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 -

Eagle Eye Tile Ltd.
("Eagle Eye" or the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 1999/183

DATE OF DECISION: May 14, 1999

DECISION

APPEARANCES

Mr. Ron Worden	on behalf of the Employer
Mr. Ian Macphail	on behalf of himself
Mr. Andrew Macphail	on behalf of himself
Ms. Shelina Shivji	on behalf of the Director

OVERVIEW

This is an appeal by the Employer 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 8, 1999 which determined that Eagle Eye was liable for wages, overtime wages and vacation pay to Ian and Andrew Macphail. The Director's delegate found that they were owed $2,520.96.

The Employer argues that the Determination is wrong for the following reasons:

1. The Macphails were independent contractors; and

2. in any event, the hours claimed to have been worked is excessive.

FACTS AND ANALYSIS

The Employer is in the tiling business. Ian Macphail worked as a tile grouter/general labourer between June 27 and August 28, 1997. Ian Macphail worked as a tile grouter/general labourer between July 20 and August 20, 1997. They filed a complaint with the Branch.

The first issue is whether the Macphails were employees or independent contractors.

From the Determination it appears that the delegate considered the statutory definition of an "employee" and applied the traditional "common law" tests to the facts at hand. As the Employer did not respond to his request for information, he based his Determination on the information supplied to him by the Macphails, including the following:

1. Worden, a principal of the Employer, "advised them where and when to report to work, how to complete the work by providing training, and provided equipment and supplies".

2. Worden set the wage rate at $10.00 per hour.

3. The Macphails supplied time sheets on a weekly basis.

4. The Macphails were university student without previous experience in the business.

5. Ian Macphail was paid $2,000 in cash and another $200 for expenses.

The delegate concluded that the Macphails were employees and not independent contractors.

The *Act* defines an "employee" broadly (Section 1).

> "employee" includes
>
> > (a) a 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,
>
> An "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;

First, it is well established that these definitions are to be given a broad and liberal interpretation. Second, my interpretation must take into account the purposes of the *Act.* The Tribunal has on many occasions confirmed the remedial nature of the *Act*. In *Knight Piesold Ltd*., BCEST #D093/99, the Tribunal made the following comments, at page 4:

> "Deciding whether a person is an employee or not often involve complicated issues of fact. The law is well established. Typically, it involves a consideration of common law tests developed by the courts over time, including such factors as control, ownership of tools, chance of profit, risk of loss and "integration" (see, for example, *Wiebe Door Services Ltd. v. Minister of National Revenue* (1986), 87 D.T.C. 5026 (F.C.A.) and Christie et al. *Employment Law in Canada* (2nd ed.) Toronto and Vancouver: Butterworth). As noted by the Privy Council in *Montreal v. Montreal Locomotive Works*, <1947> 1 D.L.R. 161, the question of employee status can be settled, in many cases, only by examining the whole of the relationship between the parties. In some cases it is possible to decide the issue by considering the question of "whose business is it". ...."

In my view, the delegate did not err in reaching the conclusions he did, based on the facts before him. In its appeal submission, the Employer suggests that the Macphails agreed to work as independent contractors. The appeal provides few particulars to support the argument that the Macphails were independent contractors and is little more than a bald assertion, which is of little assistance to the Tribunal. Even if the parties did agree to characterize the relationship as suggested by the Employer, given the relevant facts--which are largely undisputed by the Employer--there is little doubt that the relationship was an employment relationship, as determined by the delegate. In my view, the appeal on this point must be dismissed.

In any event, when initially contacted by the delegate in March 1998, the Employer took the position that the Macphails were independent contractors and not employees. In October, the delegate issued a Demand for Records and requested further information for the investigation of the complaints. The Employer did not respond to this request for information and records. The Employer's appeal submission does not deny this. I am of the view, therefore, that the Employer failed to participate in the investigation by not responding to the delegate. I agree with the principles set out in *Kaiser Stables*, BCEST #D058/97, and other cases, that the Tribunal should not generally allow an appellant who refuses to participate in the Director's investigation, to file an appeal questioning the merits of the Determination. The issue raised by the Employer--that the Macphails were independent contractors--could have been more fully addressed during the investigation had the Employer decided to participate. On that ground alone, in my view, the appeal must fail.

The second issue is whether the Macphails "over-billed" the Employer. The appeal submission is somewhat unclear on this point. The Employer acknowledges the Macphails' claim--set out in the Determination--that they provided time sheets to the it. On the one hand, the Employers seems to be saying that it does not have the time sheets--"we do not have these as we were expecting

invoices from the individuals" and "we do not have any records of hours"; on the other, the Employer seems to be saying that the time sheets are not correct as the Macphails "are billing too many hours for the work completed".

Also this ground of appeal must be dismissed. First, the appellant has the burden to prove that the Determination is wrong. If, as claimed by the Employer, the amount of wages awarded in the Determination is wrong, one would expect some basic particulars, *i.e.*, the Employer's view of the hours worked by the Macphails. The Employer's statements that it does "not agree what they <the Macphails> are saying", feels that they are "not correct" and that the Employer knows how long each contract "should take" are of little or no assistance to the Tribunal. Second, and in any event, for the reasons set out above, I am not persuaded to enter into an inquiry of the merits of this matter because the Employer did have an opportunity to provide information and records to the delegate and failed to do so. The delegate based his Determination on records provided by the complainants. In the circumstances, it would be inappropriate for me to allow the Employer to now question the delegate's conclusions.

In the result, the appeal must fail.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated March 8, 1999 be confirmed together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal