

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 -

470999 B.C. Ltd., Roywood Holdings Ltd. and Hendrix Lake Recreational Society, associated corporations, James Stanley Wood, a Director or Officer of 470999 B.C. Ltd., Roywood Holdings Ltd. and Hendrix Lake Recreational Society, associated corporations and Rebecca Swan-Wood, a Director or Officer of 470999 B.C. Ltd., Roywood Holdings Ltd. and Hendrix Lake Recreational Society, associated corporations
(the “company”, “Wood” and “Swan-Wood”)

- of Determinations issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: David Stevenson

FILE NOS.: 98/615, 98/616 and 98/617

DATE OF HEARING: January 18, 1999

DATE OF DECISION: February 17, 1999

DECISION

APPEARANCES

For the appellants:	James Stanley Wood Rebecca Swan-Wood
For the individual	in person

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) of three Determinations of a delegate of the Director of Employment Standards (the “Director”) all dated August 28, 1998.

The first Determination concluded that 470999 B.C. Ltd., Roywood Holdings Ltd. and Hendrix Lake Recreational Society (the “company”) were associated corporations for the purposes of the *Act* and had contravened Sections 17(1), 18(1), 21, 27, 28, 36(1), 40(2), 44, 45, 46, 57(1), 57(2), 58(1), 58(2), 58(3) and 63 of the *Act* in respect of the employment of Timothy A. Dick (“Dick”) and ordered the associated corporations to cease contravening the above sections of the *Act* and to pay Dick an amount of \$29,854.84.

The second Determination concluded that James Stanley Wood (“Wood”) was a director/officer of the associated corporations, had contravened the same sections of the *Act* as the associated corporations, ordered James Stanley Wood to cease contravening those sections and, applying Section 95 of the *Act*, ordered James Stanley Wood to pay an amount of \$4,388.73.

The third Determination, although addressed to Rebecca Swan-Wood (“Swan-Wood”), determined that James Stanley Wood was a director/officer of the associated corporations, had contravened the same sections of the *Act* as the associated corporations, ordered James Stanley Wood to cease contravening those sections and, applying Section 95 of the *Act*, ordered James Stanley Wood to pay an amount of \$4,388.73.

The appeal relates to all three Determinations and raises identical grounds in respect of each. The main ground of appeal is that the Director was wrong to conclude that Dick was an employee of the associated corporations. It is argued on appeal that Dick was an independent contractor. In the alternative, if Dick was an employee, the appeals dispute the findings relating to hours of work, overtime and alleged unlawful deductions.

ISSUES TO BE DECIDED

The issue raised by the appeal is whether the appellants have met the burden of persuading the Tribunal that any or all of the Determinations ought to be varied or cancelled because the Director erred in fact or in law in reaching the conclusions upon which the Determinations are based. In this case, the nature of the burden on the main ground of appeal requires the appellants to persuade the Tribunal the conclusion of the Director that Dick was an employee was wrong in fact, in law, or both. The burden on the alternative ground is to show the Director was wrong in calculating the hours of work and overtime or the amount of unlawful deductions.

Before considering the grounds of appeal raised by the appellants, a preliminary concern arises in respect of one of the Determinations in this appeal. As indicated above, the third Determination, while it is addressed to Swan-Wood and indicates in its preamble that the Director had decided that she was a director/officer of the associated corporations, is issued against Wood. In my view, that Determination is a nullity. It cannot stand as a Determination made against Wood because it is legally vexatious. There is already a Determination made against Wood and this is a duplication of proceedings relating to him. It cannot stand as a Determination against Swan-Wood because it does not name her. There is a provision in the *Act* that salvages proceedings from being nullified by technical irregularities. That provision reads:

123. A technical irregularity does not invalidate a proceeding under this Act.

However, this error is not a technical irregularity. Failing to identify the correct person to whom a Determination is directed is a substantive matter. It is not like using “Ltd.” instead of “Inc.” when naming a corporate person in a Determination. That kind of error would be a technical matter. In this kind of case, naming a completely different person than the person intended to be named has the potential to mislead the “true” object of the Determination into a false belief about the need to appeal that Determination. It was apparent at the hearing that prejudice has occurred, as Swan-Wood disagreed strongly with the conclusion that she was a director/officer of the associated corporations and should be held responsible under Section 95 of the *Act*, although that disagreement was not identified in the reasons for appeal.

The result of this analysis is that the Determination addressed to Swan-Wood is cancelled and the remainder of this decision will deal only with the Determinations relating to the associated corporations and Wood. The Director is not precluded from issuing a correct Determination respecting Swan-Wood and if that is done Swan-Wood will have an opportunity to appeal that Determination in accordance with the requirements of the *Act*.

FACTS

In 1994, 470999 B.C. Ltd. (the “company” purchased some recreational property at Hendrix Lake near Clinton. The property had some houses on it, but many of them were unoccupied. Sometime in May, 1994, Dick first heard that the company was looking for a “caretaker” for the property. Dick was working at the time as a guide during the summer months and believed the job involved looking after the property during the winter. Some contact was made on his behalf with the company between May and October and in October, 1994 he personally contacted David Elwood Platt, one of the directors/officers of the company. Shortly after he met with Mr. Platt, Roy Nelson, another director/officer of the company, Wood and their respective wives. The group discussed the requirements of the job, the conditions, which included a house to live in, and the compensation that Dick would receive for performing the job. The directors offered the job to Dick and he accepted it. It was agreed he would be paid \$2000.00 a month, but would receive \$1800.00 a month and a house to live in. The equipment and tools needed to perform the job were provided by the company, including a backhoe, a pick-up truck and, later, a snowmobile. The company set up an account in its name at Tasco Supplies Ltd. and Dick was authorized to purchase items he needed for the job he was required to perform. For larger purchases he was required to get approval from one of the directors/officers of the company.

Dick was to be generally responsible for “caretaking” the property but his main responsibilities were maintaining the water and sewer systems of the town and keeping the roads clear of snow. He was told he could call the directors/officers if there was any problem he could not attend to or needed help with. He was also given the authority to use the equipment to clear driveways for individual owners of houses within the recreational property and bill them “on the side”.

He started work effective November 1, 1994. Shortly after he started he was told by Wood he would have to fix the furnaces in many of the vacant homes in the property as they had not been properly maintained for a period of more than ten years. He worked with Mr. Platt and Wood on that task through November and December, 1994.

In January, 1995, Dick was convinced by Mr. Platt that he should purchase the house that he then lived in. Dick and the company signed an Option Agreement (the “Agreement”) on January 7, 1995. It is not important to this appeal to set out the complete details of the Agreement, but there are two aspects of it that warrant noting and further analysis.

First, the Agreement contemplated that Dick would pay to the company an amount of \$2000.00 as consideration for the option. This amount would be applied to the purchase price of the property if the option was exercised. The amount was paid by a cash payment of \$1000.00, followed by three equal monthly payments of \$333.33. These amounts were subsequently deducted from the February, March and April, 1995 payments to Dick.

Second, Dick would pay an amount of \$600.00 a month for a 24 month period to “lease” the house. The 24 month period coincided with the term of the option. The paragraph in the Agreement relating to this payment reads:

THE LEASE

RENT paid by Lessee/Optionee \$600.00/mo., \$300.00 of each RENT payment shall apply to the purchase price of the EQUITY.

At the same time as the Agreement was made, Dick was told by Wood and the other directors that he would now receive \$1400.00 a month. Dick indicated he did not like that arrangement, but he was not in a position to oppose it too vigorously and, to quote his testimony on the point, "it was left at that".

In June, 1995 the Hendrix Lake Recreational Society was created. Its general purpose was to administer the property and, most particularly to oversee the continuing development and maintenance of key common facilities, such as water treatment, sewage and roads. The Directors of the Society were Mr. Platt, Mr. Nelson, their respective wives and Wood. Other directors were added and some were removed between June, 1995 and June, 1997, when Dick was told his services were no longer required at the property after July 31, 1997 but those changes are not relevant to this appeal.

Things began to come apart in the summer of 1995. A sewage system was installed, but did not work properly. Dick spent many hours keeping the system operational and many more hours performing work related to attempts at correcting the deficiencies in the system. Eventually, the authority granted to the company to install a sewage treatment facility was withdrawn and the existing facility became a source of dispute between the company and the regulating government agency. The company and the Society ran out of money and, in early 1997, stopped paying Dick on a regular basis. Dick did not exercise his option to purchase the property he was occupying nor did he pay rent on the property. He was asked to vacate and refused. Wood brought an application under the *Residential Tenancy Act* and was awarded three months rent in the amount of \$1800.00 and an order for immediate possession. Dick appealed the award, but that appeal was denied in a review Decision dated December 29, 1997.

Dick brought a small claims action relating to the Agreement. On April 6, 1998, a Judge of the Provincial Court concluded the Agreement was void for uncertainty and ordered repayment of the \$2000.00 paid in consideration of the option.

ANALYSIS

On the question of whether the Director was wrong in finding Dick was an employee of Wood for the purposes of the *Act*, Wood argues that Dick was in complete control of many aspects of his work, including what work would be done, when the work would be done, how the work would be done, what hours would be worked, who would do the work and what the standards would be for the work performed. He says the amount of control that Dick had means he is an independent contractor, not an employee. In reply, the Director examines the facts and applies those facts to several common law tests used by the Courts to assist in identifying the absence or presence of an employment relationship – the four-

fold test, the integration test and the permanency test. In *Insulpro Industries Inc. and Insulpro (Hub City) Ltd.*, BC EST #D405/98, the Tribunal made the following statement in respect of the question of the definition of “employee” under the *Act* and the relationship between that definition and the common law tests:

While common law tests may be helpful, in the final analysis, it is the *Act* that must be interpreted and applied. The *Act* defines employee as follows:

“*employee*” includes

- (b) a person, including a deceased person, receiving or entitled to wages for work performed for another,
- (b) a person the 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;

“*employer*” includes a person

- (b) who has or had control or direction of an employee, or
- (c) who is or was responsible, directly or indirectly, for the employment of an employee

Both of those definitions are inclusive, not exclusive. The *Act* is remedial legislation and should be 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.). I agree with the following comment from *Machtinger v. HOJ Industries Ltd.*, *supra*, that:

. . . an interpretation of the *Act* which encourages employers to comply with the minimum requirements of the *Act*, and so

extends its protection to as many employees as possible is favoured over one that does not.

It may be that common law tests, while a helpful guide, are not determinative of this issue when it is considered in the context of the definitions and objectives of the *Act* (see also: *Project Headstart Marketing Ltd.*, BC EST #D164/98).

I have no difficulty concluding that Dick was an employee for the purposes of the *Act*. Wood has not persuaded me that the findings of fact made by the Director on this question are wrong. The findings of fact made by the Director are reflected in the following excerpts from the Determination:

The respondents hired the complainant and told him what his duties were. While it is true that the hours were not specified or recorded, that flexibility is part of the nature of this particular job. The respondents clearly told the complainant who his bosses were . . . and whose “employ” he was in

The complainant owned nothing and the respondent owned everything that was used to perform the job duties

The complainant had no chance of profit, but rather a set salary per month

The complainant . . . made no investment in the business

The work the complainant performed was integral to the day-to-day operation of the townsite

This was not a temporary assignment or a simple task to be completed, but rather an ongoing relationship that lasted 2 ½ years and had the potential for an even longer period of time.

Most of these facts were confirmed in the evidence before me during the appeal. The fact that Dick exercised a considerable degree of independent judgement in respect of how and when he did his work is not conclusive of independent contractor status. Many employees are hired for the very reason that they are perceived by their employer to be capable of working independently of direct supervision and are expected to carry out critical work responsibilities with minimal or no specific direction relating to how or when that work is done.

In respect of the second part of this appeal, the Director filed a submission on the appeal with the Tribunal dated November 16, 1998, which varied the amount owed from \$29,854.84 to \$26,535.41, inclusive of interest to the date of the submission. As a result of that submission, the Determination will, at a minimum, be varied to reflect that recalculation. In respect of the appeal of the hours of work and overtime calculations, I

conclude that Wood has not met the burden of showing those calculations to be wrong and that aspect of the appeal is dismissed.

The conclusion of the Director in respect of the deductions made from wages requires more analysis. The Determination notes that Section 21 of the *Act* generally prohibits an employer from withholding or deducting wages from an employee unless permitted or required to do so by the *Act*, by the *Regulations* or by some other enactment. Section 22 requires or allows an employer to honour an employee's written assignment of wages and, in particular, subsection 22(4) states:

(4) *An employer may honour an employee's written assignment of wages to meet a credit obligation.*

In the Determination, the Director says:

The employer has no written authorization and, therefore, owes all deductions made for the purposes of rent/lease and/or purchase of the complainant's house while he was employed.

It is not clear from the Determination whether the Director considered that the Option Agreement might be viewed as a "*written assignment of wages*" for the purposes of the *Act* when reaching the above conclusion.

In the Determination, under the heading "Evidence/Parties Positions", the Director notes the following statement from Dick:

- commencing in January 1995 he was paying \$300.00 per month for rent and \$300.00 per month for the purchase of his home, leaving a balance of \$1400.00 on his paycheque;

If the circumstances confirmed a clear agreement between the parties to allow the employer to deduct \$600.00 a month from Dick's wages, it would not be inconsistent with the objects and purposes of the *Act* to find the Agreement was a "*written assignment of wages*" for the purposes of the *Act*.

However, the evidence does not allow me to find there was any such agreement. The testimony of Wood and Dick differed significantly on whether the parties agreed the \$600.00 a month would be deducted by the employer from Dick's wages. Wood says there was a discussion about the easiest way to pay the amount and it was "agreed" to take it directly from Dick's cheque. Dick says the directors decided the easiest way to get the amount would be to take it from his cheque, so that was what happened, even though he voiced objection to it. In the context of other evidence indicating the nature of the relationship between Dick and the directors of the company, it is more probable that the directors decided to take the \$600.00 directly from Dick's cheque without perceiving the need for his input or his agreement. Accordingly, the Agreement cannot be viewed as a

“*written assignment of wages*” for the purposes of the *Act* and the unauthorized deduction is prohibited by the *Act*.

This aspect of the appeal is also dismissed.

ORDER

Pursuant to Section 112 of the *Act*, I order the Determination in respect of the associated corporations, dated August 28, 1998 varied to show the amount owing, as of November 16, 1998, as \$26,535.41 and I further order the Determination in respect of Wood in his capacity as Director/Officer of the associated corporations dated August 28, 1998 confirmed in the amount of \$4,388.73, together with any interest that has accrued pursuant to Section 88 of the *Act* from the date of the Determination.

David Stevenson
Adjudicator
Employment Standards Tribunal