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 -

Fibrestone Products Ltd.
("Fibrestone")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	2000/548
DATE OF HEARING:	November 10, 2000
DATE OF DECISION:	December 8, 2000

DECISION

APPEARANCES

Donald F. Hoffman, President/Director & Louis Kariya, Secretary/Director	for Fibrestone Products Ltd.
George Crowston	on his own behalf
No appearance	for the Director of Employment Standards

OVERVIEW

This is an appeal filed by Donald F. Hoffman on behalf of Fibrestone Products Ltd. ("Fibrestone") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on August 3rd, 2000 under file number ER 4-280 (the "Determination").

The Director's delegate determined that George Crowston ("Crowston") was employed by Fibrestone during the period from 1991 to 1999. The delegate further determined that Fibrestone owed Crowston the sum of $4,599.83 on account of unpaid vacation pay accrued during the period December 1997 to November 1999 ($1,025.19), recovery of workers' compensation premiums that had been deducted from Crowston's pay and remitted to the Workers' Compensation Board ($3,373.16) and interest payable pursuant to section 88 of the *Act* ($201.48). Finally, by way of the Determination, Fibrestone was also assessed a $0 monetary penalty pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation.*

Fibrestone's appeal was heard at the Tribunal's offices in Vancouver on November 10th, 2000 at which time I heard the testimony and submissions of Mr. Hoffman, for Fibrestone, and Mr. Crowston, on his own behalf. Louis Kariya also appeared on behalf of Fibrestone but he simply adopted Mr. Hoffman's evidence as his own. The Director was not represented at the appeal hearing.

ISSUE ON APPEAL

Fibrestone says that it does not have any liability to Crowston under the *Act*, at least for the period prior to 1999, because Mr. Crowston was not an "employee" as defined in section 1 of the *Act.* At the appeal hearing, Mr. Hoffman conceded that Crowston was a Fibrestone employee during 1999 (and Crowston was so noted in the company's payroll records).

FINDINGS AND ANALYSIS

Fibrestone fabricates fiberglass products, mainly bathtubs and shower stalls but also swimming pool diving stands. Crowston's job was to operate a "chopper gun" which, as I understand the evidence, sprays fiberglass into a pre-prepared mold. In a typical workday, Crowston completed 3 to 6 such molds which then proceeded to another production area to be finished. On occasion, Crowston also did other tasks such as trimming completed molds and doing some minor carpentry associated with the production process. Throughout his tenure at Fibrestone, Crowston was paid both an hourly rate for some tasks and also a "piece rate" for each mold that he completed. Crowston usually worked 5 or 6 hours each day. He regularly attended at Fibrestone's fabricating plant in Langley--working a five-day week--and, for the most part, in carrying out his assigned tasks, he used Fibrestone's tools and equipment.

In my view, the delegate quite properly rejected Fibrestone's contention that Crowston was, at any time, an independent contractor. There is nothing in the evidence before me to suggest that Crowston's basic job functions changed (although the company's product mix may have) in any material fashion in 1999--during which latter period, as noted above, Fibrestone concedes that Crowston was an employee.

The delegate turned her mind to the relevant statutory provisions (especially the statutory definitions of "employee" and "employer") and the various common law tests that have traditionally been used to determined whether one is an employee or an independent contractor. Mr. Hoffman, for Fibrestone, appears to believe that because there was a written agreement which suggests that Crowston was a contractor, Crowston must, therefore, as a matter of law, have been an independent contractor. However, the evidence before me clearly shows that although Crowston "invoiced" Fibrestone for his services (every two weeks) and did not receive a T-4 statement of earnings for the tax years prior to 1999, Crowston was nonetheless in an employment relationship with Fibrestone throughout his entire association with that firm.

The so-called "contractor's" agreement between the parties does not, in fact, actually state that Crowston is an independent contractor; rather, the agreement only states that Crowston is a "pieceworker" and that he "will only be paid for amount of product produced [sic] and will be responsible to remit any and all taxes, insurance or benefits that become due and payable on my behalf". The "invoices" that Crowston submitted to Fibrestone (which do not even set out a specific amount payable) consist of nothing more than a statement of hours worked and the number of molds completed. This handwritten sheet, in turn, was submitted to Mr. Hoffman who then calculated Crowston's gross entitlement, his WCB remittance and the net amount payable. A cheque for the net amount was then issued to Crowston. Crowston neither charged, nor did Fibrestone ever pay, any GST with respect to the services described in Crowston's "invoices".

As noted in the Determination, an individual is not an independent contractor merely because their compensation is based on a "piecework" formula. Indeed, the statutory definition of "regular wage" (see section 1 of the *Act*) specifically contemplates employees being paid a "piece rate". Crowston carried out his tasks at Fibrestone's shop, he used Fibrestone's equipment, Fibrestone's materials and, ultimately, was subject to Fibrestone's direction and control. Although Crowston worked independently, as do many employees, he was economically

dependent on Fibrestone and was not in a position to either profit or risk loss from his endeavours.

Given the foregoing, and for the reasons set out in the Determination (which I adopt), I must conclude that the delegate correctly held that Crowston was an employee rather than an independent contractor.

Since, as I have confirmed, Crowston was an employee throughout his tenure with Fibrestone, he was, given his length of service, properly awarded vacation pay at the rate of 6% of earnings. Further, the WCB remittances were not lawfully deducted from Crowston's earnings [see section 21(2) of the *Act* and section 14 of the *Workers Compensation Act*] and thus, pursuant to section 21(3) of the *Act,* Fibrestone was properly ordered to reimburse Crowston on that account.

The appeal is dismissed.

ORDER

Pursuant to section 115 of the *Act,* I order that the Determination be confirmed as issued in amount of $4,599.83 together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act,* since the date of issuance. It follows from the foregoing that the $0 penalty is also confirmed.

Kenneth Wm. Thornicroft

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal

KWT/bls