Employment Standards TRIBUNAL

An appeal

- by -

Russell Ward Flooring Ltd.
("Russell Ward")

- 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: Ib S. Petersen

FILE No.: 2001/887

DATE OF HEARING: April 8, 2002

DATE OF DECISION: April 11, 2002

DECISION

APPEARANCES:

Russell Ward on his own behalf

OVERVIEW

This is an appeal by Russell Ward pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") of a Determination of the Director of Employment Standards (the "Director") issued on May 30, 2001 which determined that Kevin and Chris Bigelow were employees of Russell Ward and that they were owed $2,479.46 on account of unpaid wages under the *Skills Development and Fair Wages Act*.

The employer appealed the Determination. Ward argued that the Determination is wrong because the Bigelows were, in fact, independent contractors. In a Decision, dated August 23, 2001, I referred that issue back to the Director (the "Original Decision"). Specifically, I directed that the "Delegate must consider the relationship in its entirety" in order to determine status.

FACTS AND ANALYSIS

The background facts were set out as follows in the Original Decision:

> "Russell Ward operates a floor laying business in North Vancouver. It appears that the firm does work on ships. The Determination arises out of work done in connection with a contract Russell Ward had in connection with the construction of the Kootenay Lake ferry, in Nelson, British Columbia, a project to which the Skills Development and Fair Wages Act applied. The Bigelows worked as a floor layer and labourer, respectively, between June 5 and 14, June 19 and 24, and July 10 and 14, 2000 (Chris Bigelow did not work after July 10). The Delegate concluded that the Bigelows were employees of Russell Ward. They were, therefore, entitled to be paid the difference between the hourly rates paid and the rates and benefits provided for under the *Skills Development and Fair Wages Act* and/or by agreement...."

The basis for the Delegate's Determination with respect to "employee" status was the Kootenay Lake ferry project only. The results of the referral back are set out in a letter dated December 19, 2001. The Delegate applied the "four fold test" to answer the question of "whose business is it." He applied that test to the Kootenay Lake ferry project and, again, concluded that the Bigelows enjoyed employee status under the *Act*.

The Original Decision stated:

> First, although the facts addressed (sic) the Delegate are relevant to the inquiry into employee status, he did not address the facts in light of the statute, its purposes, and the common law tests. These facts may or may not, depending on all of the circumstances of the case, indicate that the Bigelows are employees for the purposes of the *Act*. I agree

> with the Delegate that the cheque issued to Chris Bigelow could indicate an employment relationship. I also agree that the letter from Russell Ward to the Branch regarding Kevin Bigelow is an indication of that. However, the focus of his analysis is a narrow (sic), focussing only on the brief periods of work on the ferry project. In the circumstances, I am not satisfied that the Delegate properly considered the relationship between the Bigelows, collectively or individually, in its entirety. His analysis is incomplete. For example, it is clear that Kevin Bigelow performed services for Russell Ward before the ferry project (and, perhaps after). Moreover, some (or all) of these services were performed through a corporate vehicle, Bigelow Holdings Ltd., of which Kevin Bigelow is a principal, and GST was charged on these services. Some of these services are characterized as "consulting services." As well, from Kevin Bigelows submission I understand that he is the distributor of the coating (which I understand was used in the ferry project). In my view, the Delegate must consider the relationship in its entirety and, when he failed to do so, he erred in law."

In his report, the Delegate stated:

> "In regards to the second question with respect to the entirety of the relationship I do not believe that is a valid consideration. The claimants are not pursuing any other money than that which they earned on the Kootenay Lake ferry project."

With the greatest respect, while the Delegate may disagree, the Original Decision stands until set aside on reconsideration. It is not for the Delegate to decide that he does not agree with the terms for the referral back. As stated in the Original Decision, when the failed to consider the entirety of the relationship, he erred in law. Re-arguing that case does not change that. In my view, the Delegate erred when he failed to consider the question remitted back to him.

I appreciate that the decision that someone is an employee for the purposes of the *Act* is often a subtle and difficult one. In the circumstances of the instant case, I have decided to cancel the Determination. Based on the evidence before me at the hearing, and submissions on file, I am of the view that the Bigelows were independent contractors. I base that decision on my view of the "the relationship in its entirety."

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated May 30, 2001 be cancelled.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal