

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 -

CCS Contracting Ltd.
("CCS")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 97/346

DATE OF HEARING: October 15, 1997

DATE OF DECISION: November 19, 1997

DECISION

APPEARANCES

Carl Szydlik	on behalf of CCS Contracting Ltd.
Nancy Szydlik	on behalf of CCS Contracting Ltd.
Tony Wall	on behalf of CCS Contracting Ltd.
Art Anderson	on behalf of CCS Contracting Ltd.
Paul Perry	on behalf of CCS Contracting Ltd.
John R. Milne	counsel for CCS Contracting Ltd.
Ken Ringland	on his own behalf
John Dafoe	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by CCS Contracting Ltd. (“CCS”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated April 14, 1997 issued by a delegate of the Director of Employment Standards (the “Director”). CCS alleges that the delegate of the Director erred in the Determination by concluding that Ken Ringland (“Ringland”) was an employee and entitled to the amount of \$11,709.88 for overtime wages, annual vacation pay, statutory holiday pay, compensation for length of service and interest.

ISSUES TO BE DECIDED

The issues to be decided in this appeal are:

1. Was Ringland an employee ?
2. If Ringland was an employee, was he owed wages as set forth in the Determination ?

FACTS

The following facts are not in dispute:

- Ringland performed work as a buckerman for CCS commencing Sept.16, 1991;
- Ringland provided his own vehicle, power saws, fuel/oil and repairs for both;
- Ringland was paid on a production basis dependent upon the volume of wood that he 'bucked';
- Ringland performed work on a seasonal basis as follows:
 - Sept. 16, 1991 - Oct. 8, 1991
 - Nov. 25, 1991 - Mar. 14, 1992
 - Jun. 29, 1992 - Oct. 30, 1992
 - Nov. 30, 1992 - Mar. 24, 1993
 - Jul., 26, 1993 - Oct. 16, 1993
 - Nov. 22, 1993 - Mar. 31, 1994
 - Jul. 19, 1994 - Oct. 19, 1994
 - Nov. 1, 1994 - Mar. 25, 1995
- At the end of each seasonal period, CCS issued a Record of Employment ("ROE") to Ringland;
- In each case the ROE indicated that the reason for issuing was "A", Shortage of Work;
- In each case the ROE indicated that the expected date of recall was "unknown";
- CCS withheld statutory deductions from Ringland's pay and remitted them to Revenue Canada on Ringland's behalf;
- CCS paid the employer's share of the statutory remittances required by Revenue Canada;
- CCS issued Ringland an annual T-4 statement;
- CCS kept no daily records of the hours worked by Ringland;
- Ringland kept records of daily hours worked from Jul. 19, 1994 to Oct. 19, 1994;
- Ringland filed a complaint alleging he was owed overtime wages, annual vacation pay, statutory holiday pay and compensation for length of service;

The delegate of the Director investigate the complaint and determinate that Ringland was an employee and further that Ringland was owed wages for overtime, annual vacation pay, statutory holiday pay and compensation for length of service.

EVIDENCE

Carl Szydlik ("C.Szydlik") testified and stated that:

- he is a director/officer of CCS;
- he has been in the logging business since 1956;
- CCS had a contract with Northwood Pulp & Timber Ltd. ("Northwood") to harvest and deliver logs to Northwood operations;

- CCS is what is commonly referred to as a “stump to dump” contractor in that CCS looks after all aspects of harvesting from falling to delivery to the mill;
- he feels that Ringland is an independent contractor because Ringland supplies own tools, vehicle and is paid by cu. metre of wood;
- he believes that the rate of pay was negotiated prior to each season;
- Ringland was paid based on the cut off period of the mill where the wood was delivered;
- the Northwood mill with which CCS has the contract for “stump to dump” usually tells CCS when to start logging and when to stop;
- the decision of when to start/stop is based on the conditions in the woods;
- the usual period of work is from “break up to freeze up”;
- he hired Ringland on the basis of working from “break up to freeze up”;
- this period is generally March to October, although on some occasions work continued into November;
- he feels that the “break up to freeze up” period is a clear definite term;
- some employees were kept on by CCS after the logging season to work on the farm owned by CCS but Ringland never was;
- some employees were kept on by CCS after the logging season to do mechanical work on equipment in the shop;
- CCS never paid for any expenses incurred by Ringland;
- most of the work by CCS in the period July 1994 to March 1995 was in a remote location across Babine Lake;
- everyone traveled across Babine Lake on a barge which only operated from Monday to Friday;
- CCS had a feller buncher, a skidder and 2 buckermen at the worksite;
- Ringland worked with another buckerman, Paul Perry (“Perry”) during the time period in question;
- Perry is an independent contractor;
- Perry and Ringland would each get paid for 50% of the volume of wood bucked;
- he personally visited the worksite from time to time;
- the only direction given to the workers was where to harvest and what lengths to buck the log to;
- workers stayed in camp and paid for camp costs;
- Ringland would contact C.Szydlik during layoff periods and ask when work was going to be available;
- Ringland and Perry hired on the same basis of break up to freeze up;
- if Ringland was not able to work because of illness, he would not get paid as no wood was being bucked;
- Ringland could do the same work for someone else when he was not working for CCS;
- Ringland was free to go and work for someone else if he chose to do so;
- if Ringland were an employee, he would have been paid at an hourly rate, not based on volume;

- he believes he told Ringland during the period Nov. 1994 to Mar, 1995 that CCS was going to purchase a wood processor, a piece of equipment which would eliminate the need for a buckerman;
- he feels that the work performed by Ringland “wasn’t bad”;
- it is the standard in the logging industry for buckermen to supply their own vehicles, power saws and supplies.

In response to questions on cross examination from Ringland, C. Szydlik stated:

- it is possible that on 3 Sundays the crew went across Babine Lake to preload trucks;
- he doesn’t recall working Saturdays at the Emerson worksite, although it is possible that the bunchers did so to stay ahead of the rest of the crew.

In response to questions on cross examination from the delegate of the Director, C. Szydlik stated:

- some of his workers were employees and others were independent contractors;
- Perry and Ringland each got a cheque for 50% of the wood bucked and it would not have worked out if one was an employee and the other a contractor;
- the buncher operator, skidder operator and loader operator were all on contract;
- once employees finished logging and they continued to work either at the shop or the farm, they reverted to hourly rates of pay;
- the logging equipment is owned by CCS.

Nancy Szydlik (“N. Szydlik”) testified and stated that:

- she is the bookkeeper for CCS and as such was responsible for the payroll;
- CCS is one of the contractors for Northwood;
- Ringland never worked longer than 6 consecutive months;
- Ringland has worked for others when there was no work at CCS;
- Ringland would call to say he was available for work;
- Northwood sets out the rates and suggests roughly what we should pay our sub-contractors;
- she and Ringland agreed that his rate would include 6% to cover annual vacation pay and statutory holidays;
- Ringland told her he wanted to be a contractor but he had trouble handling his money so asked her to take statutory deductions off on each pay;
- Perry did not have statutory deductions taken from his pay;
- CCS did not pay GST to Ringland;
- the amount of money paid to Ringland and Perry for bucking was based on the weigh scale slips when the wood was delivered;
- Ringland did not submit his hours on a daily or weekly basis except on one occasion when he was involved in firefighting;

- if Ringland was on an hourly rate of pay he would have gotten approximately \$18.00 per hour;
- she recalculated his payroll on the basis of \$18.00 per hour and added the appropriate overtime rates and it is clear that if Ringland were to be considered an employee, he was grossly overpaid;
- the rate paid to Ringland was to include all of his costs, vehicle fuel, insurance, repairs, power saw fuel and repairs;
- CCS paid for WCB coverage for Ringland;
- other contractors who paid for their own WCB premiums got an additional 10% while Ringland only got the 6%;
- C. Szydlik took the paycheques out to the woods on payday and distributed them to all workers;
- Ringland requested statutory deductions be made so he could collect UIC (“Employment Insurance”) between logging seasons;
- employees were hourly paid and contractors paid by volume. all the logging contractors did it this way;
- only employees submitted time sheets;
- CCS bought the ‘camp’ in 1994;
- Tony Wall sometimes worked 10 hour days.

In response to questions on cross examination by the delegate of the Director, N. Szydlik stated:

- the skidder operator, Tony Wall, was employed on an hourly basis and provided time slips as required;
- Ringland got paid on his production;
- Ringland’s rate was set by CCS based on the suggestions by Northwood that certain portions of the work or certain pieces of equipment would be worth so much;
- CCS was paying what other contractors were paying;
- CCS paid the employer’s share of C.P.P. and E.I. premiums, however, CCS did not lower Ringlands base rate as a result of this;
- Perry was also paid GST on top of his 1/2 share.

Perry testified and stated that:

- he worked for CCS for about 12 years on a seasonal basis as a buckerman, faller and equipment operator;
- the time he worked with Ringland, he was a buckerman;
- the normal work week was Monday to Friday and workers stayed in camp;
- he traveled back and forth to the worksite in his own vehicle;
- work would start by 7:00 a.m. or 7:30 a.m. and continue until dark;
- they did not work at night;

- every truckload of wood that went into the mill got a scale slip and based on that volume, he and Ringland got 50% each;
- they got paid whenever the mill cut off period was;
- no one told us what to do on a day to day basis, we had a job to do and did it;
- Ringland and he used their own saws, fuel, vehicles;
- doesn't recall working on any weekends;
- never worked on any statutory holidays;
- it was common to be paid on a production or volume basis;
- workers are usually called contractors;
- he never had any statutory deductions taken from his pay;
- he had his own GST Number;
- Ringland was a contractor the same as Perry was;
- if a day's work was missed it was no big deal as they got paid based on volume;
- it was our job to do the bucking and it was up to us how we did it;
- if we worked hard we could earn more;
- usually worked from freeze up to break up ;
- he would usually go to work elsewhere when the logging season ended;

In response to questions on cross examination by Ringland, Perry stated:

- there were the odd occasions when work was done using the lights from a pick up or a loader;
- they probably worked the odd Saturday on the Emerson worksite.

In response to questions on cross examination by the delegate of the Director, Perry stated:

- CCS would tell him what the rate was before he started working;
- the rate was always split with Ringland;
- for the last couple of years he has been working for CCS on a day rate basis, but still as a contractor;
- he could have had someone else do his work in his place if he had found a dependable person.

Tony Wall ("Wall") testified and stated that:

- he is currently operating the log processor for CCS but had previously operated skidder;
- he is a year round hourly paid employee of CCS;
- he submits his hours weekly;
- he often rode in Ringland's vehicle to and from the worksite;
- Ringland was usually at the worksite by daybreak;
- Ringland did not have any company name on his vehicle;
- it was common knowledge that Ringland was a contractor;

- he did have statutory deductions taken from his pay.

In response to questions on cross examination by the delegate of the Director, Wall stated:

- Ringland was usually at the worksite by daybreak, earlier in the summer and later in the winter;
- the difference between an employee and a contractor is the method of payment, employee gets paid by the hour and a contractor gets paid on production.

Art Anderson (“Anderson”) testified and stated that:

- he has worked for CCS for the last 10 years;
- he has his own incorporated company;
- he has worked with Ringland;
- he provided a feller buncher to CCS under contract until CCS bought their own feller buncher;
- he now operates the feller buncher for CCS under contract;
- he was usually the first worker at the worksite and the last to go home;
- the longer he worked the more wood was cut down the more money he made;
- Ringland and Wall usually left the worksite before he did each day;
- it was common knowledge that Ringland was a contractor;
- CCS never told us we would be back the next season, we just perceived that;
- he doesn’t recall Ringland working more than 6 consecutive months;

In response to questions on cross examination by Ringland, Anderson stated:

- when the trucks came in to get loaded, the buckermen would be there to trim the loads to ensure high quality standards were maintained;
- where he operated the feller buncher was at the back of the block and he could not see the landing where the buckermen worked, although he could hear the radio;
- sometimes Ringland was late for supper in the camp;
- the summertime was tough as more hours were put in because of the extra daylight hours;
- he worked some Saturdays and Sundays at the Emerson worksite;
- the camp cookhouse was open at 4:30 a.m. but a person could get in by 4:00 a.m. and have cornflakes or make toast etc.

In response to questions on cross examination by the delegate of the Director, Anderson stated:

- he understands a contractor as someone who supplies his own vehicle, equipment etc. and is paid by volume;

- he worked on the farm for CCS during the off season and was paid on an hourly basis to his company;

Ringland testified and stated that:

- he was always an employee and never a contractor;
- he was paid as an employee and issued ROE's and T-4's;
- he kept his time on a calendar when they were working across Babine Lake;
- he worked more than 8 hours per day on a fairly regular basis;
- it was not uncommon to work using the lights from pick ups or the loader.

In response to questions on cross examination by counsel for CCS, Ringland stated:

- he worked with Perry and they split the production;
- no one was there to tell them how to do the job, that's what they were hired to do;
- if CCS wanted them to use a specific landing, C. Szydlik would tell them;
- everybody worked together to harvest the timber;
- others were paid on hourly, volume or day rate basis;
- he did not tell N. Szydlik that he wanted to be a contractor;
- the reason he got paid the way he did was because that was the way that CCS wanted it to be;
- he doesn't recall N. Szydlik's comments about it being up to his conscience to apply for UIC;
- he doesn't recall the conversation about the extra 6% being for annual vacations and statutory holidays;
- he doesn't recall being paid annual vacation pay;
- he was never offered work at the shop or on the farm over the summer;
- his calendar notations with respect to hours of work were made each day as they were worked;
- he only kept records of hours while at camp;
- he was at work every day that work was able to be performed;
- he is currently working as an employee at Northwood sawmill;
- he worked by using the headlights of the pick up or loaders on many occasions.

In response to questions on cross examination by the delegate of the Director, Ringland stated:

- the rate of pay was set by CCS;
- he doesn't recall any conversation with N. Szydlik about the 6% extra for vacations and stats;
- he was told if he did not like the rate he could go somewhere else;

- when he was working at the Emerson worksite, he was the only buckerman so he got 100% of the volume rate.

SUBMISSIONS OF THE PARTIES

The parties were invited to make submissions on the application of Section 128 (3) and Section 4 of the *Act* with respect to the matter under appeal.

Section 128(3) and Section 4 provide :

128. (3) If, before the repeal of the former Act, no decision was made by the director, an authorized representative of the director or an officer on a complaint made under that Act, the complaint is to be treated for all purposes, including section 80 of this Act, as a complaint made under this Act.

Section 4, Requirements of this Act cannot be waived

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.

Counsel for CCS submits that with respect to Section 128 (3), the position of CCS is that while the complaint is to “be treated for all purposes, including section 80 of this *Act*, as a complaint made under this *Act*”, the remedy doesn’t follow. In the case at hand, there is no evidence that Ringland worked 6 consecutive months.

Counsel for CCS submits that with respect to Section 4, the position of CCS is that this section does not do anything to determine if Ringland was an employee or contractor.

The delegate of the Director shares the view of CCS counsel with respect to Section 128 (3) however, he is of the view that Ringlands period of employment was not interrupted by the periods of temporary layoff.

The delegate of the Director had no submission with respect to the application of Section 4 to this appeal.

Counsel for CCS submits that Ringland was not an employee and is not entitled to the benefits of the *Act*. The badges of independent contractorship are present. The only thing that indicates otherwise is the tax arrangement between the parties. UIC/PPP/employee remittances, Separation Record and lack of GST paid.

Counsel for CCS further submits that the remaining badges are sufficient inspite of the above to weight the scale to the independent contractor side.

- a) **control** - worked independently at his own rate;
- b) **ownership of tools** - all tools needed to work were owned by him, truck, chainsaw, tools, radios and he paid the expenses for fuel, repairs etc. He transported himself to worksites;
- c) **risk of profit** - worked harder paid more;
- d) **risk of loss** - not work not paid - ie sick etc.; risk of breakdown of own equipment.

In addition he:

- a) negotiated his rate and the time he worked;
- b) discussed deductions from his pay
- c) was paid on production;
- d) was paid when the wood crossed the scales;
- e) regular cutoff times applied;
- f) was free to work anywhere else and was never invited to work year round as other hourly employees were.

Counsel for CCS further submits that on balance, Ringland was an independent contractor and not an employee. Counsel invites the Tribunal to consider Weibe Door and Montreal for law that applies. The whole of the relationship must be examined. Counsel also included summaries of tax cases for consideration.

Alternatively, Counsel for CCS submits that if Ringland is an employee, he is excluded from severance benefits as he did not work for 6 months and he was hired for a definite term. Counsel for CCS further submits that the *Act* does not say hired to a definite date, rather it says definite term. Term is defined not by dates but by the happening of an event. In this case weather determines the “term” and is the industry standard.

Counsel for CCS further submits that the fact that Ringland never claimed for severance in the past is consistent with him being a contractor.

Counsel for CCS further submits that vacation pay was included in the rate negotiated and it would be patently unfair to force the employer to pay it twice.

Counsel for CCS further submits that Ringlands records with respect to statutory holidays are unreliable and should not be considered.

Counsel for CCS further submits that if any amount is found to be owing from the Company to Ringland, it should be set off against the overpayment to him.

Counsel for CCS finally submits that the onus of proving his entitlement to benefits is on the employee on the balance of probabilities. The *Act* only imposes the burden of proof on the Employer when dealing with pregnancy or age (Section 126). Ringland has not met that burden.

The delegate of the Director submits that Counsel for CCS is correct when he characterizes the actions of CCS as being consistent with the standard in the industry, however, that does not mean that the actions are correct. The industry appears to operate under the misconception that merely by paying someone on the basis of production or volume, somehow makes that person an independent contractor.

The delegate of the Director further submits that all the indicators in this appeal clearly point to Ringland being an employee.

The delegate of the Director finally submits with respect to the “definite term” issue, that the intent of this is the requirement to have a start date and an end date. The delegate of the Director invites the Tribunal to consider Section 65(3) where employees under a collective agreement who are laid off on a seasonal basis are excluded from the provisions of Section 63, compensation for length of service and find that this clearly expresses the intent to not exclude all seasonal employees, only those covered by a collective agreement.

ANALYSIS

The delegate of the Director determined that Ringland was an employee. As a consequence of that determination, Ringland became entitled to certain statutory benefits provided for in the *Act*. The burden of establishing that the delegate of the Director erred in the Determination rests with the appellant, in this case, CCS.

The issue of whether a person is an employee or an independent contractor is often difficult to determine especially in the absence of any written agreement which sets out the terms and conditions.

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 Section 4 of 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 - CCS offered Ringland employment as he was 'hired' each season. There was no evidence of any 'bids' being solicited by CCS from a number of independent contractors to do the bucking work performed by Ringland.

Dismissal - CCS issued a ROE at the conclusion of each logging season indicating that Ringland was laid off due to shortage of work.

Method of Work - CCS, under its contract with Northwood, determined which areas were to be harvested at which time, what lengths the logs were to be bucked to and instructed Ringland accordingly.

Remuneration - The evidence of N. Szydlik was that Northwood suggested the rates to be paid for the various function of a "stump to dump" operator and CCS paid those rates to Ringland.

Clearly, in the case at hand, CCS obtained the "stump to dump" contract from Northwood and determined where, when and how the work was to be done by Ringland. The fact that Ringland was paid on the basis of volume of production does not, in and of itself, make him an independent contractor. Many employees in the forest industry are remunerated by a number of different incentive or production based methods. CCS clearly treated Ringland as an employee by paying for the WCB coverage, by taking statutory deductions from his pay, by issuing ROE's and T-4's, all of which are not required if a person is an independent contractor.

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

Clearly, in the case at hand, Ringland was responsible for bucking the logs after the logs had been harvested by CCS and ensuring that the end product met the specifications determined by CCS prior to the wood being transported to the mill. Ringland was an integral and important part of the chain in the "stump to dump" operation of CCS. Ringland did not have any markings on his vehicle nor did he operate in any way which might distinguish him from an employee of CCS such as Tony Wall. An ordinary person would certainly be of the view that Ringland was an employee of CCS.

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

In the case at hand, Ringland had no risk at all. Ringland takes no financial risk, has no liability regarding the business of CCS and has an on-going, indefinite term relationship with CCS. Ringland ventured no capital investment into CCS and can expect no return for profit. Ringland's only option to increase his earnings were by virtue of working more to be paid more.

Ringland did provide and maintain his own vehicle and powersaws, however, there was no evidence provided with respect to the value of the vehicle and the tools so I am unable to determine whether this investment was "substantial".

The evidence was that Ringland had worked for CCS during the logging season on an ongoing basis for a number of years. The relationship between Ringland and CCS would be considered as permanent in the context of the seasonal nature of the logging industry.

With respect to "diversity", there was no evidence of Ringland 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 Ringland is simply required to provide general efforts on behalf of CCS through his bucking activities.

A review of the Specific Result Test as it relates to this case involves two criteria;

1. **Specific Work** - if Ringland is an independent contractor, it is agreed that certain specific work would be done for CCS. Conversely, in an employee/employer relationship, Ringland agrees to provide labour and services for CCS.
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, Ringland personally provided the labour and services relating to provision of bucking logs for CCS. CCS alleges that Ringland could have 'hired' someone to perform the work on his behalf although there was no evidence that this was ever done.

If Ringland 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 services related to bucking logs to the lengths determined by CCS at a location determined and provided by CCS.

Based on the evidence provided and on the balance of the probabilities, I conclude that Ringland was an employee of CCS.

With respect to the issue of annual vacation pay and statutory holiday pay, Section 28 (1) of the *Act* requires an employer to keep certain records, among which are records in regard to annual vacations and statutory holidays. The provisions of Section 28 (1) state:

28. (1) For each employee, an employer must keep records of the following information:

- (a) the employee's name, date of birth, occupation, telephone number and residential address;*
- (b) the date employment began;*
- (c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;*
- (d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;*
- (e) the benefits paid to the employee by the employer;*
- (f) the employee's gross and net wages for each pay period;*
- (g) each deduction made from the employee's wages and the reason for it;*
- (h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;*
- (i) the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;*

(j) how much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken.

There were no records kept by CCS with respect to annual vacations and statutory holidays pursuant to Section 28 of the *Act* in regard to Ringland.

In the absence of any records, I conclude that Ringland is entitled to annual vacation pay and statutory holiday pay as calculated by the delegate of the Director and set forth in the Determination.

There were no records kept by CCS with respect to the daily hours worked by Ringland pursuant to Section 28 of the *Act*. Ringland provided some record of hours worked. The evidence indicates that Ringland worked from daybreak to dark and given that duration of time it is certainly probable that hours in excess of 8 in one day were worked by Ringland.

In the absence of company records or contrary compelling evidence, I conclude that Ringland is entitled to be paid for the overtime hours worked as calculated by the delegate of the Director and set forth in the Determination.

Section 63 of the *Act* contains the liability of an employer to pay compensation for length of service. That liability may be discharged under a certain number of circumstances such as retirement, dismissal for just cause, voluntary termination, etc. Furthermore, Section 65 provides for exceptions to the liability of an employer to pay compensation for length of service. The relevant portions of Section 65 state:

Section 65, Exceptions

65. (1) Sections 63 and 64 do not apply to an employee

....

(b) employed for a definite term,

(c) employed for specific work to be completed in a period of up to 12 months,.....

(2) If an employee who is employed for a definite term or specific work continues to be employed for at least 3 months after completing the definite term or specific work, the employment is

(a) deemed not to be for a definite term or specific work, and

(b) deemed to have started at the beginning of the definite term or specific work.....

(3) Section 63 does not apply to

....

*(b) an employee covered by a collective agreement who
(i) is employed in a seasonal industry in which the practice is to lay off employees every year and to call them back to work,
(ii) was notified on being hired by the employer that the employee might be laid off and called back to work, and
(iii) is laid off or terminated as a result of the normal seasonal reduction, suspension or closure of an operation.....*

It is clear, in my view, that the meaning of the phrase ‘definite term’ in Section 65(1)(b) when taken in context with the purposes of the *Act* and in conjunction with the wording of Section 65 (2), the only reasonable conclusion is that ‘definite term’ must have a start date and an end date, otherwise, when would the clock start to tick to begin to count the 3 months extension of such a ‘definite term’ as permitted by Section 65(2).

The transitional provisions of Section 128 (3) clearly require the subject matter of this appeal to be treated in **all** respects as a complaint under this *Act*, even though the period of employment in this complaint was completed while the former Act was in force.

Pursuant to Sections 128 and 63 of the *Act*, Ringland would have been entitled to 2 weeks compensation for length of service or **written** notice in lieu thereof. There was no evidence that Ringland was given **written** notice that his employment would be terminated.

Based on the evidence provided and on the balance of probabilities, I conclude that Ringland is entitled to 2 weeks compensation for length of service in the amount as calculated by the delegate of the Director and set forth in the Determination.

For all of the above reasons, the appeal by CCS is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated April 14, 1997 be confirmed in the amount of \$11,709.88

Hans Suhr
Adjudicator
Employment Standards Tribunal

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