

An appeal

- by -

Lutz Consulting & Contracting Ltd.
("LCCL")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: David B. Stevenson

FILE No.: 2002/3

DATE OF HEARING: August 8, 2002

DATE OF DECISION: September 9, 2002

DECISION

APPEARANCES:

on behalf of Lutz Consulting & Contracting Ltd.	Henry Lutz
on behalf of the individual	In person

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Lutz Consulting & Contracting Ltd. (“LCCL”) of a Determination that was issued on December 11, 2001 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that LCCL had contravened Part 3, Sections 17(1), 18(1) and Part 4, Sections 34(2) and 40(1) and (2) of the *Act* in respect of the employment of Kurt Giddings (“Giddings”) and ordered LCCL to cease contravening and to comply with the *Act* and to pay an amount of \$3,586.23.

LCCL says the conclusion in the Determination, that Giddings was an employee for the purposes of the *Act*, was wrong and that at all relevant times Giddings was an independent contractor working on a contract basis for LCCL.

ISSUE

The issue in this appeal is whether the conclusion in the Determination that Giddings was an employee for the purposes of the *Act* was correct.

THE FACTS

Giddings claimed he had worked for LCCL from July 13, 2000 to December 19, 2000 and was owed overtime pay, for hours worked in excess of eight in a day and forty in a week, annual vacation pay and statutory holiday pay. By way of background, the Determination noted that LCCL is a construction company and general contractor. From the outset, LCCL took the position that Giddings was an independent contractor, not an employee. Giddings had worked for LCCL previous to the period covered by the claim as New Concept Construction and both parties had consistently treated that relationship as being one of contractor/sub-contractor.

In its analysis, the Determination noted the following aspects of the relationship between LCCL and Giddings during the claim period:

Based on Lutz’s information, it was Lutz alone, that made the decision to hire and fire Giddings, set the hours of work, method of work, and the hourly wage. Lutz tracked Giddings hours of work. . . .

Lutz stated that Giddings was allowed to come and go as he pleased, and that he did not have issue with Giddings quality of work, therefore there was never any risk that the work would not get done properly. Lutz did require that Giddings submit daily hours worked. . . .

. . . Lutz paid Giddings directly in Giddings own name rather than the name New Concept Construction as he had done in the past. Lutz stated that Giddings hourly rate was \$18.00 per hour. . . .

Lutz was the General Contractor and obtained all the construction contracts. . . .

The method of invoicing and the method of invoicing [sic] by the other independent contractors was not the same as the invoicing and payment methods for Giddings. Lutz confirmed that Giddings worked daily, on an hourly basis, and produced records showing his daily hours of work at the rate of \$18.00 per hour. . . .

. . . Giddings had no risk with respect to his work because he was paid on an hourly basis. There is no evidence that Giddings supplied capital, took financial risk, and had liability regarding the company's business. . . . Giddings did not work for any other clients during his period of employment, and his hours of work indicate same.

Based on the information available, at best, Giddings had a tool belt and other miscellaneous tools to do carpentry, drywall and miscellaneous handyman work, and the evidence provided showed that Giddings utilized Lutz's tools, equipment and material as required. . . .

An independent contractor should have submitted an estimate for specific work in a specific period. The work performed by Giddings was at various sites, continuous and on an hourly basis. His duties were describes as non-specific such as carpentry, drywall and miscellaneous handyman duties. Giddings was instructed which site to work on and when, and Abetkoff (the witness for both the employer and the complainant) was Giddings' job foreman on several jobs.

At the hearing of this appeal, I heard evidence from John Abetkoff, Bernie Lutz and Maryanna Prodan. Mr. Abetkoff testified that he had worked with Giddings on two jobs during the claim period. He said that Giddings had used many more tools on these jobs than appears to have been recognized in the Determination. He stated his belief that during the claim period Giddings had worked for others besides LCCL, but could not name any of them. He said he saw Giddings and Maryanna Prodan create invoices for payment to Giddings. In cross examination, Mr. Abetkoff said that he and Giddings met every morning at LCCL's office, where they picked up tools, he identified a compressor and chop saw, and received a list of things to do that day from Mr. Lutz.

Mr. Bernie Lutz, the brother of the owner of LCCL, Henry Lutz, testified that he had known Giddings for approximately ten years and that during that time he had always worked as an independent sub-contractor. Mr. Bernie Lutz said he had worked with Giddings on some jobs during the claim period and identified the work the Giddings had performed - demolition work, building walls, installing ceilings, some finishing work and hauling garbage from job sites to the dump. His evidence on that point was less complete than the information contained on LCCL's sub contract labour sheet for Giddings, which was provided by LCCL during the investigation and which showed the following descriptions of work: framing, sheeting, shingle roof, build deck, setup shop, benches, plywood rack, cleanup shop, paint deck, move shop, drywall, taping, demo, drywall/insulate, t-bar ceiling, ceiling tile, form, pour concrete, strip forms, install steel shelves, steel stud, sanding, take trailer to dump. Mr. Bernie Lutz also described tools he had seen Giddings use. In cross-examination, he elaborated, and corrected, Mr. Abetkoff's evidence about meeting at the LCCL's office, adding that several persons, Mr. Lutz, Mr. Abetkoff, Giddings, himself and sometimes Maryanna Prodan, would be at those meetings, that they didn't take place every morning at the LCCL office - sometimes they would take place on the site or over the phone - and they

were used to set out the day's priorities and work schedule. He said he had seen Maryanna Prodan and Giddings' preparing his invoices together.

Maryanna Prodan testified that she and Giddings prepared his invoices together. They worked from the daily record of hours submitted by Giddings and recorded by her onto the subcontract labour sheet. She also expressed the view that during the claim period Giddings performed work for others, but she was unable to identify who those others were. She mentioned that Giddings had used the shop to build a tool box, cabinet and counter-top, had borrowed a chain saw and had done a 'concrete job and bathroom reno and lots of other stuff'. She said Giddings had no set hours, that he did split shifts, had week-ends off and had a variety of starting times. She also identified some of the tools which she knew Giddings owned. On Giddings invoices, the general description of the payment being made is for "sub-contract labour for Kurt Giddings" and there is consistent reference to payment for "labour and materials". Ms. Prodan said, in respect of the latter entry, that Giddings sometimes purchased material for the jobs he was on and was reimbursed for it. She specifically mentioned that he had been reimbursed by LCCL for gas for a trip to Kamloops.

ARGUMENT AND ANALYSIS

The Determination sets out an analysis of Giddings' status under the *Act* from the perspective of a number of common law tests. The Tribunal has said on many occasions that common law tests, while a helpful guide, are not determinative of this issue when it is considered in the context of the definitions and objectives of the *Act*. As noted in the Determination, the *Act* defines employee and employer in following terms:

"employee" includes

- (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
- (b) a person the 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 those definitions are inclusive, not exclusive. The Act is remedial legislation and 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.).__I agree with the following comment from *Machtinger v. HOJ Industries Ltd.*, supra, that:

. . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible is favoured over one that does not.

The Tribunal has, through *Larry Leuven*, (1996) BC EST No. D136/96, and other decisions, said that it will consider any factor which is relevant. In *Cove Yachts (1979) Ltd.*, BC EST D421/99, the Tribunal set out the following relevant factors:

- The actual language of the contract;
- control by the employer over the “what and how” of the work;
- ownership of the means of performing the work (e.g. tools);
- chance of profit/risk of loss;
- remuneration of staff;
- right to delegate;
- the power to discipline, dismiss, and hire;
- the parties’ perception of their relationship;
- the intention of the parties;
- the degree of integration between the parties; and
- if the work is a specific task or term.

While there was no written contract between LCCL and Giddings, it has not been disputed that the agreement was for Giddings to provide his labour to LCCL on an hourly basis doing a variety of jobs as required on several different contracts obtained by LCCL. I do not accept that Giddings had much control over the “what and how” of the work he did. The evidence indicated that LCCL told Giddings on a daily basis what work was expected to be done and he was directed by LCCL to the job site on which he would work. There was no evidence that he could have turned down any assignment or opt to go to work in some other location for a different contractor. I accept that ownership of the means of performing the work is mixed. Giddings used many of his own tools at the job sites, but also used tools owned and supplied by LCCL. I do not agree with the suggestion that Giddings held a chance of profit on the contracts he worked on nor did he bear any risk of loss. He ‘profited’ only to the extent of his own labour, as any employee might do, and while LCCL said that Giddings assumed a risk of loss because he would not get paid for his work if LCCL did not get paid on their contract, there was no evidence in support of that assertion. On the face of the evidence, Giddings got paid for all hours recorded by LCCL as having been worked by him. Giddings had no staff. There was no evidence that he could delegate any of the work assigned to him by LCCL. LCCL had, and exercised, the power to hire and fire Giddings. The ‘perception’ of the parties of their relationship is neutral, as both parties have expressed a different view of their relationship - LCCL saying it was a business relationship; Giddings saying it was an employment relationship. The same may be said for the intention of the parties. There was, on the evidence, considerable integration of the work performed by Giddings into the business of LCCL. He worked on an hourly basis, it was LCCL’s work that was being performed by him and he was assigned to perform that work by LCCL, the work he performed was consistent with that of an employee, he reported his hours worked on daily basis, was paid only for the hours worked and was reimbursed for out of pocket expenses incurred on behalf of LCCL. Finally, Giddings work was neither work specific nor term specific. As the Determination noted, the work Giddings performed was at various sites, continuous and hourly. No estimates for the work performed by Giddings were made by him.

The Determination noted thirteen points of direction and control. While there is a basis for argument on a few of those items, the vast majority remained unchallenged or unaltered by the evidence.

Overall, I am not persuaded that the conclusion made in the Determination was wrong and the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated December 11, 2001 be confirmed in the amount of \$3,586.23, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal