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 -

Charles Montana
("Montana")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	David B. Stevenson
FILE No.:	2000/540
DATE OF HEARING:	November 17, 2000
DATE OF DECISION:	December 6, 2000

DECISION

APPEARANCES:

on behalf of Charles Montana: Charles Montana

on behalf of the individuals: in person

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Charles Montana ("Montana") of a Determination which was issued on July 14, 2000 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Montana had contravened Section 17(1), 21(1), 40(2) and 58(1) of the *Act* in respect of the employment of Robert Cristescu ("Cristescu") and Stefan Grecu ("Grecu"), and ordered Montana to cease contravening and to comply with the *Act* and to pay an amount of $5,031.91.

Montana has appealed the Determination on the grounds that Cristescu and Grecu were not his employees, but were independent contractors working for Port Clements Wood Products Ltd. ("Port Clements"), through Charles Montana Contracting.

ISSUE

The issue in this appeal is whether the Determination correctly concluded that Cristescu and Grecu were employees for the purposes of the *Act*.

THE FACTS

The Determination notes the following background:

> Cristescu and Grecu were employed by Charles Montana (Montana) on the Queen Charlotte Islands in the spring of 1999. Cristescu and Grecu were employed as shake block cutters on a piece rate system.

Port Clements is a shake and shingle manufacturer. It has the right to salvage wood in TFL 39 for its cedar shake and shingle operation in Port Clements, B.C. Montana sub-contracts from Port Clements to salvage wood in that area. The arrangement between Montana and Port Clements is evidenced by a rather brief document identified as a "Shake & Shingle Sub Contractor Contract". Montana testified that he, in turn, sub-contracts with several people to do the salvaging work. These people are called "shakers". No such contract existed between Montana and Cristescu and Grecu. Montana said his main responsibilities were to supervise the salvaging work being done in TFL 39 (including assigning the shakers to work in designated

areas within TFL 39), to ensure Workers Compensation rules are followed and to ensure the Forest Practices Code is followed.

Briefly, the process for salvaging the wood involves the shakers locating salvageable cedar logs, cutting those logs into 18" or 24" blocks, putting the blocks into slings (if the logs are not cut on the road), where they are picked up by helicopter and transported to a roadside location. Once the helicopter has moved a sufficient number of blocks to the roadside, a crew travels the road in a truck, loads the blocks onto the truck, does a preliminary count of the volume of wood loaded at each location and transports that wood to the Port Clements mill. At the mill a more specific count of the volume of wood is made, the load is valued and payment is made to Montana.

Cristescu and Grecu had no experience as shakers. They heard there was work available in Port Clements and they contacted Montana. They were told a bit about the work and what they would be paid. They went to Port Clements on the basis of telephone discussions with Montana. They had no gear or equipment. Montana purchased the necessary gear and equipment and spent about a week training them. Cristescu and Grecu worked as a team from approximately March 29, 1999 to April 30, 1999. They left Port Clements on or about May 10, 1999.

ARGUMENT AND ANALYSIS

Montana says Cristescu and Grecu were independent contractors, not employees. The appeal sets out the following points:

1. Montana is not responsible for hiring the shakers. Port Clements performs that function, although Montana acknowledges he has provided input into their decision.

2. The method of work is determined by the shakers in their own discretion, provided they adhere to the Forest Practices Code Regulations and other guidelines established by Port Clements.

3. Remuneration is determined by Port Clements.

4. The control exercised by Montana over the work activities of Cristescu and Grecu was limited to ensuring they stayed within contract areas, adhered to the Forest Practices Code Regulations and to pass on mandates from Port Clements.

5. Shakers are only paid full rate for blocks cut out at 5 square to the block minimum. Blocks smaller than the minimum standard are substandard and payment for substandard blocks are prorated based on the cut out of the block. Accordingly, Cristescu and Grecu took the financial risk if they cut substandard blocks.

6. Shakers are supposed to provide all their own gear and equipment and to ensure it meets WCB standards. Cristescu and Grecu, while they did not have their own equipment and it was provided by Montana, agreed to pay back the cost of this gear and equipment.

7. Cristescu and Grecu could have provided the same service to any other party without seeking permission from or notifying Montana.

8. The work performed by Cristescu and Grecu was not integral to the business of Montana.

In my view, Montana has not satisfied the burden of showing Cristescu and Grecu were not employees for the purposes of the *Act*.

The *Act* defines employee, employer and work:

> *"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;*
>
> *"work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.*

The difficulty for Montana in this appeal is twofold. First, the arguments outlined in the appeal are not supported by the evidence. There is no evidence that Port Clements had anything to do with the hiring of Cristescu and Grecu. Mr. Bruce Brown, a principal of Port Clements, gave evidence on behalf of Montana. In the course of his evidence he said that Montana had hired the two individuals. I do not accept that Montana' s role was limited in the manner described in the argument. The evidence was that Montana trained the Cristescu and Grecu in the requirements of the job. Montana assigned them to the area in which they were required to work. He coordinated the gathering of the blocks that had been cut by Cristescu and Grecu.

On the face of the material, the right to salvage cedar in TFL 39 belonged to Montana. He had contracted with Port Clements for the right to do that work and, presumably, for the amount he would receive for the blocks that he could deliver to Port Clements. Cristescu and Grecu could not sell the blocks they cut to any other person for a better price. They had no control of the price that Port Clements paid to Montana. They were told by Montana how much they would be paid for their work. Their wages were based on a piece rate and on the quality of the blocks they cut. They had no control over either. The obvious fact that a piece worker can earn more money by increasing his or her production is irrelevant to whether they are an employee under the *Act*,

which clearly contemplates persons covered by its provisions can be paid wages based on a piece rate.

Neither Cristescu and Grecu had any financial investment in their work. All of the gear and equipment required for the work was bought and paid for by Montana. Even if, as Montana said in the appeal, "it is standard . . . that [cutters] provide their own equipment", that fact is not inconsistent with employment status under the *Act*. There are many employees who bring either all or some of their own tools to the job. On the facts, Cristescu and Grecu did not bring or own any of the gear or equipment required for their particular work. Further, in this case, some of the equipment essential to the business and which was required and used for key aspects of the work - a helicopter, slings, one or more lift trucks - were not brought to the enterprise by Cristescu and Grecu nor did they have any financial responsibility for that equipment.

The second difficulty for Montana is that the definitions of *"employee"* and *"employer"* quite comfortably define the relationship between he and Cristescu and Grecu. In an early decision of the Tribunal, *Re Barry McPhee* (BC EST #D183/97), the following observations were made at page 5:

> 1. The definition of "employer" under the Act is not confined to traditional concepts identifying the master/servant relationship under the common law. It is cast in sufficiently broad terms to allow the purposes of the Act to be realized and should be given a liberal interpretation. . . .
>
> 2. The definition of "employee" is also stated in broad terms and indicates an intention by the legislature to cast the statutory net of the Act as far as the its purposes, governed by some rational limitations, will justify. We note in this context a key purpose of the Act is to ensure the basic standards of compensation and conditions of employment are received by employees.

The Tribunal also observed that:

> The Act exists, in large part, for the benefit and protection of employees who otherwise have no control over decisions of their employer about the terms and conditions under which they will be employed. A key purpose is to ensure the application of minimum standards of compensation and conditions of employment, including hours of work, overtime pay, leaves of absence, annual and statutory holidays and holiday pay and length of service compensation for termination without notice, for those employees.

The *Act* is remedial legislation and, as such, is given such large and liberal interpretation as will best ensure the attainment of its purposes and objects. Section 2 of the *Act* sets out its purposes, one of which is to *"ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment"*. In *Machtinger v. HOJ Industries Ltd.* (1992) 91 D.L.R. (4th) 491 (S.C.C.), the court noted that:

> . . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extend its protection to as many employees as possible is favoured over that does not.

When the above definitions are taken, in their entire context, and considered in a manner that is consistent with their grammatical and ordinary sense, with the scheme of the Act, the object of the Act and the intention of Parliament the circumstances of the case compel a conclusion that Cristescu and Grecu were, during the relevant period, employees of Montana. The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination, dated July 14, 2000, in the amount of $5,031.91 be confirmed, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson

David B. Stevenson
Adjudicator
Employment Standards Tribunal