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 -

Geoffrey B. Godding
(" Godding ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: David B. Stevenson

FILE No.: 2000/307

DATE OF DECISION: August 14, 2000

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Geoffrey B. Godding ("Godding") of a Determination which was issued on April 18, 2000 by a delegate of the Director of Employment Standards (the "Director"). Godding had filed a complaint for length of service compensation in respect of his employment with Protrux Systems Inc. ("Protrux"). The central issue in the Determination was whether Godding was an employee for the purposes of the *Act*. The Determination noted, however, that if Godding was an employee for the purposes of the *Act*, other provisions of the *Act*, including annual vacation pay, statutory holiday pay and overtime pay, would apply and wages in respect of those matters would be owed. The Determination included fifteen attachments that set out the arguments of the parties and several documents relied on or referred to by the parties in making their respective arguments.

The Determination concluded that Godding was not an employee for the purposes of the *Act*. Godding has appealed that conclusion and asks the Tribunal to overturn it.

The Tribunal has decided that an oral hearing is not required in order to address the issue raised in this appeal.

ISSUES TO BE DECIDED

The issue is whether the Director erred in concluding Godding was not an employee for the purposes of the *Act*.

FACTS

The Determination set out the following background information:

> Protrux Systems Inc. runs a trucking business which picks up and delivers building supplies for a variety of customers.
>
> All parties agree that the business is subject to the provisions of the BC *Employment Standards Act.*
>
> Godding worked from March 2 1998 to June 19 1998[1] as an owner operator of a 1957 Kenworth Truck used to pull loads exclusively for Protrux.
>
> The complaint was filed in the time period allowed by the Act.

[1] Godding worked for Protrux for18 days in March, 20 days in April, 20 days in May and 14 days in June, 1998.

On the issue of whether Godding was an employee for the purposes of the *Act*, the Determination stated:

> A number of facts would lead one to the conclusion that the complainant is not an employee; facts such as:
>
> - the complainant is an incorporated entity known as Godding Enterprises Ltd. Godding Enterprises operates in the trucking business offering to contract trucking to the highest bidder.
>
> - the complainant structures his affairs so as to make it appear that Godding Enterprises Ltd. pays him an annual salary of $13,000.00, see attachment 4 to this.
>
> - there is no evidence that the complainant was required either directly or indirectly by Protrux to structure his affairs as an owner operator.
>
> - the complainant confirms that owner operator was and is his status of choice both before and after his relationship with Protrux. In this respect, I see no effort here on the part of Protrux to defeat the purpose of the Employment Standards Act as set out in Section 2.
>
> Certain other facts would lead one to conclude that the complainant is an employee; facts such as:
>
> - the complainant being required by Protrux to pay a $79.00 initiation fee and $44.80 per month in union dues to IWA (Canada) Local 1-271 as if he were an employee and then receiving no representation from them at time of dismissal on the grounds that he was not an employee.
>
> - the complainant and the company employees are part of a common pool of drivers who attend common staff meetings, work under a common dispatch, have common requirement to subject themselves to drug testing and are indistinguishable in the application of most company rules.
>
> - the "ordinary man" would not distinguish between the Protrux sign on an owner operators truck and the Protrux sign on a company truck.

An explanation of some of the above statements are required. Godding operated under a company, called Godding Enterprises Ltd. ("GEL"). He was the sole shareholder of that company. The material shows that GEL paid him $13,000.00 of taxable income and that a T4 Summary was issued for that amount by GEL. The material also indicates that GEL had income of approximately $29,000.00 during the relevant period.

IWA - Canada, Local 1-271 (the "Union") was, at the relevant time, the certified bargaining agent of a unit of employees of Protrux described as:

> "employees at and from 1961 - 100A Avenue, Langley, B.C. except office staff."

Godding was not included in the bargaining unit and was never covered by any provision of the collective agreement. Apparently, he was required by Protrux to have membership in and pay dues to the Union because the pick up of building supplies was done at mill sites where the employees were represented by the IWA - Canada.

ANALYSIS

In his reply to the appeal, counsel for Protrux submits that it should be summarily dismissed without a hearing under Section 114 of the *Act*. As noted above, the Tribunal has decided an oral hearing is not necessary, but there is no basis otherwise for dismissing this appeal under Section 114. Counsel also submits the Tribunal's authority in this appeal is limited to reviewing the Determination to the same extent as the Tribunal would review an exercise of discretion by the Director. Reference is made to *Jody L. Goudreau* BC EST #D066/98, where the Tribunal stated:

> The Tribunal will not interfere with an exercise of discretion unless it can be shown the exercise was an abuse of power; the Director made a mistake construing the limits of her authority; there was a procedural irregularity; or the decision was unreasonable.

With respect, the issue raised by this appeal does not principally involve an exercise of discretion by the Director. The central matter in this appeal is an issue of interpretation and application of the *Act*. In such circumstances, the Tribunal has all the authority necessary to review the Determination and is not bound to review the Determination as though it were an exercise of discretion. The comments made by the Tribunal in *Re Takarabe*, BC EST #D160/98, at para. 62 are appropriate:

> . . . the Tribunal can decide the Appellants' grounds for appeal while remaining firmly within the jurisdiction given to it in Part 12 and Part 13 of the Act. As noted above, Section 108(2) of the Act gives the Tribunal the power to decide all questions of fact or law.

Both Godding and counsel for Protrux made extensive submissions to the investigating officer on the issue raised by this appeal. As noted in the Determination, both approached that issue more from the perspective of the common law tests for determining whether a person is an employee or an independent contractor. Both made sound arguments for their respective positions.

Godding relied on what is referred to as the "economic realities" of the relationship between he and Protrux, highlighting the several aspects of that relationship in the context of relevant criteria:

- he worked exclusively for Protrux from March 2 to June 19, 1998;
- he was told how, where and when to work;
- while he owned the tractor trailer unit, the specialized trailers that he towed were owned by Protrux;

- he had no interest in the business of Protrux, undertook no risk of loss and had no expectation of receiving any profit from the business; and

- he took no part and had no say in the business organization of Protrux.

He also noted that the decision to join the Union was not his, but was a requirement stipulated by Protrux. Protrux deducted the initiation fees and the monthly dues payments from his "wages". Godding did not invoice Protrux, but turned in daily time sheets showing the hours he worked and the jobs performed. He was paid based on those time sheets and neither charged nor collected GST .

Counsel for Protrux relied on the "fundamental control", or four-fold test, and the *"de jure"*, or payment of wages, test. The former test was enunciated in the Privy Council decision *Montreal Locomotive Works Limited*, [1947] 1 D.L.R. 161 and identified four elements that, when considered, would determine whether the relationship between two parties was one of employment or one of contract - "of service" or "for services":

- which party had control over the work and its performance;

- which party had ownership of the "tools";

- which party bore the risk of loss; and

- which party had the chance for profit.

The latter test, counsel submitted, has been used by the Ontario Labour Relations Board and by arbitrator Paul Weiler in *Amplitrol Electronics Ltd.*, an unreported decision dated September 2, 1969 and has considered the following matters:

- whether the contract itself provide for an hourly rate with a relatively fixed mark-up for profit;

- whether the equipment and premises used belong to the purported employer;

- whether the work involved the application of standards prescribed or set by the purported employer;

- was there evidence of significant independent control by the purported employer's supervisors; and

- whether the purported employer controlled the manner in which the work was performed.

On the basis of those tests, counsel argued that Godding was not an employee, but an independent trucking contractor, citing several facts and factors: he was not covered by the collective agreement, as employees were, he was not hired as an employee, he did not serve a probationary period, he never appeared on any seniority list, he was not paid according to any

wage schedule in the collective agreement, he made no health and welfare contributions; he owned his own tractor unit, which he insured, fueled, operated and maintained; he was remunerated on the basis of a rate sheet, not an hourly wage under the collective agreement; any "extraordinary" expenses incurred in the course of working for Protrux was solely his responsibility; he had control over how a delivery was made, deciding what route to take and at what speed he would travel; he was free to decline any work offered by Protrux and to work for other companies and was not subject to any discipline if he did so; he was not required to wear a company uniform; and he was not driving a company vehicle.

Counsel also indicated that there was no intention on the part of Protrux to create an employment relationship. No statutory deductions were ever made by Protrux from the money paid to Godding for his work nor did Protrux pay W.C.B. premiums in respect of him.

While common law tests may be a helpful guide, those tests are not determinative.

The test for deciding the relationship for the purposes of the *Act*, as the Determination indicates, must be based on the definitions and objectives of the *Act*. Such test must take into account that the *Act* is intended to be remedial, imposing certain minimum benefits and standards for employees in the province that cannot be waived or compromised by private arrangements. As remedial legislation, the *Act* should be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects, see *Machtinger v. HOJ Industries Ltd.*, (1992) 91 D.L.R. (4th) 491 (S.C.C.) and *Helping Hands v. Director of Employment Standards*, (1995) 131 D.L.R. (4th) 336 (B.C.C.A.).

The *Act* expresses a public policy objective of insuring that employees receive conditions of employment that accord with minimum standards of decency and protecting those employees who generally lack the bargaining power in the market to effectively protect themselves.

The relevance of the foregoing matters is supported by the stated purposes of the *Act*, set out in Section 2:

> *2. The purposes of this Act are to*
>
> *(a) ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment,*
>
> *(b) promote the fair treatment of employees and employers,*
>
> *(c) encourage open communication between employers and their employees,*
>
> *(d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act,*
>
> *(e) foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia, and*

> *(f) contribute in assisting employees to meet work and family responsibilities.*

Other relevant statutory provisions include the definitions of employer and employee, wages and work.

The terms "employee" and "employer" are broadly defined in Section 1 of the *Act*:

> *"**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;*

Both of the above definitions are inclusive, not exclusive. Similarly, the definition of "wages" is broadly defined in the *Act*:

> ***"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,*
>
> *(c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,*
>
> *(d) money required to be paid in accordance with a determination or an order of the tribunal, and*
>
> *(e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefits, to a fund, insurer or other person,*

but does not include

(f) gratuities,

(g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,

(h) allowances or expenses, and

(i) penalties.

Finally, the meaning of work is also provided in Section 1 of the *Act*:

> ***"work"*** *means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.*

The interpretive approach to the above provisions, and to the *Act* generally, is expressed in the following comments from the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
> (para. 21)

Notwithstanding all of the above, it is neither the objective nor the intention of the *Act* to include legitimate independent contractors within the definition of employee.

The Determination notes there were aspects of the relationship between Godding and Protrux that pointed in both directions. I note particularly that the Director does not preclude a conclusion, depending on the circumstances, that an owner-operator can be an employee under the *Act*. The Determination correctly accepts that the nature of the relationship in its entirety must be assessed to determine whether an employee/employer relationship exists or that the relationship is a contractual one between two independent contracting parties.

The Determination was the result of a balancing of all aspects of the relationship between Godding (GEL) and Protrux. On a review of the Determination and the material attached to it, I cannot find that the final conclusion of the Director, that Godding was not an employee for the purposes of the *Act*, was wrong. Except for a matter which I address later, Godding has added nothing to the facts and factors that were available to and considered by the Director in making the Determination. The central consideration, that Godding, through GEL, operated a trucking business offering contract trucking to the highest bidder and that, generally, his brief relationship with Protrux was a part of his carrying on that business, was amply supported by the facts and was demonstrated in the manner in which both parties established and participated in the relationship. In other words, the Determination demonstrates a sufficient factual basis for the finding that Godding was an independent contractor in his relationship Protrux and, as such, was not included in the definition of employee in the *Act*.

The appeal is dismissed.

There are two final comments that should be made.

First, in a submission to the Tribunal dated June 12, 2000, Godding filed a copy of a consent order in the matter of an arbitration between Teamsters, Local Union No. 31 and Squamish Freightways/Comox Valley Distribution, involving a grievance that had been filed on his behalf with that employer. The purpose of filing this document was to suggest that the conclusion of his employment status under the *Act* was out of step with his status for the purpose of that arbitration and should be changed. There are two responses to this material. First, the Consent Order does not indicate that Godding was found to be an employee for any purpose, let alone for the purposes of the *Act*. The implication of the Consent Order is only that Godding was a person entitled to grieve alleged breaches of the relevant collective agreement. More importantly, the statutory framework within which the grievance was filed, and the Consent Order issued, is different than the statutory framework within which this appeal has arisen. In fact, there is nothing in the *Labour Relations Code* (the *"Code"*) that prohibits parties to a collective agreement from agreeing to include a requirement for the payment of wages or benefits to persons who are not included in the bargaining unit or who may not meet the definition of employee under the *Code*. The fact that Godding was entitled to claim rights under a collective agreement does not necessarily determine his status for the purposes of the *Code* and most certainly does not determine his status for the purposes of the *Act*. As I have tried to make clear, a person's status under the *Act* must be decided in reference to the language, objectives, purposes and intention of the *Act*, and only the *Act*.

Second, the Determination suggested the question being considered was whether Godding was an "owner-operator" or an employee, while at the same time acknowledging that an "owner-operator", depending on the circumstances, could be an employee under the *Act*. Also, throughout his submissions, Godding referred to himself as a "dependent contractor". As counsel for Protrux accurately pointed out, "dependent contractor" and "owner-operator" are not concepts that have any particular relevance under the *Act*. I agree. They are more terms of art, or "labels", that have little, if any, effect on the essential question of deciding whether Godding was an employee for the purposes of the *Act*. It only confuses matters to make findings or to frame the issue in terms other than those that relate to the essential question - was Godding an employee under the *Act* or not? Consideration of the dependence or independence of the putative employee to the putative employer is important, but those are matters of fact that should not be influenced by labels that have no particular meaning for the purposes of the *Act*.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated April 18, 2000 be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal