BC EST #D148/96

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 -

Joseph B. Horwath and M. Wynne Horwath
Operating Cedar Crest Mobile Home & RV Park
("Cedar Crest")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	C. L. Roberts
FILE NO.:	96/241
DATE OF HEARING:	June 11, 1996
DATE OF DECISION:	**June 12, 1996**

DECISION

APPEARANCES:

James A. Mitchell, I.C.I.A. and J. Horwath	For the Appellant
Eric Ronse	For the Director of Employment Standards
Barbara Twyman	Representing herself

OVERVIEW

This is an appeal by Joseph B. Horwath and M. Wynne Horwath operating Cedar Crest Mobile Home & RV Park ("Cedar Crest"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued on March 12, 1996 (Determination CDET #001463) wherein the Director found that the employer had contravened the *Employment Standards Act* in failing to pay wages and vacation pay to Barbara Twyman, and ordered that Cedar Crest pay $4,496.46 to the Director of Employment Standards.

ISSUE TO BE DECIDED

The issue on appeal was whether Ms. Twyman was an independent contractor or whether there was an employer/employee relationship between the parties.

The Employer contends that Twyman was an independent contractor and that no further funds are due and owing.

The Director contends that, irrespective of the written agreement entered into, Twyman was an employee, and recalculated the wages and vacation pay in accordance with the requirements under the *Act*.

FACTS

Ms. Twyman worked as the caretaker/manager for Cedar Crest Mobile Home Park in Castlegar from May 31, 1993 to August 31, 1993, and again from July 16, 1994 to July 31, 1995. There was no dispute taken to the characterization of Ms. Twyman's employment status as an independent contractor for the first time period.

The agreements entered into between the parties for both periods are identical in form, and contain the same terms and conditions. The only distinction between the two is that the pay, which was $700.00 per month, was increased to $800.00 per month as of November 1, 1994, plus an additional 8% of the rents collected.

The second agreement also varied from the first in that it placed the responsibility for negligent acts upon the contractor. The validity of this term, although questioned in the hearing, was not at issue before me.

The agreements identify Ms. Twyman as a private contractor, and state that the caretaker manager was to use her best efforts to ensure that the park was fully tenanted, execute tenancy agreements on behalf of the owner, collect rents and deposit them on behalf of the owner, maintain a petty cash account, attend to landlord tenant matters, supervise repairs and other work done in the park and confirm all invoices submitted for payment, authorize repairs up to $50.00, providing regular services in the park including clean up, landscaping, ensuring park safety and adherence to the rules.

There is no dispute to the following facts:

- Twyman used her own facilities and supplies on the job, including desk, telephone, computer and adding machine. Long distance telephone call expenses were reimbursed by Cedar Crest, and she was provided with a gasoline allowance of $10.00 per month;

- Twyman was issued a T4A slip (for contract or self employed income) rather than a T4;

- Twyman could, and did, establish her own hours of work;

- Twyman was able to hire her own replacement workers when she went on holidays, without seeking approval from the Horwaths. Although she did in fact notify the Horwaths of the days she would not be present, and where she would be, there was no expectation or obligation that she do so.

ANALYSIS

I heard evidence from Ms. Twyman and Mr. Horwath, and argument from Mr. Mitchell and Mr. Ronse.

On the basis of the evidence presented, I set aside the decision of the Director.

Although Ms. Twyman was issued a T4A slip, rather than a T4, and was identified as an independent contractor in the agreement, I am unable to conclude those factors are, in themselves, determinative of her employment status.

It is clear that regardless of what label parties attach to their employment relationship, the nature of their daily relationship will be assessed to determine whether an employee/employer relationship exists or that of an independent contractor. (Castlegar Taxi v. Director of Employment Standards (1988) 58 BCLR (2d) 341).

I have reviewed several common law tests of whether a person is an employee or an independent contractor, (the four fold test, the integration test, and the control test), the definition of the *Act*, and the Tribunal decisions in *Christopher Sin v. Director of Employment Standards (#D015/96), Warbrick v. Director of Employment Standards (#D019/96) and Larry Leuven v. Director of Employment Standards (#D136/96).*

I have also noted the report of the Commission charged with reviewing Employment Standards (Rights and Responsibilities in a Changing Workplace: A review of Employment Standards in British Columbia) in which the Commission noted that the definition of employee was a cause for concern. It was the Commission's recommendation that the term employee be broadly defined so that employers could not escape coverage of the law by identifying employees as contractors. The report recommended that the definition of 'employee' "...should be expanded to reflect the prevailing judicial view of employee status. The long established definition of an employee in the common law is relevant in this respect. The distinction between an employee and a contractor turns on: control; ownership of tools; chance of profit; and risk of loss." (page 32). The report went on to say that "...legitimate independent contractors normally should be excluded from coverage under the *Act*."(page 33)

Section 1(1) of the *Act* defines an employer as including a person who:

> (a) has control or direction of an employee, or
> (b) is responsible, directly or indirectly, for the employment of an employee.

Section 1(1) defines wages to include:

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

I have examined the relationship between the parties, placing greatest emphasis on the issue of control, or whether Ms. Twyman was under the direction or control of the Horwaths regarding the time, place and way in which the work was done.

Generally, the greater the degree to which the employer supplies goods or services, retains direction or control, or has economic dominance, the greater the likelihood of employment status.

Although Ms. Twyman performed additional work for Cedar Crest, it is clear that work was done under separate contracts, for which she was paid amounts over and above the primary monthly contract amount. That work included painting the fence, cleaning up debris and selling logs. The evidence is that she had the opportunity to take other work for profit, and in fact did so. I do not consider the 8% bonus as an opportunity for profit, as the Act defines this 'incentive' payment as wages.

Ms. Twyman was given tools to assist her in carrying out her duties, including a lawnmower, a filing cabinet, a gas weed-eater, garden hoses, sprinkler, wheel barrow, shovels, hoe, pruner etc. However, she provided her own telephone, answering machine, computer and vehicle. In the key areas for which she was responsible, she provided her own tools. The remaining tools were not required for her use, as she was entitled to contract out that work, as she saw fit.

Ms. Twyman did not share the risk in the event of a loss. Her payment was $800.00 per month regardless of whether the park was fully rented or not.

As the mobile home park is located in Castlegar and the Horwaths live in Sooke, it was impossible for them to exercise daily onsite supervision.

Telephone records show that there were approximately 2.5 telephone calls per week between the parties. The Director contends that this indicates a high degree of control and supervision. I am unable to agree. Several of the telephone calls were less than one minute, suggesting that a message was left on an answering machine, or of little importance. The records indicate that one telephone call per week was normal unless there was an emergency or matter of extraordinary complexity. I note that the calls between the previous park manager and the Horwaths were much less frequent.

Although Ms. Twyman stated she was required to be on the job every day, and was visited by tenants as early as 6:30 a.m., she acknowledged that this was not as a result of any instructions from Mr. Howarth. I am satisfied that she was told to be available "to do the job." How she did so, provided she managed the park efficiently, was up to her.

I find that, notwithstanding the amount work performed by Ms. Twyman in an effort to manage the park properly, very little was closely prescribed by Cedar Crest. All park residents were responsible for maintaining their pads, so there was no obligation for Ms. Twyman to be present at the park more than one or two hours per day to carry out the general maintenance functions, which she could have contracted out, ensure that park rules were being complied with, and to be available for emergencies, for which she could have carried a pager. I note that she would not have to be available on site to collect rent more than one or two days per month, as rent was payable on a monthly basis. I am unable to find that her hours were scheduled or regulated by the Horwaths.

It is possible that Ms. Twyman was less efficient than previous managers, or more diligent, however, I am unable to find that the extra work was directed by the Horwaths. I am satisfied how and when she did the work expected of her was not of concern to Cedar Crest, provided that the work contracted for was done.

Ms. Twyman purchased a mobile home in the park, and lived in it during the period in question. Undoubtedly, this made it easier for her to perform her job. However, it was not required by Cedar Crest that she do so. In fact, the previous manager did not live on site.

Notes to Ms. Twyman from Mr. and Mrs. Horwath were submitted into evidence to support her contention that they exercised control over how she performed her job. Those notes contain information on how to complete notices of rent increase and when and how to serve them, receipts for money received, and other general information on rents due, or short, as well as photocopies of bills paid, which were for her information only.

I am unable to find that this evidence supports Ms. Twyman's contention that she was closely supervised. The *Residential Tenancy Act* provides a strict code for landlords which must be complied with in order to enforce Landlord's rights under the *Act*. I find that the 'directions' given to Ms. Twyman were no more than an enumeration of those legislative requirements, or merely of an informative nature - they were not exercising close control or supervision, merely ensuring that their rights and obligations as landlords were preserved. None contained specific instructions on how to carry out her job. I am unable to conclude that the Horwaths exercised close supervision and control over the manner in which
Ms. Twyman performed did her job.

I am unable to conclude that Twyman was an employee. It is clear that it was the employer's intention to create a contractual relationship. In fact, that is what existed between the parties at an earlier point in their relationship. It also characterized the relationship between the previous manager and the Horwaths.

I am also unable to find that Ms. Twyman was an integral part of the business. The park was essentially self managed. There was little day to day onsite work required, as evidenced from the previous manager, who was pursuing a full time course of studies at the same time she managed the park.

In December 1995, the issue of Ms. Twyman's employment relationship was considered by the Tax Court (Joseph Horwath & M. Wynne Horwath, o/a Cedar Crest Mobile Home Park v. The Minister of National Revenue (TC5598). The case was an appeal of the finding of the Minister of National Revenue that Ms. Twyman was employed in insurable employment with the Appellant from July 17, 1993 to August 27, 1994, and assessing the Appellants with unemployment insurance premiums and interest, and Canada Pension Plan premiums. The Court found that there was very little control or supervision over
Ms. Twyman, and concluded that she was a contractor. The Court noted (at p 4) that there were certain minimum requirements which had to be met, such as collect the rents and be available in emergencies, but that there was much freedom to do other things, including full time nursing studies. The Court also found that both Ms. Twyman and the previous manager had an opportunity for profit, and that there was little in the way of tools provided

to them. The Court concluded that the caretaking services was not "the kind of service that was required on a daily basis, but rather, more of a general supervisory nature and both Barbara Twyman and Patsy Rose [the previous caretaker] were free to engage in other work and other pursuits and were only required to carry out the duties that they had contracted for." The Court concluded by finding that "When one looks at all of the factors in the manner required by the Federal Court of Appeal, in my view, the facts here are greatly different from those involved in the cases of resident caretaker/janitors who live in a large apartment block and who are required to undertake strict daily routine duties as directed by a superintendent or owner who was probably, if not on site daily, then certainly on a weekly or bi-weekly basis. In this instance I see very, very little difference between the Horwaths retaining Barbara Twyman and/or Patsy Rose or retaining the services of an agency in Castelgar for carrying out the same type of duties. That is collecting rents, serving the required notices, if needed, under the *Residential Tenancy Act*, and being available for a telephone call to take details of an emergency and to then use discretion to retain other individuals as might be necessary to carry out the particular remedial work". The Court found in favour of the Appellant, and vacated the assessments.

The Director contends that the finding was incorrect, largely because Mrs. Twyman did not present any evidence. I note that the decision was not appealed. It is not within my jurisdiction to question the 'correctness' of that decision, and in fact, such a finding is not necessary for the purposes of this decision.

I am unable to concur with the Director's characterization of Ms. Twyman's duties as being similar to those performed by a caretaker. I find that her functions more closely parallel those of a property manager, whose responsibility it is to collect rents, take action in emergencies, arrange for the general maintenance of the property, and normally have authority to spend money to a prescribed amount. They have authority to contract out work they are unable to do themselves, as Ms. Twyman was. In the case of a caretaker, there are often more day to day chores to perform, such as cleaning common areas, including the lobby and laundry rooms, conducting check in and check out inspections, fixing leaking taps etc. In mobile home parks, where the tenants own their own mobile homes, the duties are much less onerous.

I am also unable to find that Ms. Twyman's duties were integral to the business operations. The park is essentially self operating, and the work performed by Ms. Twyman was only accessory to it.

I am satisfied that Ms. Twyman had the freedom to determine how she would carry out her duties as prescribed by the contract, and in fact, was an independent contractor. Although she viewed herself as working for one person, the opportunity for her to provide other services to other parties, or do other work, existed. The previous caretaker/manager was in full time course of studies, and I presume that Ms. Twyman could have availed herself of other opportunities as well. The fact she did not do so cannot be held against the Appellants.

ORDER

I Order, pursuant to Section 115 of the Act, that Determination #000235 be cancelled.

C.L. Roberts
Adjudicator
Employment Standards Tribunal

CL:jel