

An appeal

- by -

Russell Ward Flooring Ltd.
("Russell Ward")

- 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: Ib S. Petersen

FILE No.: 2001/474

DATE OF DECISION: August 23, 2001

DECISION

SUBMISSIONS:

Mr. Russell Ward	on behalf of Russell Ward
Mr. Kevin Bigelow	on behalf of himself and Mr. Chris Bigelow
Mr. J. LeBlanc	on behalf of the Director

OVERVIEW

This is an appeal by Russell Ward pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination of the Director of Employment Standards (the “Director”) issued on May 30, 2001 which determined that Kevin and Chris Bigelow were employees of Russell Ward and that they were owed \$2,479.46 on account of unpaid wages under the *Skills Development and Fair Wages Act*.

Ward argues that the Determination is wrong because the Bigelows were, in fact, independent contractors.

FACTS AND BACKGROUND

Russell Ward operates a floor laying business in North Vancouver. It appears that the firm does work on ships. The Determination arises out of work done in connection with a contract Russell Ward had in connection with the construction of the Kootenay Lake ferry, in Nelson, British Columbia, a project to which the *Skills Development and Fair Wages Act* applied. The Bigelows worked as a floor layer and labourer, respectively, between June 5 and 14, June 19 and 24, and July 10 and 14, 2000 (Chris Bigelow did not work after July 10). The Delegate concluded that the Bigelows were employees of Russell Ward. They were, therefore, entitled to be paid the difference between the hourly rates paid and the rates and benefits provided for under the *Skills Development and Fair Wages Act* and/or by agreement. The Bigelows submitted records of their hours worked. Russell Ward did not keep records of the hours worked by Bigelow. Despite being requested by the delegate to refute these hours, Russell Ward did not provide any evidence to do so.

The basis for the Delegate’s decision with respect to “employee” status was the following:

- Russell Ward obtained the work.
- The contract to do the work was between Russell Ward and the general contractor.

- Russell Ward provided all the materials used on the job.
- Russell Ward set “start and stop times” for the claimants.
- The decision to let Chris Bigelow go was taken by Russell Ward.
- Russell Ward covered the Bigelows’ expenses for room and board.
- The Bigelows worked for an hourly rate.
- In a letter to one of the joint venture partners of the project, Russell ward listed Kevin Bigelow as an employee. The letter was intended for the Employment Standards Branch for the purpose of monitoring the application of the *Skills Development and Fair Wages Act*.

After the deadline for submissions had closed, the Bigelows filed a further submission. I did not consider this late submission.

ANALYSIS

The appellant has the burden to persuade me that the Determination is wrong. For the reasons set out below, I am persuaded that it has met that burden in part.

The *Act* defines an “employee” broadly (Section 1).

“employees” includes

- (a) a 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,

An “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;

It is well established that the definitions are to be given a broad and liberal interpretation. The basic purpose of the *Act* is the protection of employees through minimum standards of

employment and that an interpretation which extends that protection is to be preferred over one which does not (*Machtiger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986). Moreover, my interpretation must take into account the purposes of the *Act* (*Interpretation Act*). The Tribunal has on many occasions confirmed the remedial nature of the *Act*. Section 2 provides (in part):

2. The purposes of this Act are as follows:

(a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;

The application of the statutory definitions of “employee” and “employer” (Section 1) is not as easy or simple as one might have expected. As noted in *Knight Piesold Ltd.*, BCEST #D093/99:

“Deciding whether a person is an employee or not often involve complicated issues of fact. With the statutory purpose in mind, the traditional common law tests assist in filling the definitional void in Section 1. The law is well established. Typically, it involves a consideration of common law tests developed by the courts over time, including such factors as control, ownership of tools, chance of profit, risk of loss and “integration” (see, for example, *Wiebe Door Services Ltd. v. Minister of National Revenue* (1986), 87 D.T.C. 5026 (F.C.A.) and Christie et al. *Employment Law in Canada* (2nd ed.) Toronto and Vancouver: Butterworth). As noted by the Privy Council in *Montreal v. Montreal Locomotive Works*, [1947] 1 D.L.R. 161, the question of employee status can be settled, in many cases, only by examining the whole of the relationship between the parties. In some cases it is possible to decide the issue by considering the question of “whose business is it”.”

Ward accepts most of the Delegate’s factual assertions. He agrees that he forwarded a letter to the Branch--in connection with the Branch’s monitoring of the Kootenay Lake ferry project--that described Kevin Bigelow as an employee. He call that a “white lie” having to do with “union unrest.” He agrees that he “secured the work” and does not deny that the contract for the ferry project was between him and the general contractor. He also says that sub-contracting was both permitted and normal. While he agrees that he supplied all the material, the Bigelows supplied all their “labourers tools.” He also agrees that he paid for all room and board during the project. He does not agree that he set the “start and stop times” for the Bigelows. In that regard, he says that their hours were different from his and Peter Manzer’s hours. As well, he says that he never “let Chris Bigelow go, I never hired him.” Ward states that Kevin Bigelow contracted with Russell Ward both before and after the ferry project and suggests that the Bigelows complaint to the Branch was the result of his telling Kevin Bigelow--some months after the ferry project--that he would no longer be requiring his services.

Ward also takes issue with an invoice from Kevin Bigelow for “consulting services” (related to the ferry project) which includes GST. Ward disputes this and says that his company has been installing its materials for years.

The Delegate argues, among others, that the comparison with Ward's and Manzer's hours ought not to be considered because the delegate requested those records and Russell Ward failed to supply same during the investigation. As well, he notes that the appeal does not contain the actual time sheets, "but only listed aggregates with no supporting records." The hours recorded by the Bigelows should, therefore, stand unchallenged. Moreover, while Ward denies hiring and firing Chris Bigelow, he does not explain why Russell Ward issued a cheque to him for the work on the ferry project. That is inconsistent with his working for Kevin Bigelow or Bigelow Holdings Ltd. The Delegate emphasizes that Russell Ward stated to the Branch--as part of the monitoring process under the *Skills Development and Fair Wages Act*--that Kevin Bigelow was an employee. He does not accept that this was a "white lie." On balance, the Delegate argues, the Bigelows were employees and:

"Ward has not provided any evidence that would establish that the Bigelows were "independent contractors." Ward has not provided any evidence that seriously challenges the claims made by the Bigelows."

In his submission, Bigelow notes that he is "the sole distributor for Canada for TrafficGuard coatings and says that "Ward is not aware of the experience I possess." Generally, they take issue with Ward's assertions.

First, although the facts addressed the Delegate are relevant to the inquiry into employee status, he did not address the facts in light of the statute, its purposes, and the common law tests. These facts may or may not, depending on all of the circumstances of the case, indicate that the Bigelows are employees for the purposes of the *Act*. I agree with the Delegate that the cheque issued to Chris Bigelow could indicate an employment relationship. I also agree that the letter from Russell Ward to the Branch regarding Kevin Bigelow is an indication of that. However, the focus of his analysis is a narrow, focussing only on the brief periods of work on the ferry project. In the circumstances, I am not satisfied that the Delegate properly considered the relationship between the Bigelows, collectively or individually, in its entirety. His analysis is incomplete. For example, it is clear that Kevin Bigelow performed services for Russell Ward before the ferry project (and, perhaps after). Moreover, some (or all) of these services were performed through a corporate vehicle, Bigelow Holdings Ltd., of which Kevin Bigelow is a principal, and GST was charged on these services. Some of these services are characterized as "consulting services." As well, from Kevin Bigelows submission I understand that he is the distributor of the coating (which I understand was used in the ferry project). In my view, the Delegate must consider the relationship in its entirety and, when he failed to do so, he erred in law.

In my opinion the appeal is granted. In the circumstances, I do not cancel the determination but rather refer the issue of employee status back to the Director for further investigation. I do not refer the issue of hours worked back. In my view, the Delegate allowed Russell Ward several opportunities to provide the relevant documentation and it failed to take advantage of these opportunities. It is not entitled to have this issue re-investigated.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated May 30, 2001 be referred back to the Director for an investigation of whether the Bigelows were employees of Russell Ward.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal