

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 -

Grande Isles Resort Ltd. and Donald Henry Frederickson,
a director of Grande Isles Resort Ltd.
("Grande Isles")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NoS.: 1999/367 and 1999/373

DATE OF DECISION: August 26, 1999

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Grande Isles Resort Ltd. and Donald Henry Frederickson, a director of Grande Isles Resort Ltd. (collectively, “Grande Isle” or the “employer”) of Determinations which were issued on May 19, 1999 by a delegate of the Director of Employment Standards (the “Director”). The Determinations concluded That Grande Isle had contravened Sections 21(1), 40(1), 45, 46(1) and 58(3) of the Act in respect of the employment of Scott D. Gibson (“Gibson”), ordered Grande Isle to cease contravening the Act, to comply with the Act and to pay an amount of \$2426.55. The Determinations also found that Donald Henry Frederickson was the sole director of Grande Isles.

Grande Isles says the conclusion in the Determinations that Gibson was not a “contract worker” is wrong and, in any event, the calculation of the amount of wages owed is wrong.

ISSUES TO BE DECIDED

The issues are whether Grande Isle has shown that Gibson was not an employee under the Act and, if he was an employee under the Act, whether the amount of wages owed is wrong.

FACTS

The Determination concluded that Gibson had performed a number of trade -related tasks at the Grande Isle Resort between June, 1997 and December, 1997, including carpentry, plumbing, painting and electrical work. He was paid an hourly rate of \$15.00. While Grande Isle disagrees with the conclusion that Gibson was not a contract worker, there is no disagreement on the face of the appeal with the findings of fact in the Determination relating to whether Gibson was an employee under the Act. The following findings of fact were made in the Determination:

[Gibson] worked at the direction, although not the close supervision, of the Employer and he was required to perform all the work personally. The Employer provided the tools necessary to complete the work, although not all the tools. The chance of profit and risk of loss related to the work rested entirely with the Employer. Gibson was paid by the hour and the costs of all the materials were covered by the Employer.

Grande Isle provided the records upon which the calculation of wages owing were based. The Director concluded that Grande Isle had paid Gibson \$6997.50 in wages during the June 2, 1997 to December 22, 1997 period. This conclusion was based on the time sheets maintained by the employer for that period and provided to the Director. At the conclusion of the investigation, the Director prepared a draft calculation and sent Grande Isle a copy of it. It was sent to the attention of Senga Gardner, who was the employer’s bookkeeper. In the accompanying memorandum, the Director stated:

As per our conversation, attached is the calculation for Gibson. Please check it against your records and get back to me. For the wages paid by employer amount on the last page, I’ve just used the amounts on the time sheets for the periods I have records of hours worked for. I haven’t dealt with anything prior to 2 June and I haven’t included some work in August for which he was apparently paid \$1703 as I have no records of hours worked.

Ms. Gardner replied to the memorandum from the Director on behalf of the employer. In the reply, she made no comment about the Director not dealing with anything before June 2.

In the appeal, Grande Isle said the Director had not credited them with all payments made to Gibson for work performed and provided records that showed Gibson had been paid \$7634.80 for the work he performed for Grande Isle. Some of the payments made to Gibson related to the period before June 2, 1997, specifically, from April 30, 1997 to June 2, 1997.

ANALYSIS

Grande Isle has not shown there is any error in the Determination. There is no doubt from the accepted facts that the Director was correct to conclude Gibson was an employee under the *Act*.

Also, while Grande Isle is correct in its assertion that the Director did not include all amounts paid to Gibson, Grande Isle has not shown that the Determination ought to be varied or canceled as a result as the Director did not include *either* the amounts paid or the hours worked in the period before June 2 in the calculation of wages owed. If the amounts paid for work done in April and May were included in the calculation, the hours worked would need to be determined for that period and included in the calculation as well. Based on the material provided with the appeal, the increase in the total amount shown as “wages paid by the employer” to cover the period before June 2 would be more than offset by a corresponding increase in the total hours worked during that period.

The appeal is dismissed.

Grande Isle has also asked the Tribunal to hold the money ordered to be paid as a result of the Determination until a Small Claims action is concluded. While I cannot help but feel some sympathy for Grande Isle, who appears to have extended considerable charity to Gibson, the Tribunal does not have the jurisdiction in the context of this appeal to do what is asked. Our jurisdiction following a consideration of an appeal is limited by Section 115 of the *Act* and, basically, is to confirm, cancel or vary a Determination or to refer it back to the Director. While the Tribunal does have authority, under Section 113 of the *Act*, to suspend the effect of a Determination, no application has been made under that provision and, in any event, any order made under Section 113 is, except in unique circumstances, limited to the period during which the Tribunal is considering the appeal. Apart from this limited power under Section 113, the authority to decide whether and when to enforce a Determination belongs to the Director and the request being made here by Grande Isle is a matter which is appropriately addressed to the Director.

ORDER

Pursuant to Section 115 of the *Act* the Determinations dated May 19, 1999 are confirmed in the amount of \$2426.55, plus interest on that amount pursuant to Section 88 of the *Act*.

David Stevenson
Adjudicator
Employment Standards Tribunal