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 -

Cary Lawrence Praetor
operating as C.I.P. International
("CIP" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 1999/446

HEARING DATE: October 18, 1999

DECISION DATE: November 5, 1999

DECISION

APPEARANCES

Mr. Cary Lawrence Praetor — on behalf of the Employer

Mr. Mark Randall — on behalf of himself

OVERVIEW

This is an appeal by Cary Lawrence Praetor ("Praetor") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on June 28, 1999. The Determination found that Mark Randall ("Randall") was an employee of the Employer--and worked for the Employer--until December 9, 1998. Randall had been employed by the Employer from July 1998 as a superintendent, or operations manager, at a work site at Hopcott Road in Delta, B.C. where CIP had been engaged to provide services and expertise with respect to waterproofing membranes, coatings and sealants. The issues before the delegate were: (1) whether Randall was employed and worked for the Employer in November and December 1998, and (2) whether he was terminated without cause on or about December 9, 1998. The delegate answered these questions in the affirmative and awarded Randall $9,362.03. The Employer disputes these conclusions.

FACTS AND ANALYSIS

As the appellant, Praetor has the burden to show that the Determination is wrong. Having heard and considered the evidence presented at the hearing at the Tribunal's offices on October 18, 1999, I am of the view that the appeal cannot succeed. At that time Praetor and Steven Williamson testified on behalf of the Employer; and Randall, Richard Harris and Jack Bibby testified on behalf of Randall.

In a nutshell, Praetor's evidence boils down to the proposition that it withdrew from the work site at the end of October 1998. At that time Praetor filed a lien against the property because of non-payment. Praetor says that he instructed Randall not to have any contacts with the customer. Praetor agrees that some of his employees kept working there but he says, as far as I can discern, that they worked for another company, International Hi-Tech Industries Inc. ("IHT") and/or for CIP to finish certain work in order to protect CIP in the anticipated litigation with respect to the project. Negotiations between Praetor and IHT ensued with respect to lifting the lien and continuing the project. Praetor says that he knew Randall was working on the project in November and December but says that his employment was terminated at the end of October when CIP withdrew. His employment was limited to the particular project. As his employment came to an end, he was not paid for November and December.

Randall says that his employment was not terminated until mid December. He says that he kept working at the site for Praetor until he was terminated. In December he started working for IHT. The delegate noted in the Determination that witness statements confirmed that it was "likely" that Randall worked in November-December. Other witnesses confirmed that he worked for Praetor at the time. He says that he did not get paid for November and December and explains that the Employer apparently had a cash flow problem. When he complained, he was terminated for being

"disloyal". I accept the evidence tendered by Randall and others that he worked at the site in November and December and that he worked for Praetor, including supervising other of Praetor's employees.

In dismissing the appeal with respect to work done in November and December and the termination date, I consider the following to be consistent with Randall continuing as an employee of Praetor for the time in question. On December 9, 1998, Praetor wrote to Jack Bibby of IHT. The letter contained the following:

> "b) As of 9/12/1998, *I will formally be placing Mr. Mark Randall on suspension*. As this is an internal affair and has no bearing on you. As I will be ensuring the speedy completion of this project."

Praetor did not explain how he could place Randall on suspension in December if, as he now says, he fired him at the end of October. That, in my view, defies common sense. The delegate did not see the logic and, quite frankly, neither do I. It is consistent with Randall continuing as an employee. Importantly, the letter is written by the Employer. Randall testified, and Richard Harris (who was present at the meeting) confirmed, that Praetor terminated his employment on December 9. Randall testified that he was supposed to be paid at the end of November, that he asked Praetor for his wages (and those of his wife, who also worked for the Praetor), and that he had a telephone call from one of the "sub-trades" who had heard from Steven Williamson, Praetor's general manager, that he was going to get fired. He brought Harris along as a witness. Harris explained that Praetor told Randall that "his services were no longer needed".

In the result, I dismiss the appeal with respect to whether Randall worked in November and December and the date of termination.

In my view, Praetor did not have cause for termination of Randall. Praetor says that he instructed Randall not to work at the site at the end of October. In the circumstances, I prefer the evidence tendered on behalf of Randall that he was fired in December because he complained about non-payment of wages. That is not just cause for termination.

Praetor also argues that Section 63 does not apply to Randall. He relied on the exceptions set out in Section 65. I understand that the specific provisions relied upon are:

> 65.(1) Sections 63 and 64 do not apply to an employee
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> (b) employed for a definite term,
> (c) employed for specific work to be completed in a period of up to 12 months,
> (d) employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under section 427 of the *Bank Act* (Canada) or a proceeding under an insolvency Act,
> (e) employed at a construction site by an employer whose principal business is construction,

In my view, the exceptions do not apply here. Generally, these exceptions apply to employees who work for temporary periods, of either uncertain or fixed duration, and whose employment past the

temporary periods are unknown (see, for example, *Nixon*, BC EST #D573/99 and *Middleton*, BC EST #D321/99). In construction, employees often are hired for a single project and then let go once their role in the project has been completed (*Nixon*). The burden is on the appellant, in this case the Employer, to show that the Determination was wrong. I am prepared to accept that the Employer's principal business is "construction"--*i.e.*, the "construction, renovation, repair or demolition of property or the alteration or improvement of land" (Section 1). However, while Randall primarily worked at the site, supervising other employees, I am not persuaded that he is a regular management employee of the Employer fits into this exception. It is incumbent on the appellant to provide the evidence to support the argument and there was little evidence before me with respect to Randall's terms and conditions of employment. I do not accept Praetor's evidence that Randall was hired for the specific project. A letter from the Employer, signed by the general manager, Mr. Williamson, stated that Randall was employed as "operations manager". Moreover, I am not satisfied that Randall was employed for a specific term. Nor am I satisfied that he was employed for specific work to be completed within a 12 month period. I accept that Randall was employed in a managerial capacity with Praetor. I am not persuaded that the Employer's contractual dispute with the customer was an unforeseeable event. In short, in my opinion, the exceptions do not apply.

I do not understand how the delegate arrived at the quantum owed. The delegate determined that Randall was entitled to wages based on $5,510 per month. Praetor argues that this is incorrect. Pay slips presented at the hearing for July, August, September and October 1998 indicated that Randall's monthly salary was $4,000. He also received a monthly car allowance of $490. Allowances are not included in "wages" (see Section 1, "wages"). In the result, I refer the matter of the calculation of wages owed for November and December, vacation pay from September at the rate of 4%, one week's compensation for length of service and interest back to the Director based on a monthly salary of $4,000.

At the outset of the hearing, the Praetor stated that he was not the Employer. He explained that CIP was an incorporated entity but did not present any documentation to support this. The company letterhead does not indicate that CIP is a corporation. In the circumstances, I do not accept Praetor's argument on this point and prefer to let the Determination stand on this point.

ORDER

Pursuant to Section 115 of the Act, I order that Determination in this matter, dated June 28, 1999 be confirmed, except to the extent that the calculation of quantum be referred back to the Director for calculation. This is to be done on an expeditious basis.

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Ib Skov Petersen
Adjudicator
Employment Standards Tribunal