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 -

Seton Timber Company Ltd.
(the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE No.: 2000/357

DATE OF HEARING: September 21, 2000

DATE OF DECISION: December 6, 2000

DECISION

APPEARANCES

Mr. Ken Fraser

Mr. James Freek	on behalf of the Employer
Mr. William Garceau	on behalf of himself

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on April 26, 2000. According to the Determination, Garceau alleged that he was an employee of the Employer from January 3, 1998 to August 17, 1998. He claimed that he was employed as mechanic/truck driver/manager. The Determination concluded that Garceau was a manager and owed wages: regular wages and vacation pay. The delegate awarded him $28,528.66.

The conclusion that Garceau was an employee and a manager is based, among others, on the following:

- Garceau and Freek, the owner of the Employer had been friends for many years.
- Freek operated the business with another "partner." Apparently, the relationship was not working out and Freek was seeking another partner in the business.
- Garceau visited Freek and joined him in camp in early January 1998.
- There were discussions between Freek and Garceau to have the latter become a partner in the business. These discussions never came to fruition.
- Garceau transferred equipment into the business. This equipment included two trucks.
- Garceau used his own credit card, fuel card and telephone to buy permits, fuel and supplies etc.
- Garceau did not have signing authority over bank accounts.
- Garceau was involved in the termination of an employee.

FACTS

A hearing was held at the Tribunal's offices on September 21, 2000. Garceau attended in person. Freek and Fraser participated via telephone.

Freek testified at the hearing that Garceau "was coming on as a partner." In his view, that was the basis for the relationship "all along." Freek testified that Garceau handled all the affairs of the business as a partner:

- he re-built equipment;
- he was involved in which employees would "go";
- he was involved in setting the wage structure;
- he was involved in the purchase of new equipment; and
- he brought equipment into the business (trucks, heavy equipment and fire pumps);

With respect to the hours found by the delegate to have been worked by Garceau, Freek explained that there was no work done by the crew until February. In his view, therefore, Garceau did not work for the initial period from January. He agrees that Garceau "came along to see the operation." Freek provided a list of Garceau's hours based on the hours worked by the crew. In his view, the hours found by the delegate are excessive.

Garceau agreed that he discussed becoming a partner with Freek. Apparently, Freek's (then) partner was in the process of leaving the business.

Garceau testified that he "assumed" he would be working for wages. He mentioned that the rest of the crew, though the Employer was not a unionized company, was working on terms and conditions and employment similar to the I.W.A. coast master agreement. Garceau conceded that he assumed that he would be paid like the crew. He agreed that he "did not clarify stuff." The Determination states that Garceau's wage rate was either $3,000 per month or $17.51 per hour. The complaint form indicated that the rate of pay claimed by Garceau was $25 per hour. He explained that he was not involved in setting the wage structure for the employees.

With respect to the hours worked, Garceau testified that he not only worked along side the crew, but worked additional hours, doing repair work on the equipment, buying supplies etc. Garceau was asked if he kept track of his hours. He agreed that he did not hand in a time card like other employees. He said, however, that he provided Freek with "a slips of paper with hours on it" from time to time. Freek conceded that he was not in a good position to question the hours worked. Garceau's hours of work, according to him, is based on an estimate of the hours worked by the crew. Freek denied that he ever received "slips" of paper with hours as claimed by Garceau. I note that these "slips" were not before me, nor, it would appear, were they before the delegate. What the delegate had to ascertain the hours was a sheet of paper setting out the hours claimed to have been worked by Garceau on each day between January and August.

ANALYSIS

It is trite law that the Appellant has the burden to persuade me that the Determination is wrong.

The issue before me is whether Garceau was an employee and, if so, a manager. The Employer, as well, questions the hours worked, the rate of pay and the amounts actually paid to Garceau. The Employer also says that it should be able to deduct certain amounts for, among others, room and board, personal telephone calls etc.

Briefly put, in my view, the Determination reached the correct conclusion, *i.e.*, that he was an employee and a manager. I set out my reasons below.

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;*

I approach the employee status issue with the following principles in mind. 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 (*Machtinger 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*.

The factual circumstances, on the material issues, are in dispute. There is little doubt that the instant case differs from the typical employee-employer situation that ends up before the Tribunal. In this case there were "discussions" about some form of "partnership" between Garceau and Freek. I understood Freek's evidence to be that he proceeded on that basis. In other words, Garceau came to camp and worked on the basis that he was going to be a partner in the business once his (then) partner left the business. It follows that there was no agreement between Garceau and Freek that the former would be a "partner" in the business in January. This conclusion is supported by some of the documents filed in the appeal. In a letter to the delegate, Garceau explained:

> "Jamie Freek, who had been one of my best friends, had been asking me to come work for him since Sept. 1997, when I had gone to visit him and went to help him fix their yarder. I finished the contract I was working on in December. My family

> and I went to their place for New Years and I went into camp to help him start back up on Jan. 3. He was telling me how things weren't working out well with his partner, Chuck Hustings and we began to discuss my buying into the company when they finally split with him. Jamie asked me to stay on and help him in the mean time..."

In a letter addressed to Garceau, dated August 28, 1998, also sent to the delegate, Freek's wife explained:

> "If you [Garceau] go back to the beginning, you knew what things were like with Chuck. You came in knowing that we wouldn't be able to pay you for quite some time. It was enough we had to pay Chuck for doing dick all. You had thought about a future partnership, since you were unhappy with the way things were with your job. But you knew you couldn't do anything about that until the situation with Chuck and DWD was settled. When this was done you would be able to meet with Ken to discuss partnership. We are very aware that we owe you money. Especially the $5,000.00. The other bills will get paid. But do you think it's fair to say in July, "Here's my bills from March and they need to be paid...."

In light of this, I am unable to conclude that there was an agreement between Garceau and Freek that the former would join the business as a "partner" in January 1998. Freek's testimony, in my opinion, tends to support that conclusion that there was no agreement. All there was, was some expectation that in the future there might be a business relationship of some sort. I agree with the delegate's conclusion that this business relationship never came to fruition.

To an extent both Garceau and Freek conducted themselves in a manner consistent with those expectations, *i.e.*, that there was going to be a business relationship. There is evidence that Garceau paid company bills for supplies etc. He transferred equipment in the Employer. He signed the purchase of company equipment, for two trucks, as a "director." It is quite clear that he was not a director at that (or any other time).

On balance, I am prepared to accept Garceau's testimony that he came to work for the Employer in January 1998. In my view, he meets the statutory definition of an "employee," *i.e.*, he was "a person ... receiving or entitled to wages for work performed for another," or " a person an employer allows, directly or indirectly, to perform work normally performed by an employee." There is no dispute that Garceau performed work. As there was no agreement to the effect that Garceau became a "partner" in the business between January and August, as I have found, the work performed was for "another," namely the Employer. In my view, Garceau was an employee. That interpretation accords with the principles set out in *Machtinger*, *above*, and the remedial principles of the *Act*.

The question then turns to the delegate's conclusion that Garceau was a "manager." Briefly put, I agree with the delegate's conclusions in that regard. The relationship was clearly different from that of a typical employee. Section 1(1) of the *Regulation* of the *Act* defines, *inter alia*, "manager":

> *1. In this Regulation:*

"manager means"

(a) a person whose primary employment duties consist of supervising and directing other employees; or

(b) a person employed in an executive capacity.

In all of the circumstances, and on the balance of probabilities, I accept that Garceau functioned as a manager as defined in the *Regulation*. For example, he was involved in the scheduling or work, in determining who would "go," and he terminated an employee.

I now turn to the issue of hours and days worked. The Employer's evidence as to the days worked is less than clear. The Employer, in fact, acknowledges that its numbers is an "estimate" based on hours worked by other employees. As pointed out by Garceau, a letter from Freek's wife to him in October 1998, asserts that the employer is entitled to charge him room and board from January 1, 1998 to July 31, 1998. In my view, that would be consistent with the start date asserted by Garceau. In the circumstances, I am prepared to accept the hours claimed by Garceau.

I am troubled by the delegate's finding that the hourly rate was $17.51. He used that hourly rate to determine the total amount Garceau was entitled to. It is not clear to me how the delegate arrived at that amount. On the complaint form Garceau had put down $25 as the hourly rate. The delegate was informed by the Employer that Garceau was receiving a draw of $3,000 per month. The Employer's evidence, particularly that of Ken Fraser, a shareholder and the company's accountant, was that he was instructed to provide a twice-monthly draw of $1,500, cash-flow permitting, to Garceau. It is clear that Garceau was paid certain amounts, some $5,500. It is not entirely clear to me what he was paid for. Some of these amounts were on account of "draws." Some of these amounts may have been on account of expenses incurred on behalf of the Employer's business. In my view, both must be taken into account. I refer this back to the Director.

At the hearing, Garceau's testimony was that he "assumed" that he would be paid for the work he did for the Employer. It is clear that he did not clarify what the hourly rate would be. He testified that he "did not clarify stuff." It is reasonable to infer from his evidence that he assumed that he would be paid at a rate similar to what the crew was paid. However, there was no such agreement. In fact, there was no agreement between the Employee and the Employer as to the wages to be paid. In the result, Garceau is entitled to be paid at the minimum wage rate in effect at the time based on the hours worked as found in the Determination. I refer the determination of the amount owed back to the Director.

I do not accept that the Employer is entitled to deduct on account of room and board. There was no agreement to that effect between the Employer and Garceau. In fact, the evidence was that other employees were not charged for room and board.

In short, I am referring the amount owed back to the Director for determination.

ORDER

Pursuant to Section 115 of the Act, I order that Determination in this matter, dated April 26, 2000, be referred back to the Director.

Ib Skov Petersen

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal

ISP/bls