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 -

Park Ridge Homes Inc.
Park Ridge Holdings Ltd. and
Park Ridge Homes (1993) Ltd.

(“ Park Ridge ” or the “Employer”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE No.: 2000/145

DATE OF HEARING: May 23, 2000

DATE OF DECISION: June 28, 2000

DECISION

APPEARANCES

Mr. Brad Hughes Mr. Lloyd Hughes	on behalf of the Employer
Mr. George Audette	on behalf of himself

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 February 14, 2000 which determined that Mr Audette ("Audette") was an employee of Park Ridge and that he was owed $7,792.92 on account of overtime wages, vacation pay and statutory holiday pay. The Employer argues that the Determination is wrong because Audette was, in fact, an independent contractor and not an employee. In the result, he is not entitled to the amount awarded. The Employer indicated at the hearing that there is no dispute with respect to the amount owed should I find that Audette was an employee. Park Ridge also questions the findings of the delegate that the three companies listed as the Employer are associated and related companies within Section 95 of the *Act*.

FACTS AND ANALYSIS

Park Ridge is in the home construction business. Audette worked for Park Ridge between October 1992 and January 1999. He provided general labour on construction sites. At the time, the relationship came to an end in January 1999 he was paid $14.00 per hour. Audette testified, and this was not in dispute, that his rate was $7.50 per hour, but that after his first day, this rate was increased to $9.00. Over time the rate increased to $14.00. The Employer says that Audette agreed, when he was hired, to perform services as a 'contractor', *i.e*., not as an employee. The Employer also says, and that is not in dispute, that Audette never questioned the basis for the relationship while he was working with Park Ridge. Generally, Audette was paid twice a month on the basis of invoices, supplied by the Employer, submitted twice a month. There is no issue before me that Audette was not paid in accordance with these invoices. The amount awarded in the Determination is based on these invoices.

The delegate concluded that the three incorporated entities operated as associated companies. This aspect of the Determination was not seriously questioned at the hearing and I do not propose to deal with this in much detail. It is clear from the Determination that the delegate considered Section 95 of the *Act* and facts relevant to a finding that the companies operated in an associated fashion, including, the nature of the work done by the companies, the work done by Audette, the supervision of the work, and overlapping directors and officers. In the result, there is no basis for setting aside this conclusion.

The main issue before me is whether Audette was an employee or an independent contractor. The delegate, after setting out the Employer's and Audette's positions in some detail, applied the common law tests in making her determination that Audette was an employee.

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

> *"employees" 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;*

I approach these definitions with the following principles in mind. It is well established that the definitions are to be given a broad and liberal interpretation. The basic purpose of the *Act* is the protection of employees through minimum standards of employment and that an interpretation which extends that protection is to be preferred over one which does not (*Machtinger v. HOJ Industries Ltd*., <1992> 1 S.C.R. 986). Moreover, my interpretation must take into account the purposes of the *Act* (*Interpretation Act*). The Tribunal has on many occasions confirmed the remedial nature of the *Act*. Section 2 provides (in part):

> *2. The purposes of this Act are as follows:*
>
> *(c) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;*

As noted an a recent decision of the Tribunal,:

> "Deciding whether a person is an employee or not often involve complicated issues of fact. With the statutory purpose in mind, the traditional common law tests assist in filling the definitional void in Section 1. 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"."

It is clear from the Determination that the delegate considered these tests in making his determination that Audette was an employee.

In any event, on the basis of the evidence before me at the hearing, and the applicable legal principles, I would agree with the delegate's conclusion that Audette was an employee. This conclusion is supported by the facts, not in dispute, that Audette had the use of the Employer's truck and company credit card to pay for fuel and, occasionally, supplies and materials for the business and that the Employer supplied all the tools used by Audette in the work (except, perhaps, a hammer). In my view, this is more consistent with Audette being an employee. Audette testified that the Employer told him what to do and when to do it. Audette says he did not have a business, a business name or a business licence, all he did was to supply labour to the Employer's business. He agrees that he did work a few days for two other business--4-5 days for one, and 5-6 days for another--"when things were slow" at Park Ridge. The Employer was unable to show that Audette generally worked for other businesses such that it could reasonably be argued that he operated a "labour supply business" as the Employer contended. It appears to me that Audette, as found by the delegate, worked exclusively for Park Ridge. The fact that he worked for others for a few days does not detract from that. Based on the evidence at the hearing, it appears to me that Audette was not in business for himself but, rather, simply supplied labour for the business of Park Ridge. It does not appear to me, as argued by the Employer that Audette was in the same position as roofing contractors, painting contractor etc. who supplied services to the Employer. In my opinion, considering the evidence in light of the applicable legal tests, Audette was an employee.

The nub of the Employer's appeal is its view that Audette was hired as a contractor and that, if he was dissatisfied he could have re-negotiated his relationship with Park Ridge or pursued other work. It is clear that the Employer is concerned that Audette did not challenge his status during years of working with Park Ridge. Audette says that the issue of him being a "contractor" did not come up at the beginning of the relationship. He says that he was hired to work for an hourly rate. Essentially, he explains that he was not aware of his rights as an employee until later and, he felt, in any event, that the matter was not open to negotiation. Lloyd Hughes is quite adamant that the issue of Audette being a contractor was discussed at the time of hiring. Even if I accept Lloyd Hughes testimony that the parties had intended the relationship to be an independent contractor relationship, in *Straume v. Point Grey Holdings Ltd.*, <1990> B.C.J. No. 365 (B.C.S.C.), the court noted, at page 3, that "the declared intention and classification of the contract parties may not bind statutory or third parties not party to the contract as against its true nature". While the parties' intent is relevant in an action for wrongful dismissal, *i.e.*, an action founded in contract, and may be a relevant factor before the Tribunal, I do not agree, in view of the remedial nature of the statute, that much weight should be placed on this factor. As well, Section 4 of the *Act* specifically provides that an agreement to waive any of the requirements is of no effect.

In short, I am not persuaded to interfere with the Determination.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated February 14, 2000 be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal