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 -

Cove Yachts (1979) Ltd.

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	John M. Orr
FILE No:	1999/459
DATE OF HEARING:	September 17, 1999
DATE OF DECISION:	September 30, 1999

DECISION

APPEARANCES:

Donald Taylor, Esq.	Counsel for Cove Yachts(1979) Ltd.
Phil Pidcock	President, Cove Yachts(1979) Ltd.
Dale Kopeck	On his own behalf
Elizabeth Lyle	Delegate of the Director

OVERVIEW

This is an appeal by Cove Yachts(1979) Ltd. ("Cove") pursuant to Section 112 of the Employment Standards Act (the *"Act"*) from a Determination (No. 84796) dated June 30, 1999 by the Director of Employment Standards (the "Director").

Cove has operated a boatyard in Mill Bay since 1979 and employed Dale Kopeck ("Kopeck") in 1986 as a general boat work labourer. Kopeck continued to be employed until December, 1996, when his status was apparently changed from employee to contractor. In June 1998 Kopeck's employment ended and he subsequently made a claim for vacation pay, statutory holiday pay, and overtime wages. Cove says that Kopeck is not entitled to these amounts because he was an independent contractor. The Director determined that Kopeck was an employee.

Cove has appealed on the grounds that the Director was wrong in law to conclude that Kopeck was an employee.

ISSUES TO BE DECIDED

The issue to be decided in this case is whether the Director made any error in law in concluding that Kopeck was an employee and not an independent contractor.

THE FACTS

Kopeck commenced work for Cove in 1986 when he was about 19 years old as a general boat work labourer. During the next ten years Kopeck became an apprentice shipwright and graduated to become a journeyman shipwright. He was paid an hourly wage and there is no dispute that during this time period he was an employee entitled to the normal benefits as set out in the *Act*.

In 1995 Cove entered into an arrangement with Dougann Pirie ("Pirie"), a marine mechanic, whereby Pirie would work at the boatyard "on a contract basis" at a rate of $25.00 per hour. There would be no deductions at source and no employee benefits. Pirie testified that he supplied his own tools, except for major equipment which was supplied by Cove on site, and that he did his own tax returns. Pirie testified that there real benefits to him in this arrangement as he could claim certain write-offs. He said it was better for him because he got more money and paid less tax.

Pirie was called as a witness by Cove to confirm that in the Fall of 1996 he had a number of conversations with Kopeck in which the benefits, and shortcomings, of being a contractor were discussed. He says that Kopeck expressed an interest in a similar arrangement for himself.

Pidcock testified that, in November 1996, Kopeck approached him and suggested that perhaps he should become a contractor. Pidcock says that he cautioned Kopeck about the downside of such an arrangement and suggested that he think about it. He says that in December Kopeck decided that he did want the change in status and it was agreed that this would take place effective January 01 1997.

Kopeck disputes that he was the one who sought-out the change and says that it was Cove's decision. But he agrees that the end result was that his hourly rate was increased by $2.00 and that the relationship was treated by both parties as a "contract" position commencing in January 1997. The actual work done, or services provided, by Kopeck for Cove did not change in any way although it is suggested that he may have had more freedom to work overtime as it was paid at the same rate without premium.

The evidence which I heard, and which I accept, is that Kopeck voluntarily agreed to the new "contractual" arrangement. The nature of his work did not change although he may have been able to work more overtime hours without specific permission but these hours were paid at the flat rate without premium. It was clear that Kopeck would not have been able to work significantly less hours. Cove provided all the customers, set the price for the job, and collected payment. Kopeck received no portion of the fee and there were no incentive payments or bonuses. Cove determined the amount of work that was available to be done and Cove set the deadlines. Cove provided all the major tools and equipment for Kopeck and decided, or approved, holiday times. Kopeck provided his services and some basic tools.

Mr Pirie testified that he didn't receive "any piece of the action" and all his hours were paid at straight time. Pirie said that he wouldn't have considered it proper to take on his own clients as this would have been in competition to Cove but he did help-out boaters from time to time on a volunteer basis.

ANALYSIS

Kopeck's work for Cove began before the current *Act* came into force but his work was terminated after it came into force therefore pursuant to Section 128 (4) the provisions of the current Act apply.

The *Act* provides a definition of employee 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,*
>
> *"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;*
>
> *"work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.*

Section 4 of the *Act* provides that the requirements of the *Act* cannot be waived:

> *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* (provisions relating to collective agreements)

In my opinion Section 4 applies to the defining of the employer/employee relationship. If in fact the relationship is that of employer/employee then the parties can not agree to waive the provisions of the *Act* and treat the relationship as an independent contract. To allow such would defeat the very purpose of the *Act* to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment. Therefore the intentions of the parties, although they can be taken into consideration in considering the substantive nature of the relationship, are not decisive of the issue.

The Courts and this Tribunal have set out on many occasions the nature of the test that must be applied in arriving at a conclusion on a given set of facts. See for example Larry Leuven (1996) BCEST # D136/96; also BCEST # D338/96, BCEST # D364/96 and BCEST # D368/96.

The definitions in the *Act* are to be given a liberal interpretation according to our Court of Appeal. See *Fenton v. Forensic Psychiatric Services Commission (1991) 56 BCLR (2d) 170:*

> "the definition 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 BC Supreme Court has noted that:

> "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"
>
> *Castlegar Taxi v. Director of Employment Standards (1988) 58 BCLR (2d) 341*

Also in *Castlegar Taxi*, Mr. Justice Josephson referred to the following passage of a decision by Paul Weiler, then Chair of the Labour Relations Board:

> "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 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 independent of the supposed employer."
>
> *Hospital Employees' Union, Local 180 v. Cranbrook & District Hospital, (1975) 1 Can. LRBR.42*

Counsel for Cove refers me to the decision of our Court of Appeal in *Walden v. Danger Bay Productions Ltd., (1994) 90 B.C.L.R. (2d) 180* in which the Court found that two actors in the Danger Bay television series worked as independent contractors and not as employees. Counsel submitted that the case supported the proposition that in a case where there is a clear contract between the parties that it is not an employer employee relationship then it is not necessary to look any further into the practical or real relationship. I am unable to reach this conclusion from my reading of the case. In my view the Court of Appeal upheld the trial Judge's findings of facts and his method of analysis and application of legal principles. The trial judge in that case clearly examined the totality of the relationship although concluding that the relationship was not that of employer/employee.

Various tests set out by this Tribunal indicate that we will consider several factors including:

* 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 for profit/risk of loss
* remuneration of staff
* right to delegate
* discipline/dismissal/hiring
* right to work for more than one "employer"
* perception of the relationship
* integration into the business
* intention of the parties
* is the work for a specified task or term?

Applying the above to the facts of this case, the elements which point toward an independent contractor relationship are firstly that it was clearly the mutual intention of the parties. Secondly there was little supervision of the worker and he could work his own hours which were not "tracked " by Cove. He provided some of the tools required for the job.

The elements which indicate an employer/employee relationship include that there was no written contract which could be looked to for assistance to indicate other than an employee/employer relationship. Other elements include the following:

* Cove controlled what work was to be done;
* Cove controlled the means for the worker to perform the work by providing the facility, the clients, all the major equipment and some specialised tools;
* there was no opportunity for the worker to make any profit over and above the stipulated fixed hourly rate;
* there was no risk of loss by the worker. He was not an entrepreneur;
* the worker was not free to delegate his work;
* he was not at liberty to hire and fire staff;
* he was not at liberty to work for more than one person (except perhaps on his holidays);
* the work was an integral part of the business;
* the worker was not hired for any one specific job or for any specific time period;
* other than some flexibility in hours, there was no change in the work done by the worker when he was an employee to when it is alleged he was a contractor;
* all the fees paid for the services were paid to Cove and the customers were provided by Cove.

The onus on an appeal such as this is on the appellant, Cove, to establish that the Director's delegate made an error in applying the law or was substantially wrong in some significant finding of fact. I can not find that she made any such error. Her findings of fact are not substantially challenged by the evidence before me and I find that she applied the proper principles of law in coming to her determination.

It is an unfortunate situation, as in this case, where the worker agrees to, and perhaps benefits from, defining the relationship as a "contract" and then at the conclusion of the "contract" claims all the benefits of employment status for the term of the "contract". However, I am charged with the responsibility to apply the *Act* to the circumstances before me and, despite the intention of the parties, there is no doubt in my mind that the relationship was, in law, that of employer/employee.

ORDER

Pursuant to Section 115 of the *Act* I order that the Determination is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal