

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 -

Greenhouse Studios Inc. & S.B. Vancouver Studios Inc.
("GSI")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Hans Suhr
FILE NO.:	97/594
DATE OF HEARING:	October 7, 1997
DATE OF DECISION:	November 7, 1997

DECISION

APPEARANCES

Roger Levens	on behalf of Vancouver's Greenhouse Studios et al
Bruce Levens	on behalf of Vancouver's Greenhouse Studios et al
Patricia Rose	on behalf of Vancouver's Greenhouse Studios et al
Alfred Waghorn	on his own behalf
Corey Dixon	on behalf of Alfred Waghorn
Dermot Shane	on behalf of Alfred Waghorn
Sandy Mercado	on behalf of Alfred Waghorn
Lesley A. Christensen	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Greenhouse Studios Inc. & S.B. Vancouver Studios Inc. ("GSI"), under Section 112 of the *Employment Standards Act* (the "Act"), against Determination No. CDET 006581, dated July 14, 1997 issued by a delegate of the Director of Employment Standards (the "Director"). GSI alleges that the delegate of the Director erred in the Determination by concluding that Alfred Waghorn ("Waghorn") was an employee and entitled the amount of \$11,649.92 for regular wages and overtime wages.

ISSUES TO BE DECIDED

The issues to be decided in this appeal are:

1. Was Waghorn an employee of GSI ?
2. If Waghorn was an employee, was he a manager ?
3. If Waghorn was not a manager, is he entitled to overtime wages ?
4. Is Waghorn owed regular wages ?

FACTS

The following facts are not in dispute:

- Waghorn signed a number of “Independent Contractor Agreements” with GSI;
- Those agreements were for the following periods:
 - Jan. 1, 1993 to Dec.31, 1993
 - Jan. 1, 1994 to Dec. 31, 1994
 - Jan. 1, 1995 to Dec. 31, 1995
- The rate of remuneration in the Jan. 1, 1995 to December 31, 1995 agreement was set at \$3,800.00 per month (plus GST if applicable);
- Payroll records indicate that Waghorn was paid as follows:
 - Jan. 1, 1995 to June 30, 1995 \$3,800.00 per month
 - July, August & September 1995 \$3,400.00 per month
 - October 1995 to Feb. 29, 1996 \$4,000.00 per month
 - Mar. 1, 1996 to May 1996 \$4,000.00 total paid

EVIDENCE

I received a great deal of evidence during the course of this appeal hearing and I will only recount the evidence which, in my view, is relevant to the case at hand.

Roger Levens (“R. Levens”) and Bruce Levens (“B. Levens”) testified on behalf of GSI and stated that:

- Waghorn was first “hired” by the father of R. Levens and B. Levens, and the senior Mr. Levens signed the first contract with Waghorn;
- Waghorn signed a revised contract dated July 25, 1995 for the period to June 30, 1996, which set the rate of pay at \$3,400.00 per month and included the clause “...may be altered at any time upon mutual agreement.”;
- GSI argues that Waghorn was an independent contractor as he:
 - set his own hours;
 - decided what work he wanted to do;
 - arranged for someone else to provide relief if he was going to be unavailable;
 - provided some of his own tools;
 - had control over how funds were spent;
 - billed for his services;
 - was key to the business although not integral;
 - provided the same or similar services to others while at GSI;
- alternatively, GSI argues that if Waghorn is found to be an employee, he was clearly a “manager” and as such, not entitled to overtime wages;
- the calculations performed by the Director are inaccurate and do not reflect the actual working hours;

- GSI did not keep daily records of hours worked by Waghorn;
- Patricia Rose (“Rose”) attempted to keep the records of hours worked by all personnel, however, the attempt was not very successful given the nature of the workplace with personnel coming and going at all times of the day or night;
- GSI is concerned that the Director is acting as advocate for Waghorn instead of as a neutral party in this appeal.

In response to questions on cross examination by the Director, R. Levens and B. Levens stated:

- Waghorn was provided with \$5,000.00 Canadian by GSI to purchase equipment and supplies as he saw fit during a trip to England;
- the immigration requirements restricted Waghorn to only performing work for GSI;
- Waghorn had input into technical decisions and into what area money would be spent;
- Waghorn had discretion over all technical expenditures, approximately \$20,000.00 per year;
- if funds were available, Waghorn was authorized to spend them;
- Waghorn did not have cheque signing authority;
- Waghorn arranged for all technical services coverage and GSI paid for such services as required;

Dermot Shane (“Shane”) testified and stated that:

- he had worked as a film producer and as such had utilized the facilities at GSI;
- he recalls Waghorn working on a project of his but he did not pay Waghorn directly as B. Levens advised that “the Studio would take care of him (Waghorn)”

Rose testified and stated:

- she had started with GSI as a receptionist and was currently the bookkeeper/assistant manager;
- GSI did not normally keep records of hours worked by ‘contract personnel’;
- she recalls on one occasion, which lasted about a month, that an effort was made to record the daily hours worked by all personnel;
- the attempt to record hours was not very successful, as hours were only recorded on a haphazard basis;

In response to questions on cross examination by the Director, Rose stated that:

- some of the handwritten hours on the studio schedule with respect to Waghorn were hers, but the majority were by someone else;
- most of the numbers, 2 or 3, referred to the studio number that would be available for Waghorn to work in;
- the ‘crew’ would gather in the kitchen area for lunch and other break periods;
- the amount of work dictated when breaks were taken.

Corey Dixon (“Dixon”) testified and stated:

- he was a technician at GSI for some of the same time as Waghorn;
- he and Waghorn had differing areas of expertise;
- he does not recall a specific technical budget, although the opinions of the technicians were asked in regard to technical needs;
- things were not usually repaired unless the item was needed by a client.

In response to questions on cross examination by R. Levens and B. Levens, Dixon stated that:

- he felt very uncomfortable with this whole matter as he was a friend and professional colleague of Waghorn and currently contracted to GSI to provide technical services;
- he currently provides contract technical services to other studios on an ‘on-call’ basis;
- his job title at GSI is “Technical Manager” but it would be more accurate to call him a “Contract Technician”;
- when he was at GSI while Waghorn was there, he did not keep any specific records of hours worked each day;
- there are approximately 12 studios in the area at the level of GSI and lots of smaller ‘basement studio’;
- most studios use contract technicians.

In response to questions on cross examination by the Director Dixon stated:

- he left GSI in December 1994 after attempting to negotiate a pay raise;
- he did not approach Waghorn in regard to the requested raise as Waghorn had no say in the matter;
- after he left GSI, he would fill in for Waghorn on occasion;
- he last filled in for Waghorn on the first weekend in May 1996.

Waghorn testified and stated that he agreed with the Determination by the Director.

In response to questions on cross examination by the Director, Waghorn stated:

- he would be paged by GSI on a regular basis when he was away from the studio;
- the number of pages would vary from 2 - 3 on a work day to 6 or more on his days off;
- he would be paged by whomever had the problem, on occasion it was Roger Levens or Patricia Rose;
- depending on the nature of the problem, he could direct a fix over the phone or might have to go to the studio to effect repairs;
- he was mainly supervised by Roger Levens and Bruce Levens, although when he first started it would have been the senior Mr. Levens;
- he did not have authority to hire or fire;
- he would make arrangements for relief coverage subject to approval of either Levens;
- he never provided direct supervision to anyone;
- his job description required him to attend meetings at first, however, after about 6 or 7 months the meetings stopped being held;
- he had no role in either the administrative or executive decisions;
- he provided recommendations in regard to technical needs;
- he was advised by Bruce Levens around the end of June 1995 that his invoice would have to be adjusted to be \$3,400.00 per month;
- he did not sign the contract dated July 27, 1995;
- in mid October, he received a raise to \$4,000.00 per month;
- he submitted invoices for \$4,000.00 per month and was paid on a sporadic basis;
- his permit from Immigration expired on Jan. 1, 1996 so he went to Seattle to stay with some friends until everything was worked out;
- he was available on the pager to deal with problems as they occurred but did not visit the studio during the period Jan. 1 - 9, 1996;
- he did not appear at the studio until Jan. 10, 1996;
- GSI paid him the full amount of \$4,000.00 for January 1996;
- he worked more than 8 hours in a day and 40 hours in a week;
- he did not keep any records except for his first year;
- sometimes, especially when the studio was not busy, they were asked to keep records of hours worked;
- he believes the hours on the studio schedule sheets are an accurate reflection of his hours;
- he recalls that his normal work week would be between 55 - 60 hours;
- he left GSI as a result of a dispute that arose on May 9, 1995 when he asked Roger Levens for some money so he could go on vacation;
- he had arranged for Dixon to cover for him on May 4/5, 1996 as he was going to Whitby Island to visit Gary Garitan, a friend and a client of GSI;
- he returned to B.C. on May 5th and returned to work on May 6th;

ANALYSIS

The issue of whether a person is an employee or an independent contractor is often difficult to determine

To differentiate between an employee/employer relationship as opposed to a contractual one, all elements of the relationship between the parties must be considered carefully. Being in harmony with any one element on its own doesn't necessarily mean a person is or is not an employee, rather, I would suggest, it is a matter of balance. If there are enough elements or factors suggesting there is an employee/employer relationship the decision would then, on the balance of probabilities, lean towards the person in question being considered an employee.

Professor P.C. Weiler, as chairman of the Labour Relations Board, stated in *Hospital Employees Union, Local 180 v. Cranbrook and District Hospital (1975)*, CLRBR 42, page 51;

“The difficulty is that there is no single element in the normal make-up 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....”

When determining whether or not there is an employee/employer relationship I must consider the definitions and language of the *Act*, other relevant statutes and the applicable jurisprudence pertaining to this issue.

Statutory Considerations

The *Act* in Section 1 defines ‘employee’ and ‘employer’ as:

"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,*
- (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;*

When considering these definitions, I note that they both contain the word “includes” which indicates that the items noted in the definitions are not exclusive of the ordinary meaning of the terms ‘employee’ and ‘employer’.

When considering the objectives of the *Act*, I must take note of Sections 2 and 4 which state:

Section 2, Purposes of this Act

The purposes of this Act are to

- (a) ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment,*
- (b) promote the fair treatment of employees and employers,*
- (c) encourage open communication between employers and employees,*
- (d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act,*
- (e) foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia, and*
- (f) contribute in assisting employees to meet work and family responsibilities.*

Section 4, Requirements of this 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.

My reason for taking note of these Sections of the *Act* is to illustrate that a person may not, under the guise of a contractual relationship, waive the basic minimum standards of compensation as required by the *Act*.

Jurisprudence

To differentiate between an employee/employer and a contractual relationship, the courts have traditionally considered four factors.

- 1. Control** - is there a traditional master/servant relationship ?

2. **Integration** - to what extent or degree is the individual involved in the operation or organization ?
3. **Economic Reality** - is the individual in business for himself, or does he work for someone else ?
4. **Specific Result** - is the individual required to perform general work or to only accomplish a specific job?

Analysis of the Jurisprudence

Control

Perhaps the most important factor in determining the status of a person is the nature or degree of direction and control exercised by one party over the other. The Control Test determines whether one person is in a position to order not only what is to be done, but also the manner in which it is to be done.

When reviewing the Control Test as it applies to the circumstances of this case, I have characteristics of their relationship;

Selection - GSI offered Waghorn employment.

Dismissal - GSI alleged that Waghorn's resignation was a breach of contract.

Method of Work - GSI provided the studios, all materials, most tools needed by Waghorn, assigned projects/duties as required

Remuneration - While GSI and Waghorn negotiated with respect to the remuneration package that Waghorn was to receive, such negotiation is the norm in circumstances of a senior position.

Integration

The Integration Test examines the extent or degree to which an individual interacts with the organization or operation. This test looks at whether an individual is an integral part of the operation or is merely ancillary to the operation.

1. **Integration** - is the work performed by Waghorn integrated and done as part of the business of GSI or simply an accessory to the business of GSI ?
2. **Part and Parcel** - is Waghorn an integral part of the organization ?
3. **Ordinary Man** - would an ordinary person view the relationship between Waghorn and GSI as one of employee/employer ?

Clearly, in the case at hand, the responsibility for the maintenance of GSI facilities and the provision of all technical services for GSI and, on request, for the clients of GSI, indicates that Waghorn was an integral part of the business of GSI. GSI's letter dated December 31, 1995 to Canadian Immigration states "It is very important to the Company that Mr. Waghorn remain as our technical manager for without him, the Company would have no option but to close as there are no Canadians who have the expertise to look after our equipment. This would put 20 Canadians out of work and force the closing of our business." Waghorn was also provided with business cards which identified him as "Manager of Technical Services " for GSI. An ordinary person would certainly be of the view that Waghorn was an employee of GSI.

Economic Reality

The Economic Reality Test requires the analysis of the entire relationship between the parties in order to determine whether a particular individual is carrying on business for himself or for someone else.

Reviewing the Economic Reality Test as it applies to this case involves the close analysis of the four criteria;

1. **Risk** - whether Waghorn bears any risk of loss or possibility of profit ?
2. **Financial Investment** - does Waghorn have an ownership of machinery and equipment and if so, is the investment substantial ?
3. **Lasting Relationship** - is there an ongoing permanent relationship between Waghorn and GSI ?
4. **Diversity** - is Waghorn permitted to provide the same or similar services to other parties and, if so, is Waghorn actively involved in searching out other business opportunities ?

In the case at hand, Waghorn had no risk at all. Waghorn supplied no capital, takes no financial risk, has no liability regarding the business of GSI and has an on-going, indefinite term, subject to Immigration work permits, relationship with GSI. Waghorn ventured no capital investment into GSI and can expect no return for profit.

With respect to "diversity", there was no evidence of Waghorn performing the same or similar work for anyone else during the period in question or to suggest that he was actively searching out other business during the period in question.

Specific Result

The Specific Result Test looks at the intent of the parties and whether a contract is to provide for a single service leading to a specific result or whether Waghorn is simply required to provide general efforts on behalf of GSI through his technical expertise. A review of the Specific Result Test as it relates to this case involves two criteria;

1. **Specific Work** - if Waghorn is an independent contractor, it is agreed that certain specific work would be done for GSI. Conversely, in an employee/employer relationship, Waghorn agrees to provide labour and services for GSI.
2. **Personal Service** - a contract of employment normally requires a specific person to place his own services at the disposal of the company. Usually an independent contractor's only obligation is to see that a certain agreed upon task is completed. In other words, it does not matter who actually performs the work.

In this case, Waghorn personally provided the labour and services relating to provision of technical services for GSI. There were some occasions when more than one technical person was utilized and also some occasions where, for relief purposes, another technical person performed Waghorn's duties for a short term. Those occasions however, resulted in GSI paying the appropriate individual directly and do not impact the relationship between GSI and Waghorn.

If Waghorn were an independent contractor, the contract should have been for specific work required to be performed in a specific period. In this case, there was an indefinite term contract to provide labour and technical services.

1. Was Waghorn an employee of GSI ?

For all of the above reasons, based on the evidence provided and on the balance of probabilities, I conclude that Waghorn was an employee of GSI. My conclusion is founded primarily on the evidence of the relationship between Waghorn and GSI, a relationship which is more consistent with a relationship of employer-employee rather than one of a contractual nature.

2. If Waghorn was an employee, was he a manager ?

Based on the evidence provided and on the balance of probabilities, I conclude that Waghorn was not a manager as defined by the *Employment Standards Regulation* (the "Regulation").

The evidence indicates that Waghorn's **primary** duties were the performance of work related to all aspects of the technical services requirements of GSI, not supervision and direction of other employees.

The evidence further indicates that Waghorn's role in the Company was similar to that of a valued senior employee and was not that of an "executive capacity".

3. If Waghorn was not a manager, is he entitled to overtime wages ?

Based on the evidence provided and on the balance of probabilities, I conclude that Waghorn is entitled to overtime wages, however, the actual amount of overtime wages owing is not possible to determine from the evidence provided.

As an example of the inconsistencies of the records and calculations, on February 25, 1996, the studio schedule for Waghorn indicates 32 hours worked and the Director has credited Waghorn with 3 hours @ 1 1/2 rate and 21.5 hours @ 2 rate, which, pursuant to the provisions of the *Act*, is not possible. The *Act* clearly provides that for the purposes of calculating overtime, the work week begins on Sunday and ends on Saturday. February 25, 1996 is a Sunday, and as such, the first 8 hours should have been at straight time rate and then overtime rates applied.

Furthermore, the *Act* defines 'day' as "*day means a 24 hour period ending at midnight and "working day" means a 24 hour period beginning at the start of an employee's shift*" The *Act* does not contain any provision which would permit an individual to be paid for more than 24 hours in one day. I am further satisfied that an employee would not work for 24 hours without a break of any kind.

Waghorn, in all probability, worked overtime hours. However, as the records provided do not reflect, in my view, an accurate compilation of the actual hours worked, any calculation of overtime wages would be based purely on speculation. I am not prepared to speculate as to the actual hours of overtime worked or overtime wages owed.

In the absence of specific detailed daily hours, it is not possible to calculate overtime wages owing.

4. Is Waghorn owed regular wages ?

Based on the evidence provided and on the balance of probabilities, I conclude that Waghorn is owed regular wages.

It is not necessary for me to determine if the contract dated July 27, 1995 was actually signed by both Waghorn and GSI. The conduct of the parties, as reflected in the payroll records, clearly sets forth the understanding in regard to the wage rate from July 1, 1995 to May 1996.

Waghorn was paid \$3400.00 for July, August & September 1995; \$4,000.00 for October, November, December of 1995 and January, February of 1996. There was a total of \$4,000.00 of payment made after March 1996. I am satisfied that Waghorn is owed wages at the rate of \$4,000.00 per month for March, April and part of May 1996.

I am further satisfied that Waghorn worked until May 9, 1996. The wages owing to Waghorn are therefore calculated as:

Month		Earnings
March 1996		\$4,000.00
April 1996		\$4,000.00
May 1-9, 1996	\$4,000.00 x 12 ÷ 52 ÷ 5 x 7 (working days)	\$1,292.31
sub-total		\$9,292.31
less wages paid		\$4,000.00
balance		\$5,292.31
+ 4% Vac. pay	\$5,292.31 x .04	\$ 211.69
TOTAL OWING		\$5,504.00

With respect to the concern expressed by GSI in regard to the conduct of the delegate of the Director acting as an advocate for Waghorn, the role of the delegate of the Director at the appeal hearing is to be governed by the principles expressed in *BWI Business Incorporated* BC EST #D050/96 by Adjudicator, Thornicroft. Those principles bear repeating.

1. The Director is not the statutory agent for the employee(s) named in the determination.
2. The Director is entitled to attend, give evidence, cross-examine witnesses and make submissions at the appeal hearing.
3. The Director's attendance and participation at the appeal hearing must be confined, however, to giving evidence and calling and cross examining witnesses with a view to explaining the underlying basis for the determination and to show that the determination was arrived at after full and fair consideration of the evidence and submissions of both the employer and the employee(s).
4. The Director must appreciate that there is a fine line between explaining the basis for the determination and advocating in favour of a party, particularly when one party seeks to uphold the determination.
5. It will fall to the Employment Standards Tribunal adjudicator in each case, given the particular issues at hand, to ensure that the line between explaining the determination and advocating on behalf of one or other of the parties is not crossed.
6. It will also fall to the adjudicator to ensure that all relevant evidence is placed before the Tribunal for consideration.

I am satisfied that, in the case at hand, while the delegate of the Director may have come close to crossing the line between neutral party and advocate, she did not do so.

The appeal by GSI is therefore allowed to the extent as set forth above.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated July 14, 1997 be varied to be in the amount of **\$5,504.00** plus interest calculated pursuant to Section 88 of the *Act*.

Hans Suhr
Adjudicator
Employment Standards Tribunal