

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 -

Tony Gustavson
("Gustavson")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Genevieve Eden

FILE NO.: 96/182

DATE OF HEARING: May 22, 1996

DATE OF DECISION: May 24, 1996

DECISION

APPEARANCES

Tony Gustavson	owner of Canada Drywall
Lloyd Jordan	advisor to Tony Gustavson
Arno Schmidt	on his own behalf
Gerry Omstead	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Tony Gustavson ("Gustavson"), owner of Canada Drywall and Renovations ("Canada Drywall"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against Determination # CDET 001225 issued by the Director of Employment Standards on February 15, 1996. The Determination requires Gustavson to pay Arno Werner Schmidt ("Schmidt") \$3,253.46 representing unpaid wages including vacation pay and interest. In this appeal, Gustavson maintains that Schmidt was not an employee under the *Act*.

A hearing was held in Victoria on May 22, 1996. All witnesses gave evidence under oath.

Consideration of this appeal falls under the transitional provisions of the *Act*. Section 128(3) of the *Act* states:

If, before the repeal of the former Act, no decision was made by the director, an authorized representative of the director, or an officer on a complaint made under that *Act*, the complaint is to be treated for all purposes, including Section 80 of this *Act*, as a complaint under this *Act*.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Schmidt was an employee of Canada Drywall, and if so, what wages, if any, are owed to Schmidt.

FACTS

Gustavson and Schmidt agreed to the following facts;

1. Gustavson operates Canada Drywall and Renovations as a sole proprietorship.
2. Schmidt worked for Gustavson as a Drywaller and Jointfiller from January 1, 1995 to September 1, 1995.

3. Schmidt's rate of pay was \$20.00 per hour set by agreement between Gustavson and Schmidt.
4. Schmidt's responsibilities were to work on different job sites located around the greater Victoria area. These jobs were obtained by Gustavson who would price the job and arrange for the work to be done.
5. Canada Drywall would provide the materials for the job.
6. Schmidt advertised a business in the name of S.E.X. Drywall from December 1994 to the present in the Sidney Review once a week, on Wednesdays.
7. Gustavson has not paid Schmidt for some hours that were completed by him because he claims the work took too long or was not to the standard of the customer.
8. The hours worked by Schmidt are not in dispute.

Schmidt filed a complaint under the *Act* on September 11, 1995 alleging unpaid wages. The Determination issued by the Director's delegate, Gerry Omstead ("Omstead") states a finding that Schmidt was an employee under the *Act*. The Calculation Schedule attached to the Determination shows gross wages owing from January 1995 to May 14, 1995 as \$11,145.40. Vacation pay was calculated totalling \$445.81; wages paid in the amount of \$8,410.00 were deducted. Interest in the amount of \$72.25 was added for a total owing of \$3,253.46..

Gustavson appealed the Director's Determination on March 11, 1996 stating in his reasons for appeal that the relationship was one of contractor/sub-contractor not employer/employee. Gustavson's testimony was in accord with that stated on his reasons for appeal:

1. Employees in this industry receive an average hourly rate of \$13.50 which is 32.5% below the sub-contractor rate of \$20.00 per hour paid to Schmidt.
2. Schmidt's services were engaged solely on the basis of an independently self-employed sub-contractor as demonstrated by advertising his own business, S.E.X. Drywall.
3. Schmidt hired the services of Gustavson to work as a sub-contractor on occasion.
4. Schmidt agreed to charge backs for deficient or incomplete work which are not the actions of an employee.

Gustavson testified that he never told Schmidt he was an employee. Cheques were made out in Schmidt's name with no statutory deductions, no overtime, nor vacation pay. Examples of cheques submitted in evidence show "For Sublabour". He was not aware of Schmidt's S.E.X. Drywall business until he saw the ad in the paper after Schmidt started working for him. While Gustavson testified that he assigned Schmidt to different jobs, he denied that he supervised him or that he gave instructions to Schmidt on how to do the job stating that Schmidt was a professional and that he shouldn't have to tell him.

Gustavson's testimony included several examples of what he claimed to be deficient work and reasons for "charge backs" on Schmidt's work. His evidence was that, on each occasion, he

explained to Schmidt why he was making deductions for this work and Schmidt accepted the cheques. In June or July 1995, Gustavson asked Schmidt to provide a record of all the work he was doing so that he would know what he was paying for. Commencing August 1995, some jobs were paid on a square foot basis rather than an hourly basis.

On cross examination Gustavson acknowledged that he worked for Schmidt around 1990 to 1991 and not during the period Schmidt worked for him.

Schmidt testified that discussion of his being a contractor never came up when he was hired nor during the time he worked for Gustavson. When hired, he had asked Gustavson if he had work and Gustavson told him he would give him some work. He considered himself to be Gustavson's employee. He stated repeatedly that if he was a contractor he would know how much he would be paid before he started each job which never happened; he was just asked to record his hours. In uncontradicted testimony, Schmidt stated that Gustavson directed him where to go, what jobs to do, and provided the materials. Schmidt's evidence was that Gustavson came to the job and told him what to do; Gustavson controlled whatever he did, for example telling him to "put installation on" and "put on gyprock".

In July 1995, Gustavson asked him to write out all his hours as well as all the work he did; he also told him that some of the work would be paid as piecework. Schmidt disputed all the claims of deficient work and denied agreeing to charge backs.

Schmidt acknowledged he had some contracts through his S.E.X. Drywall business; about 10 to 15 percent of his work time was spent on these contracts during the time he worked for Gustavson, but Gustavson's job came first. If he had other work he would only do it when he finished Gustavson's work; it was just to "fill in" when Gustavson didn't have enough work. His hours of work with Gustavson were not regular; Schmidt worked for Gustavson whenever he had work.

Omstead testified that his calculations of wages owing were based on all hours worked including overtime, minimum daily hours, statutory holiday and vacation pay. The charge backs were not deducted since Schmidt is owed for all hours worked; if there was a fault in workmanship, it would be a disciplinary issue not an issue of wages.

ARGUMENTS

Gustavson argued the evidence supported a contractor/sub-contractor relationship. He referred to the "sublabour" statement on cheques issued to Schmidt, the fact that Schmidt did not work regular hours for him and also advertised his own business, and that Schmidt worked with minimal supervision. He submitted Schmidt had done piecework for him.

Schmidt argued the evidence supported an employee/employer relationship. He reiterated that Gustavson controlled whatever he did, told him where and when to go to work and supplied the materials. Gustavson also told him when too many hours were spent at jobs and that deductions were made accordingly. He submitted he was paid on an hourly basis for the time

the jobs took; contractors on the other hand will know before a job starts how much they will be paid.

Omstead argued in support of his position that Schmidt was an employee of Canada Drywall. He submitted that the evidence revealed that the jobs were obtained and materials supplied by Canada Drywall, work was performed for Canada Drywall by Schmidt, and wages were paid to Schmidt under mutual agreement. The fact that the rate was changed from an hourly to square foot basis in itself indicated an employee/employer relationship where the employer makes a decision about what the wages will be. Direction and control were further demonstrated in July 1995 when Gustavson asked Schmidt to provide hours on his statements and show work that was done. He noted that cheques had been made directly to Schmidt and not S.E.X. Drywall and that the records showed pretty well full time employment from May 15th to August 21st.

ANALYSIS

The onus for proving that the Determination should be cancelled rests with the appellant, Gustavson.

The definitions of "employee", "employer" and "work" and "wages" under the *Act* include the following:

- 1.(1) "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 ...

"employer" includes a person

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

"work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

"wages" includes

- (a) salaries, commissions or money, paid or payable by an employer to an employee for work
- (b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency ...

In addition to the above statutory definitions, common law tests have been developed in order to determine whether a person is an employee. These include the "control test", which includes the power of deciding the thing to be done, the way in which it shall be done, the means to be

employed in doing it, the time when and the place where it shall be done; the "four-fold test" which looks at control, ownership of tools, the chance of profit and risk of loss; and the "organization" or "integration" tests which suggests that if an individual's work is an integral part of the business operations, that individual will be found to be an employee.

By applying the statutory definitions and various tests to the evidence before me, I find, on the balance of probabilities, that the relationship between Schmidt and Gustavson was one of employer/employee.

I am satisfied that Schmidt performed labour for Gustavson and that Gustavson was in ultimate control of Schmidt and responsible for his employment. Schmidt was paid monies by Gustavson which fall under the broad definition of wages in the *Act*. While the rate of remuneration was agreed to at the outset, Gustavson's change of the form of remuneration during the working relationship is indicative of an employee/employer relationship where the employer makes the decision about what the wages will be. The fact that remuneration for some jobs was based on piecework does not bring Schmidt outside the definition of wages under the *Act*.

Gustavson was in control of the source of work. He determined when the work was to be done by Schmidt, directed him where to go, what jobs to do, and provided the materials. Further, Schmidt had no chance of profit or risk of loss given he was on an hourly rate which was established in advance by Gustavson and Schmidt. While Schmidt was not wholly economically dependent on Gustavson, the evidence reveals that only 10 to 15 percent of Schmidt's time was spent on contracts through his own drywall business

Finally, I find that the work performed by Schmidt was an integral part of, rather than incidental to, the business of Gustavson. The work performed by Schmidt was of the sort that would normally be performed by employees of a drywall and renovations business and was central to this business.

While other factors may be suggestive of an independent contractor relationship, such as the absence of statutory deductions, overtime, and vacation pay, these factors in and of themselves do not create independent contractor status out of the parties' employee-employer relationship.

Although there was conflicting testimony regarding whether Schmidt was given instructions or supervised, the question is not necessarily what control was exercised in this regard but whether the right to control is present in the relationship. Gustavson's discussions with Schmidt regarding what he claimed to be deficient work suggests the presence of the right to control in the relationship.

I have concluded that Schmidt was an employee of Canada Drywall. Gustavson agreed the hours worked by Schmidt were not in dispute. Under the *Act*, Schmidt is entitled to be paid for overtime, minimum daily hours, statutory holiday and vacation pay. Further, Section 21(1) of the *Act* prohibits the withholding or deduction of an employee's wages. Deductions made by Canada Drywall from Schmidt's wages in the form of charge backs for work deficiencies are prohibited under the *Act*. Employees are to be paid for all hours worked.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination #CDET 001225 be confirmed.

Genevieve Eden
Adjudicator
Employment Standards Tribunal

May 24, 1996
Date