that he would like to look after paying his own taxes instead of having GEL do the source deductions. Milne further argues that he was an employee at all times as he performed the same work as other employees of GEL.

In response to a question from the Tribunal, Milne was unable to explain why, if he was an employee, he submitted invoices to GEL for the work performed.

## **ANALYSIS**

*Was Milne an employee or a contractor?*

I must first address whether or not Milne was an employee (and therefore entitled to benefit of the *Act*) or was, as alleged by GEL, a contractor.

At common law, whether or not one is an employee depends on a variety of factors -- Who provides the equipment to be used in the work setting?; Who provides the direction or control as to how or when the work is to be done?; Is an individual able to profit or possibly risk incurring a loss as a result of their work? In addition, some courts have examined the function performed by the individual-- is it an integral part of the overall operations of the “employer”?

I must also consider the definition of employee contained in the *Act* which states:

“**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 work normally performed by an employee,
- (c) a person being trained by an employer for the employer’s business,
- (d) a person on leave from an employer, and
- (e) a person who has a right of recall

Applying these criteria to the facts at hand, I am satisfied that, notwithstanding the invoices for work performed and the absence of statutory deductions, Milne was an employee. There was no evidence that Milne had any discretion as to when or where he worked, in fact, GEL expected Milne to be available when required to report to work. GEL provided the necessary equipment to do the job (the double riding trowel, the smaller trowels). Milne was paid on an hourly basis at the same rate as other employees while a contractor, Western Concrete Services, was paid on a “cents per square foot” basis.

As I have found that Milne was an employee, rather than a contractor, I must now turn to the various issues which flow from that determination.

*Is Milne entitled to overtime rates of pay?*

There is no dispute that Milne worked in excess of 8 hours per day on several occasions and pursuant to Section 40 (1) of the *Act* is entitled to overtime wages. Section 40 (1) states:

**Overtime wages for employees not on a flexible work schedule**

- 40.** (1) An employer must pay an employee who works over 8 hours a day and is not on a flexible work schedule adopted under section 37 or 38
  - (a) 1 1/2 times the employee’s regular wage for the time over 8 hours, and
  - (b) double the employee’s regular wage for any time over 11 hours.

There was agreement that Milne worked the hours as submitted except for October 12, 1995. Furthermore it was agreed that the work performed on September 18 & 28 was at \$20.00 per hour. I have accepted that the deductions for boots/rent/advances which are listed on Milne's September invoice are authorized deductions and I have therefore calculated the wages owing to Milne as follows:

Wages earned	= \$7,517.50
+ vac. pay	= \$ 300.70
total earned	= \$7,818.20
less wages paid	= \$5,186.00
less deductions for boots/rent	= \$ 225.00
less advances (Sept)	= \$ 100.00
wages owing	= <b>\$2,307.20</b>

*Were illegal deductions taken from Milne's pay?*

As I have recalculated the wages earned by Milne, the issue of the illegal deductions becomes moot.

*Was the delegate of the Director biased?*

There was no evidence provided to substantiate the allegation of bias on the part of the delegate of the Director during the course of his investigation. I am satisfied that the delegate of the Director acted in a professional manner at all times.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order that Determination No. CDET 004137 be varied to be in the amount of **\$2,307.20** together with interest calculated pursuant to Section 88 of the *Act*.

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**Hans Suhr**  
**Adjudicator**  
**Employment Standards Tribunal**

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