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 -

586035 B.C. Ltd.
operating as 3E Farms and H&H Post and Rail
("3E Farms and H&H Post and Rail ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Cindy J. Lombard

FILE NO.: 2000/490

DATE OF HEARING: September 18, 2000

DATE OF DECISION: November 9, 2000

DECISION

APPEARANCES

Wally Elliott and Elda Elliott, shareholders in 586035 B.C. Ltd., appeared on behalf of the Appellant as did their accountant, Don Scott, who acted as the representative.

Dave Elliott appeared on his own behalf.

OVERVIEW

This is an appeal brought by 586035 B.C. Ltd. operating as 3E Farms and H&H Post and Rail ("3E Farms and H&H Post and Rail") against a Determination of the Director of Employment Standards (the "Director") issued on June 19, 2000.

The Determination was issued following a complaint by Dave Elliott regarding non-payment of wages and annual vacation pay.

The Director determined that Dave Elliott was entitled to the sum of $8,653.39 from 3E Farms and H&H Post and Rail calculated as follows:

1.	Regular Wages		
	a)	September 8, 1999 to September 24, 1999	$3,268.83
	b)	October 13, 1999 to October 31, 1999	$4,722.04
			$7,990.87
2.	Vacation Pay 4%		$319.50
3.	Interest pursuant to Section 88		$342.89
			$8,653.39

ISSUES TO BE DECIDED

Whether during the period October 13, 1999, to October 31, 1999, for which period the parties agree that monies are due and owing to Dave Elliott by the Appellant, was he an employee or independent contractor and therefore entitled to the benefits under the *Employment Standards Act* (the "*Act*") including vacation pay and interest. During the hearing, the parties agreed that the sum of $3,847.66 remains due and owing to Dave Elliott calculated as follows:

	Monies Remaining Owing
May 25 to August 15, 1999 (see Exhibit No. 1 attached for calculation)	$174.29

September 8 to October 31, 1999
(see Exhibit No. 2 attached for calculation)

a)	September 8 to 27 (period No. 1)	$3,268.83	
b)	October 13 to 31 (period No. 2)	$4,722.04	
		$7,990.87	
Less advances:		- $4,317.50	
		$3,673.37	$3,673.37
			$3,847.66

This agreement was not reached earlier than the hearing because of the Appellant's delay in providing records and an accounting.

Therefore the only question outstanding is whether vacation pay is owing on that sum pursuant to the *Act*.

FACTS AND ANALYSIS

Dave Elliott commenced his employment with 3 H Farms and H&H Post & Rail on May 25, 1999, as a truck driver. The parties agree that there were two periods of his engagement in the sense that he was driving the same truck in both periods but hauling different materials as follows:

a) May 25 to August 15, 1999

Dave Elliott drove a truck owned by Wally and Elda Elliott to haul posts for the H&H Post Rail part of the Appellant's business in California. The parties agree that during this period Dave Elliott was an employee of the Appellant for which he was remunerated at the gross rate of 38¢ per mile.

b) October 13 to October 31, 1999

During this two-week period, the truck was leased by the Appellant to Air Clair and Dave Elliott drove it hauling produce for Air Clair to Toronto. This change was a result of poor profits in the post hauling business. The new work for the truck was sought out by Dave Elliott and agreed to by Wally Elliott on behalf of the Appellant.

Dave Elliott says that he assumed that the same wage remuneration and employer/employee relationship continued except that the calculation of his remuneration changed from 38¢ gross per mile to 30% of the net profit made by the Appellant. Dave Elliott says that the two different calculations of remuneration are standards for truck drivers in the industry and work out to approximately the same wage. In both cases, he was not responsible for the truck costs, i.e. gas and maintenance. In period No. 1, the Appellant paid those costs and in period No. 2, LeClair paid them before the Appellant received its share of the profits.

The Elliotts to the contrary say that the arrangement in period No. 2 was one whereunder Dave Elliott was an independent contractor not an employee and therefore did not fall under the authority of the *Act*.

The onus is on the Appellant to show that the Director's Determination that Dave Elliott was an employee of the Appellant during the period in issue, that is, October 13 to October 31, 1999, is wrong.

Based on all of the evidence, both written and oral, the Appellant has not discharged that onus.

The *Act* defines "employee" to be:

> *(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…"*

The *Act* defines "employer" to include a person:

> *(f) "who has had control or direction of an employee, or*
>
> *(g) who is or was responsible, directly or indirectly, for the employment of an employee…"*

Except for the last two-week period of his employment, the parties agree that Dave Elliott was an employee of the Appellant. There is no compelling evidence that the relationship changed. Dave Elliott says that it was not discussed and therefore assumed that the same relationship continued. There was no written contract or records to the contrary kept by the Appellant.

The test in law as to whether a relationship is that of contractor/sub-contractor or employer/employee is fourfold:

> i) Does the employer have control or direction of the employee;
>
> ii) Who owns the tools of the trade;
>
> iii) Who has the chance of profit;
>
> iv) Who has the risk of loss.

In this case:

> i) The Appellant maintained control of Dave Elliott. Air Clair could not replace him without the agreement of the Appellant and Dave Elliott was to receive his remuneration from the Appellant. The Appellant did not have his own WCB number rather he assumed that he fell under the Appellant's number.

ii) The Appellant controlled the tools of trade i.e. the truck.

iii), iv) and v) While the Appellant and Dave Elliott shared any profit in period No. 2, the Appellant had the greater chance of profit and loss being the one with control over the truck and liable for its costs and the one who had the authority to decide whether Dave Elliott continued to operate the truck on its behalf.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination of the Director that Dave Elliott was an employee of the Appellant during the period May 25, 1999, to October 31, 1999, be confirmed.

I further order that based on the agreement of the parties, that the Determination be varied to state that regular wages owing by the Appellant to Dave Elliott is the sum of $3,673.37 and that this matter be remitted back to the Director to determine the amount of vacation pay and interest pursuant to Section 88 of the *Act*.

Cindy J. Lombard

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal