

**EMPLOYMENT STANDARDS TRIBUNAL**  
In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act*

- by -

Roger A. Aubrey and Raymond Imbeault  
(“ Aubrey, Imbeault ”)

- of a Determination issued by -

The Director Of Employment Standards  
(the “Director”)

**ADJUDICATOR:** Hans Suhr

**FILE NO.:** 96/400

**DATE OF HEARING:** September 26, 1996

**DATE OF DECISION:** May 6, 2001

## DECISION

### OVERVIEW

This is an appeal by Roger A. Aubrey (“Aubrey”) and Raymond Imbeault (“Imbeault”) the appellants, pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination Letter issued by a delegate of the Director on June 19, 1996. In this appeal the appellants claim that the delegate of the Director incorrectly determined that they were not employees pursuant to the provisions of the *Act* and further that wages are owing.

Written submissions were received from Aubrey and Imbeault, and information was provided by the Director. Subsequently, an oral hearing was held on September 26, 1996.

Persons in attendance at the hearing were:

For the Appellants	Roger A. Aubrey Raymond Imbeault
For Berwood Sawmills Ltd. and REM Holdings Ltd.	Donald A. Woodcock
For the Director	J. Ross Gould, Industrial Relations Officer

### PRELIMINARY ORDER

A preliminary issue was raised with respect to which entity, Berwood Sawmills Ltd. or REM Holdings Ltd. was the “alleged” employer.

Donald Woodcock (“Woodcock”) testified that:

- Berwood Sawmills Ltd. (“Berwood”) was a registered company with 3 shareholders, Woodcock, his father W.D. Woodcock and a Bert Jefferies;
- Woodcock was the majority shareholder;
- Berwood was never involved in any logging activity;
- Berwood shut down its operations in June 1995 and laid off all employees;

- the assets of Berwood were sold and Woodcock purchased some components of the sawmill;
- Berwood was wound up on or about May 31, 1996;
- REM Holdings LTD. (“REM”), is a registered company with a single shareholder, W.D. Woodcock;
- REM is actively involved in the business of logging;
- Aubrey and Imbeault felled trees for REM in December 1995 and again from January 13, 1996 to February 2, 1996;
- REM issued cheques to Aubrey and Imbeault with respect to the falling performed in December 1995;
- REM issued a cheque in the amount of \$2,000.00 to Imbeault with respect to the falling performed in January/February 1996.

With the consent of all parties, I ordered that this appeal be amended to reflect that REM Holdings Ltd. (“REM”) is the entity which was the “alleged” employer of Aubrey and Imbeault.

### **ISSUES TO BE DECIDED**

The issues to be decided in this appeal are:

1. Were Aubrey and Imbeault employees as defined by the Act ?
2. If the answer to #1 is yes, then I must determine if any wages are owed by REM.

### **FACTS**

I heard testimony from three witnesses, Woodcock on behalf of REM and Aubrey and Imbeault on their own behalf.

The period in dispute which was the subject of the complaints filed by Aubrey and Imbeault was January 13, 1996 to February 2, 1996.

During the relevant period, REM was engaged in logging birchwood from a small business timber sale awarded to Woodcock and located near Eaglet Lake, an area that is North East of Prince George, B.C.

He stated that Aubrey and Imbeault were hired as independent contractors to do the falling of the birchwood at Eaglet Lake.

He stated that the policy of REM was that all contractors hired had to be covered by their own WCB registration number and that they had been told that Imbeault had such a number.

He said that the rate agreed to for falling the birchwood was \$2.00 per tonne with the work to be completed by the end of February 1996 as the timber sale expired March 15, 1996.

He stated that on January 19, 1996, Aubrey and Imbeault showed up at his father's home requesting that they be paid an advance. At their request, a cheque in the amount of \$2,000.00 was made payable to Imbeault. At that time both Aubrey and Imbeault expressed their concern about the rate of \$2.00 per tonne, but were reassured that when the cold snap broke, they would easily be able to make the \$350.00 per day that they had anticipated.

On January 27 the other contractors came to the Eaglet Lake work site to begin skidding, bucking, loading and hauling away the birchwood felled by Aubrey and Imbeault. At that time Woodcock felt that the amount of birchwood that had been felled appeared to be less than what he might have expected from two experienced fallers.

On February 2, Aubrey and Imbeault approached both Woodcock and his father at the work site requesting to be paid as it was payday. They were informed by Woodcock that they were not getting the amount of birchwood out that they should have been and that REM was not prepared to either increase the rate per tonne or to pay them on a day rate basis of \$350.00 per day. Aubrey and Imbeault then left the work site. They were told that once all of the birchwood they had felled was hauled out, if it was determined they were entitled to receive additional money, it would be paid.

Woodcock further stated that at no time did Aubrey or Imbeault ever present REM with an invoice for the work performed or with a time sheet showing the days alleged to have been worked.

Woodcock further stated that as the total amount of birchwood felled by Aubrey and Imbeault was 900 tonnes, the advance of \$2,000.00 paid on January 19 in fact overpaid them for the work performed.

Aubrey testified that he and Imbeault were approached by the Woodcocks while they were working at the Bear Lake site to see if they would be interested in falling the birchwood at the Eaglet Lake location. As they were being paid a day rate of \$350.00 at the Bear Lake site, they agreed to fall the birchwood at Eaglet Lake.

They met with the Woodcocks on January 12 at which time they were shown the blocks to be cut, where to start cutting and, it was at that time they were told they could earn between

\$350.00 to \$400.00 per day. As a result of a period of extreme cold, they only worked a total of eight days, January 13, 14, 15, 16, 26, 27, February 1 and 2. He stated that it was not until the discussion with the Woodcocks on February 2 that they were told that they would not be paid on the day rate basis as they had been led to believe, but rather on a per tonne basis. He does not recall what the rate per tonne mentioned was but he and Imbeault felt that as they would not be able to make the type of money they had expected to make by being paid on a per tonne basis, they “packed it in”.

He states that they provided their own power saws, fuel, oil, repairs and parts as required. He and Imbeault traveled together in one of their pickups to and from work but were not reimbursed any money for the use of the truck.

He further states that they did not sign any contract with respect to falling the birchwood nor did they provide their own WCB coverage.

On cross examination by the delegate of the Director, Aubrey stated that the time between completing work at Bear Lake and commencing work at Eaglet Lake was approximately two weeks. He further stated that the reason the cheque of January 19 was made out to Imbeault was that Woodcock’s father did not want to make out two cheques. He further stated that after the cheque was cashed, Imbeault gave him one-half of the \$2,000.00. He further stated that when he and Imbeault had commenced working at Bear Lake for REM, they indicated that they preferred to be paid the gross amounts earned and would be responsible for their own deductions for income tax, unemployment insurance, CPP etc.

He stated that the time sheets provided to the Tribunal were prepared in late July or early August 1996 from information contained on the complaint forms. The information on the complaint forms was taken from dates recorded on a calendar at home.

Imbeault testified that he agreed with the evidence of Aubrey. He further states that the reason he had a WCB number was that he had contracted with the Ministry of Forests to do some tree spacing etc. He states that he advised Woodcock’s father during a telephone conversation sometime after February 2 that he and Aubrey had worked a total of eight days falling the birchwood. He also stated that they normally got paid every two weeks.

## **ANALYSIS**

During the course of the hearing, I heard a good deal of evidence concerning the relationship between REM, Aubrey and Imbeault prior to the period in dispute and during the disputed period.

The *Act* defines employee, employer, wages and work as follows:

**“employee”** includes

- (a) a person, including a deceased 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,
- (c) a person being trained by an employer for the employer’s business,
- (d) a person on leave from an employer, and
- (e) a person who has a right of recall

**“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;

**“wages”** includes

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

**“work”** means the labour or services an employee performs for an employer whether in the employee’s residence or elsewhere.

In addition to the above statutory definitions, various common law tests have been developed in order to determine whether a person is an employee. These include the “control test”, which determines whether a person is subject to the control and direction of the employer in respect of the manner in which the work is to be done, when it will be done and how the employees must do it; the “four-fold test” which looks at control, ownership of tools, the chance of profit and risk of loss; and the “organization” or “integration” test which suggests that if an individual’s work is an integral part of the business operations, that individual will be found to be an employee.

By applying the evidence presented at this hearing to the statutory definitions of “employee”, “employer”, “wages” and “work” and to the various tests, I find, on the balance of probabilities, that Aubrey and Imbeault were employees of REM.

I am satisfied that Aubrey and Imbeault performed labour for REM and that REM was in ultimate control of Aubrey and Imbeault and responsible for their employment. Aubrey and Imbeault were hired and paid wages by REM. I accept that REM set the rate of pay and paid wages on a regular bi-weekly basis. Aubrey and Imbeault did not submit any invoice or billing for the alleged “contracted” services rendered.

Other elements of the four-fold test suggest Aubrey and Imbeault were not independent contractors, rather they were employees. While Aubrey and Imbeault provided their own powersaws, this is a normal course of events for fallers, they had no chance of profit or risk of loss given they were on a set pay rate which was established in advance by REM.

Finally, I find that the work performed by Aubrey and Imbeault was an integral part of, rather than incidental to, the business of REM. REM was in the business of logging, and the falling of trees performed by Aubrey and Imbeault is the major component of logging for, it is trite to say, that without someone to fall the trees there is nothing to log. Such integration suggests an employee-employer relationship existed between REM and Aubrey and Imbeault.

It is conceded that other factors are suggestive of an independent contractor relationship, such as the absence of statutory deductions, compensation payments and vacation pay. On the balance, however, these factors do not create independent contractor status out of the parties’ employee-employer relationship.

Having concluded that Aubrey and Imbeault were employees of REM, I must now consider the second issue of whether they are owed wages.

Aubrey’s evidence that they were to receive between \$350.00 to \$400.00 per day is certainly indicative of a method of payment that reflects earnings based on productivity rather than a straight day rate. While the parties have differing recollections of what the rate of remuneration was to be, I conclude, on the balance of probabilities, that the rate was to be \$2.00 per tonne. As the advance of \$2,000.00 paid on January 19, 1996 exceeds the amount earned by Aubrey and Imbeault (\$1,800.00), there are no further wages owing.

The appeal by Aubrey and Imbeault is upheld to the extent that I conclude they are employees of REM however, as stated above, no further wages are owing.

## **ORDER**

Pursuant to Section 115 of *Act*, I order that the Determination letter be varied as set forth above.

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**Hans Suhr**  
**Adjudicator**  
**Employment Standards Tribunal**

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