



An appeal

- by -

Tri City Forming Ltd.  
("Tri City")

- 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:** Lorne D. Collingwood

**FILE No.:** 2001/164

**DATE OF HEARING:** June 22, 2001

**DATE OF DECISION:** July 30, 2001

## DECISION

### OVERVIEW

The appeal is pursuant to section 112 of the *Employment Standards Act* (“the *Act*”) and by Tri City Forming Ltd. (which I will refer to as both “Tri City” and the “Appellant”). Tri City appeals a Determination issued by a delegate of the Director of Employment Standards (“the Director”) on January 31, 2001. The Determination orders Tri City to pay Donald Haining, Michael G. Martin, Terry McCallum and Jeremy Wocknitz varying amounts of wages and interest.

Tri City, on appeal, claims that Haining, McCallum, Martin and Wocknitz worked as subcontractors, not employees, and that the Director may not, therefore, order the payment of any wages. The Appellant also claims that even if Martin is an employee, it is not \$1,632.92 that he is owed but much less than that. In that latter respect, Tri City calls for consideration of the fact that a \$1,000 payment was made to George Martin, Michael’s father.

An oral hearing has been held in this case. Tri City and Martin were given additional time to find and submit information in respect to the \$1,000 payment to George Martin. As documents were received by the Tribunal, they were turned over to the other party.

### APPEARANCES:

Bradley Hara	Counsel for Tri City
Michael Martin	On his own behalf

### ISSUES TO BE DECIDED

The matter of whether each of the four workers can or cannot be considered to be an employee under the *Act* is at issue. Employees are covered by the *Act*. Subcontractors are not. According to the Appellant, it is common in construction that workers such as Haining, McCallum, Martin and Wocknitz work as independent contractors.

Should I decide that Martin is an employee, the amount of the order to pay wages is then at issue. Tri City claims that he is the recipient of moneys which were paid to his father and it is argued that the Determination should account for that.

What I must ultimately decide is whether the Appellant has or has not shown that the Determination ought to be varied or cancelled, or a matter referred back to the Director, for reason of an error or errors in fact or law.

## FACTS

Tri City operated as a construction company but it is no longer active. Alvin Northcott, its sole director, became seriously ill and with that Tri City ran into serious financial difficulties. Northcott suffers from an acute manic psychosis.

Northcott was, for reason of his illness, unable to take part in the investigation conducted by the delegate.

Tri City's records are a shambles but counsel for the Appellant has managed to find a cheque which has Tri City paying Reindeer Construction. I am told that Haining operated as Reindeer Construction.

McCallum along with Tri City filed a claim of lien which is pursuant to the *Builders Lien Act*, S.B.C. 1997, and against United Properties (Windance) Ltd. ("United"). I am shown that McCallum and Tri City were successful in their claim and that, as a result, United paid \$16,893.65 into Supreme Court.

According to the Appellant, Haining, McCallum, Martin and Wocknitz were hired as subcontractors, Haining through Reindeer Construction. It is said that the men understood that they were not employees but subcontractors. I am told that Tri City did not deduct income tax or EI (Employment Insurance) and CPP (Canada Pension Plan) premiums and that it did not pay vacation pay for reason of that. Martin confirms that Northcott made it clear to him that he would not be paid vacation pay and that he did in fact understand that income tax and EI and CPP premiums would not be deducted from his pay cheque.

I am told that the four were hired for specific work and that they worked without supervision and direction. Haining and McCallum are said to have supplied their own tools. Haining, McCallum and Wocknitz are said to have operated as a business and had other clients and it is said that they were in fact working as subcontractors for other contractors in the period of the alleged employment. In that nothing has been heard from Haining, McCallum or Wocknitz, I am given no reason to believe that matters are not as described by the Appellant with one exception, that being the claim that Martin worked without supervision.

On hearing from Martin, I find that he was not in fact supervised by Northcott. Martin himself tells me he was supervised by McCallum.

I find that the work that Martin did for Tri City was his first job. Martin tells me that he did not work for anyone else and that he is not in business. Tri City does not produce evidence which shows a business with customers outside of Tri City.

## ANALYSIS

It is a purpose of the *Act* that "employees in British Columbia receive at least basic standards of compensation and conditions of employment" (the *Act*, section 2).

The term “employee” is defined in the *Act* (s. 1).

*“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 the work normally performed by an employee, ... .*

The *Act* defines “employer”, “wages” and “work” as well. Those definitions are as follows:

*“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,*
- (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 benefit, to a fund, insurer or other person, ... .*

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

The Court of Appeal has said that the definitions of employer and employee are to be given a liberal interpretation [*Fenton v. Forensic Psychiatric Services Commission* (1991) 56 BCLR (2d) 170].

“the definitions in the statute of “employee” and “employer” use the word includes” rather than “means”. The word “includes” connotes a definition which is not exhaustive. Its use indicates that the legislature casts a wide net to cover a variety of circumstances.”

The Supreme Court of Canada has also called for a broad, generous interpretation of employment standards legislation [*Rizzo & Rizzo Shoes Ltd.*, (1998) 154 D.L.R. (4<sup>th</sup>) 193].

“Finally, with regard to the scheme of the legislation, since the ESA is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits - conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.”

While important, the *Act*'s definition of employee is so broad that it captures persons that are clearly not employees. A person may be entitled to receive money for work performed for another, yet the person is clearly and obviously an independent contractor. An employer may also allow a person to perform work which is normally performed by an employee, yet the worker may be working as an independent contractor. There are limits to how far the definition of employee can be stretched.

“The difficulty is that there is no single element in the normal makeup of an employee which is decisive, and which would tell us exactly what point of similarity is the one which counts. Normally, these various elements all go together but it is not uncommon for an individual to depart considerably from the usual pattern and yet still remain an employee ... . But while the legal conception of an employee can be stretched a fair distance, ultimately there must be some limits. It cannot encompass individuals who are in every respect essentially independent of the supposed employer.” (Mr. Justice Josephson [*Castlegar Taxi v. Director of Employment Standards* (1988) 58 BCLR (2d) 341], quoting a decision by Paul Weiler, then Chair of the Labour Relations Board [*Hospital Employees' Union, Local 180 v. Cranbrook & District Hospital*, (1975) 1 Can. LRBR. 42 at 50].

In *Castlegar*, cited above, Mr. Justice Josephson noted the importance of looking at the actual nature of the relationship.

“The courts, in determining the nature of a labour relationship, have looked beyond the language used by the parties in the contract and have, instead, assessed the nature of their daily relationship.”

The approach of the Tribunal is to consider any factor which is relevant to deciding whether a person is an employee or an independent contractor. In *Boss Carpet World Inc.*, BCEST No. 315/00, borrowing heavily from *Cove Yachts(1979) Ltd.*, BCEST D421/99, I described that as an analysis of the following factors:

- The actual language of the contract;
- control 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;
- the person's remuneration and the source of his or her earnings;
- the right to hire and delegate;
- the power to discipline, dismiss, and hire;
- how the parties perceive their relationship and how it is perceived by outsiders;
- the intention of the parties;
- the degree of integration between the parties; and
- if the work is for a specific task or term.

In this case, neither Haining, McCallum nor Wocknitz have had anything to say in regard to the nature of their relationship with Tri City. I am presented only with evidence which points to relationships which are between independent contractors, not employee/employer. I have decided, therefore, to cancel that part of the Determination which orders Tri City to pay Haining, McCallum and Wocknitz wages and interest. Only an employee is entitled to the protections and benefits of the *Act*.

While Tri City claims that Martin also worked as a subcontractor, I find that it does not produce convincing evidence of that. It is unimportant that Tri City did not deduct income tax and EI and CPP premiums from Martin's pay, nor is it important that Martin took the job on the understanding that he would not receive vacation pay.

On the basis of what I know of the relationship between Tri City and Martin, I am led to believe that it was one of employment. It was Martin's first job and one that paid an hourly wage. I am not shown that Martin had any control over the what and when of what he did and I very much doubt that such an inexperienced worker would be given such control. There is no evidence of a business or customers. Martin was not required to supply expensive tools or equipment. He stood no chance of earning a profit, nor was he open to loss. He had one source of income, Tri City. As I see it, the relationship between Martin and Tri City was not one between independent contractors at all. It is an employment relationship which has been made to look like a relationship between contractors in the hope of avoiding that which is required by federal and provincial law. That may be common but it is not something I will condone.

In that I have found that Martin was Tri City's employee, it follows that he is entitled to be paid according to the *Act*. I now turn to the matter of the amount awarded.

## FACTS

Darren Johnston rents a suite in Northcott's house. It was through Johnston that Martin heard of Tri City and the chance to work.

Tri City, on filing the appeal, claimed that Martin was paid \$1,000. He was not. What Tri City did is pay George Martin, Michael's father, \$1,000 through a cheque dated June 22, 2000.

Northcott wrote a cheque for \$1,000 to George Martin on the understanding that he would take the cheque to a bank and apply it to Northcott's outstanding gas and electric bill. BC Hydro had cut the power off at Northcott's house. That left Darren Johnston and his family without heat or light.

The cheque for a \$1,000 was cashed by George Martin but it is unclear what happened to \$284.63 of the money. BC Hydro/BC Gas does not have a record of any \$1,000 payment to Northcott's account. BC Hydro/BC Gas records show a \$715.37 payment on the 23<sup>rd</sup> of June ( $\$1,000 - 715.37 = \$284.63$ ). The next payment is not until November of 2000 and the amount of that payment is \$1,066.96.

## ANALYSIS

Martin agreed to work for no vacation pay but he is entitled to vacation pay under the *Act* and he cannot agree to accept less than that.

*4 The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.*

Sections 43, 49, 61 and 69 have no application here as they pertain to workers who are covered by a collective agreement.

In regard to the payment of wages, the *Act* has this to say:

*17 (1) At least semimonthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by the employee in a pay period.*

*18 (1) An employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment.*

*(2) An employer must pay all wages owing to an employee within 6 days after the employee terminates the employment.*

*27 (1) On every payday, an employer must give each employee a written wage statement for the pay period stating all of the following:*

- (a) the employer's name and address;*
- (b) the hours worked by the employee;*
- (c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;*
- (d) the employee's overtime wage rate;*
- (e) the hours worked by the employee at the overtime wage rate;*
- (f) any money, allowance or other payment the employee is entitled to;*
- (g) the amount of each deduction from the employee's wages and the purpose of each deduction;*
- (h) if the employee is paid other than by the hour or by salary, how the wages were calculated for the work the employee is paid for;*
- (i) the employee's gross and net wages;*
- (j) how much money the employee has taken from the employee's time bank and how much remains.*

The *Act* also requires that employers keep the following records:

**28 (1)** *For each employee, an employer must keep records of the following information:*

- (a) the employee's name, date of birth, occupation, telephone number and residential address;*
- (b) the date employment began;*
- (c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;*
- (d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;*
- (e) the benefits paid to the employee by the employer;*
- (f) the employee's gross and net wages for each pay period;*
- (g) each deduction made from the employee's wages and the reason for it;*
- (h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;*
- (i) the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;*
- (j) how much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken.*



The above sections of the *Act* require that employers pay all wages that an employee is due and that they keep records which show what is earned and what has been paid.

Michael Martin has been awarded \$1,560 plus \$72.92 interest, a total of \$1,632.92. I am shown that Northcott gave George Martin \$1,000 and that only a \$715.37 was applied to his BC Hydro/BC Gas account. That leaves \$284.63 unaccounted for and counsel for the Appellant is seeking to have the amount which is awarded Michael Martin reduced for reason of the moneys which were paid to George Martin. I have decided against doing so.

It is unclear that a set-off of \$284.63 is appropriate in this case. While I am inclined to believe that George Martin kept a portion of the \$1,000 that Northcott gave him, \$284.63 to be exact, I am given no reason to believe that Michael Martin received the money. For all I know, it is his father that has the money.

Most importantly, it is clear that Tri City, in paying George Martin the sum of \$1,000 as it did, was not acting to pay Michael Martin any part of the wages that he is due. It is insufficient to pay a relative of an employee as Tri City has done here. Employers are expected to pay the person who actually performs the work.

There are other means by which Tri City may recover the \$284.63, if, as it seems, it was never George Martin's money to keep. That is what the courts are for.

## **ORDER**

I order, pursuant to section 115 of the *Act*, that the Determination dated January 31, 2001 be varied. The order to pay Donald Haining is cancelled. The order to pay Terry McCallum is cancelled. The order to pay Jeremy Wocknitz is cancelled. The order to pay Michael G. Martin \$1,632.92 is confirmed and to that I add whatever further interest has accrued pursuant to section 88 of the *Act*.

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**Lorne D. Collingwood**  
**Adjudicator**  
**Employment Standards Tribunal**