

An appeal

- by -

Future Safe Construction Limited
(the "Appellant")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Wayne R. Carkner

FILE No.: 2001/525

DATE OF HEARING: November 30, 2001

DATE OF DECISION: December 20, 2001

DECISION

This decision is based on extensive written submissions from all of the parties as well as oral evidence and argument provided by both the Appellant and the Respondent.

APPEARANCES:

For the Appellant	Oliver Hui, Counsel for the Appellant (“Counsel”) Volker Wolfe (“Wolfe”)
For the Respondent	Gudrun Schmidt (“G. Schmidt”) Josef Schmidt (“Schmidt”)
For the Director	No Appearance

OVERVIEW

This is an application by Future Safe Construction Limited pursuant to Section 115 of the *Employment Standards Act* (the “*Act*”) of a Determination issued by the Director of Employment Standards (the “Director”) on June 29, 2001. The Determination concluded that Schmidt was an employee for the purposes of the *Act* and found that the Appellant had contravened Sections 34, 36, 44, 46 and 58 of the *Act*. The Determination ordered the Appellant to pay as a remedy, including interest accrual pursuant to Section 88 of the *Act*, the amount of \$5,526.21.

ISSUES

1. Was the Respondent an employee as defined by the *Act*?
2. If the Respondent is found an employee as defined by the *Act* is he entitled to wages for overtime pay, statutory holiday pay and/or annual vacation pay?
3. If the Respondent is entitled to wages for overtime pay, statutory holiday pay and/or vacation pay did the Director make a proper calculation in determining the remedy ordered?

FACTS AND ANALYSIS

Counsel for the Appellant asserts that Schmidt was an independent contractor, not an employee as defined under the *Act*. Counsel further asserts that if the Tribunal finds that Schmidt is found to be an employee as defined by the *Act* then the Director has erred in calculating overtime pay, statutory holiday pay and/or vacation pay. The burden of proof falls to the Appellant to show that the Director has erred in conclusions reached in the Determination and bears the onus to show that the calculations were incorrect.

The Appellant operates Sintich trailer park; which is a combined year round Mobile Home Park and a recreational vehicle park, primarily during the summer months, April through September. Schmidt and G. Schmidt signed a contract as the principals of Nurjo Enterprises with the Appellant on December 15, 1996. The contract outlined that Nurjo would provide the services of “cleaning duties, snow removal, office work, yard work, etc”. Payment to Nurjo for these duties was \$800.00 per month from October to March of each year and \$1600.00 per month from April to September of each year. These amounts were increased unilaterally, by the Appellant, to \$1450.00 and \$2250.00 respectively. No new contract was entered into to reflect these increased amounts. The Schmidts worked at the park from December 15, 1996 until October 31, 1999.

Counsel submitted that Schmidt was an independent contractor. The house that was supplied to Schmidt, at a cost, contained a vacuum cleaner, a sewing machine and material for curtains, a broom and a personal computer. Counsel asserted that these were tools showing that Schmidt was an independent contractor and these tools were required for operating a business. The Director argued that these items were present in Schmidt’s residence and are normal household items and do not constitute tools provided by an independent contractor. I concur with the Director. These items constitute normal household items.

Wolfe provided testimony on behalf of the Appellant. He testified that Schmidt provided hand tools and an air compressor to perform the tasks that the contract called for. Schmidt testified that tools were provided but he chose to utilize his own for convenience and efficiency. The Director also concluded this in the Determination. No credible evidence was provided to show that the Director erred in this finding of fact.

Counsel submitted that as Schmidt used his van to store tools and move them around the mobile park that this constituted a contractor utilizing equipment to fulfill the contractual commitments. I do not find this very compelling evidence. I must conclude that, on a balance of probabilities, the van was utilized for convenience.

Counsel submitted that Nurjo Enterprises supplied two cellular phones, had an Email address and a 1-800 number. Regarding the cellular phones, these phones are a common everyday tool utilized by businesses and individuals alike. The fact that the Schmidts had them gives no credibility to the assertions that Schmidt is an independent contractor. Schmidt has never denied that he was a principal in Nurjo Enterprises, hence the Email address and the 1-800 number.

Schmidt asserted that his relationship with the Appellant was one of employer/employee and not as an independent contractor, Schmidt asserted that initially the intention was to be an independent contractor however the relationship changed and he was required to take instructions from Wolfe and was required to get permission to get time off. Wolfe testified that Schmidt had control of his own hours and was free to work when he wanted. However the evidence showed that there was a requirement for the Schmidt’s to be present at the site to check in RVs in the summer and maintain the site in the winter. In Schmidt’s submission this was not an independent contractor relationship.

Wolfe testified that the Schmidts were free to hire anyone to perform their duties, however the only evidence of this being done was when the Schmidts wanted their daughter to cover for them so they could have time off. Wolfe would not allow it as Schmidt's daughter had a baby and the park had age restrictions.

Counsel argued that *Horwath*, BC EST #D148/96, is a like case and applies in this instance. With respect, I must disagree. In the determination the Director outlined all the tests, included in *Horwath*, involved in determining whether or not Schmidt was an employee under the *Act*. In *Horwath* the adjudicator came to the conclusion that the principal there was an independent contractor based on different facts. The Director went into extensive detail in applying these tests to the case at hand and in every instance concluded that Schmidt was an employee as defined by the *Act*. No submissions or evidence were presented that contradicted the analysis provided by the Determination.

Based on the forgoing I must conclude that the director reached a proper conclusion finding that Schmidt was an employee as defined by the *Act*,

Turning to the calculation issue, Wolfe testified that there could be no overtime issues as the duties were not fulltime duties and the Schmidts could schedule around statutory holidays and weekend work.

Two witnesses were called by Schmidt. Maurice Gannon resided at the mobile home park. He testified that there were office hours in the morning and in the late afternoon seven days a week. He testified that he saw Schmidt performing duties on a regular basis. He also testified to the busy time of year when RVs could check in at any time during the day.

The second witness was Rod Steck, a friend of Schmidt's and a constable in the RCMP. He testified to the busy RV business in the summer months as, in the course of his duties, he drove by the site every shift. He also testified that Schmidt told him he could not get time off to perform recreational activities together as he (Schmidt) was required to be at the site. Schmidt testified that he provided coverage seven days a week.

I am satisfied that, based on the evidence, Schmidt was required to work seven days a week and that the Director reached a proper conclusion that Schmidt was entitled to a minimum day for each day worked as neither party had maintained credible records as to the hours worked. Reviewing the calculations I find that the Director has properly calculated the remedy for Schmidt.

CONCLUSIONS

I find that the Appellant has not met the burden of proof to show errors in the Determination

I find that the Respondent was an employee as defined in the *Act* and is entitled to overtime pay, statutory holiday pay and vacation pay.

I further find that the calculations of remedy were performed properly.

ORDER

Pursuant to Section 115 of the *Act* I order that the Determination dated June 29, 2001 be confirmed.

Wayne R. Carkner
Adjudicator
Employment Standards Tribunal