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 -

Baer Enterprises Ltd.
(the "Appellant")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE No.: 2000/204

DATE OF DECISION: June 26, 2000

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by the employer, Baer Enterprises Ltd. (the "employer") from a Determination dated March 1, 2000. That Determination found the employer liable for $111,294.31 in back pay and interest to a group of employees. This total was amended on April 10, 2000, to $100,531.10 after it was determined that under section 37.7 of the *Employment Standards Regulation* (the "*Regulations"*) double overtime need not be paid to loggers working in the Interior. The Director's Delegate determined that the employer had breached Section 20 of the *Act*.

ISSUE(S) TO BE DECIDED

1. Are Darryl Gratton and Larry Emery employees under the *Act*?
2. Is Marvin D. Jones' claim excessive?
3. Should the pick-up rentals and living out allowances be included in the wages?
4. Should the Determination be reduced to reflect net rather than gross pay?

FACTS

The employer is a logging company operating out of McBride, British Columbia. The complainants worked for the employer in various positions for at least some period between January 16 and February 18, 2000. The employer met the payroll up to January 14, 2000. Work continued for approximately a month beyond this date. The employer does not dispute that work performed by the complainants after January 14, 2000 has not been paid.

Darryl Gratton worked for the employer as a Feller/Buncher, at an hourly rate of $35.00. Larry Emery worked as a loader operator at an hourly rate of $25.00. The employer takes the position that these two are independent contractors and are therefore not entitled to the protection of the *Act.* The employer points to certain time sheets which were filled out by Mr. Gratton and Mr. Emery to support the argument.

With respect to Larry Emery the time sheets state "contract" below the hours worked. The employer submitted three such time sheets which cover the period January 16 to February 28, 2000. The employer also submitted a time sheet for Darryl Gratton. The time sheet covers the period between January 1 and January 15, 1999. On this particular sheet the employee's name is listed as Summit Contracting. The employer states that on his more recent time sheets Mr. Gratton marked his own name in the employee's name section.

Mr. Gratton has filed a Statement of Claim of Lien against the employer under the *Woodworkers Lien Act* to recover the amount owing to him. The lien covers both hours worked as well as pick up rental. In the Statement of Claim Mr. Gratton states that he was doing business as Summit Contracting when he was working for the employer. The statement was filed March 1, 2000.

The employer relies on the time sheets and the Statement of Claim filed by Mr. Gratton, and the time sheets for Mr. Emery, in asserting that the complainants were independent contractors, rather than employees.

As this is an appeal, the onus is on the employer to show that Mr. Gratton and Mr. Emery were independent contractors and not employees. The only evidence adduced in relation to Mr. Emery were the time sheets. The mere fact that the word "contract" was written on the time sheet is not enough to remove employee status. The employer has submitted nothing to indicate that Mr. Emery, a loader operator making $25.00 an hour, supplied his own equipment, or had any chance of profit or risk of loss. There is no evidence before me that Mr. Emery exercised any control over the direction or operation of the enterprise. There is nothing indicating that Mr. Emery did not work alongside employees of the employer or was not wholly integrated into the employer's business. In short, the employer has not, on a balance of probabilities, shown that Mr. Emery was an independent contractor and not an employee.

With respect to Mr. Gratton the same argument applies. The fact that a company name was on the time sheet is not enough to remove employee status. Neither does the manner in which the Woodworkers lien claim was filed dispose of the issue. The test for employee status is objective not subjective. There is no evidence before me that clearly indicates that Mr. Gratton was operating as an independent contractor.

Turning to the second issue the original calculation owing to Marvin Jones was $19,451.67. This amount was later reduced to $10,329.80, when it was determined that the original calculation had included hours of work that had already been paid for. Furthermore a reduction was made due to the inclusion of double overtime in the original calculation contrary to the *Regulations*.

The employer has asked that Mr. Jones' claim be reduced to the same amount as Robert Sansom. Mr. Sansom's claim stands at $ 11,696.87. The employer states that Mr. Jones' claim is excessive. The Delegate through her investigation has determined the amount of hours worked by Mr. Jones for which he has not received payment at 293. Mr. Sansom's hours for the same period are 358. With the exception of the week of January 30, 2000 Mr. Sansom recorded more hours than Mr. Jones on a weekly basis. Mr. Sansom only worked two days in this week, while Mr. Jones worked six days. The file indicates that Mr. Jones was not the only employee to work during this week. Further, on each day that Mr. Jones and Mr. Sansom were working together the record shows that Mr. Sansom worked more hours than Mr. Jones. The employer has adduced no evidence to contradict these findings. I cannot conclude that Mr. Jones' claim is excessive.

Thirdly the employer contends that the employees were claiming pick-up rental and living out allowances. The wage calculation summaries prepared by the Delegate are based on the hours worked multiplied by the applicable hourly rate. There is nothing in these calculations to indicate that pick up rentals and living out allowances were included. I note that on the copy of Marvin Jones' pay statement sent in by the employer pick-up rental is listed as a separate heading. It seems clear that pick up rental and living out allowances were not included in the calculation of wages owing.

Finally the employer argues that the complainants should receive only net pay as the Receiver General of Canada has already assessed Baer Enterprises for the unremitted source deductions

relating to all these claims. There is no doubt that the employees will have to pay taxes on these wages. However Determinations are made for gross pay amounts. It is the employer that is responsible for withholding the statutory deductions and remitting those amounts to the Receiver General on behalf of the employee. In other words statutory deductions are taken from the gross amount and an employee received a net pay amount. There is no basis to vary the award to reflect only net pay.

ORDER

The Determination dated March 1, 2000, as varied on April 10, 2000, is confirmed.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal