

**EMPLOYMENT STANDARDS TRIBUNAL**  
In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act*

- by -

John Wesley Warbrick  
("Warbrick")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Norma Edelman

**FILE NO.:** 95/022

**DATE OF HEARING:** February 14, 1996

**DATE OF DECISION:** March 4, 1996

## DECISION

### APPEARANCES

John Wesley Warbrick (“Warbrick”), the Appellant  
Jean Sickman (“Sickman”), partner of Warbrick  
Nupar Talwar, Delegate of the Director of Employment Standards (the “Delegate”)  
Malcolm Llewellyn (“Llewellyn”), the Other Party

### OVERVIEW

This is an appeal by Warbrick pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against Determination No. CDET 000194 issued by the Director of Employment Standards on November 24, 1995. The Determination was issued following a complaint by Llewellyn that he was owed wages by Warbrick. In this appeal Warbrick claims that Llewellyn was not an employee under the *Act*.

This appeal was conducted by way of a hearing which was held at the Tribunal’s offices on February 14, 1996.

### FACTS

Warbrick owns a truck. During May to June 1995, Warbrick had a contract with Ontime Transport Inc. (“Ontime”) where Ontime provided a trailer and goods were transported using Warbrick’s truck. Warbrick paid for the insurance on his truck. Ontime had the Motor Carrier License. A percentage of the money received by Ontime for transporting goods was paid to Warbrick for the use of his truck. Warbrick’s partner in this business was Sickman.

Llewellyn drove Warbrick’s truck, which had the name of Ontime on the door, from May 4, 1995 to June 27, 1995. Llewellyn worked a total of 416.25 hours during this period. He often worked in excess of 8 hours in a day. Warbrick does not dispute Llewellyn’s record of his days and hours of work.

Llewellyn’s rate of pay was \$13.00 per hour. He was paid by Warbrick and received a total of \$4,253.96 in wages. Llewellyn was not paid any overtime wages or vacation pay.

Llewellyn had an accident which resulted in damage to the trailer. Ontime charged the damage to Warbrick, who in turn, deducted the amount from Llewellyn’s wages.

### ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Llewellyn was an employee of Warbrick, and if so, what wages, if any, are owed to him by Warbrick.

## ARGUMENTS

It is the position of the Delegate that Llewellyn was an employee of Warbrick and the deduction from Llewellyn's wages was in violation of Section 21 (1) of the *Act*.

In support of her position that Llewellyn was an employee of Warbrick, the Delegate states that: a) Warbrick had a contract with Ontime and Llewellyn was hired by Warbrick to fulfill this contract; b) Llewellyn was paid by Warbrick and he only drove for Warbrick; c) Llewellyn had no opportunity to make a profit and he was in no position to suffer a loss; d) Llewellyn was controlled and directed by Warbrick (Warbrick told Llewellyn that he was to do as he was told by Ontime); and e) Llewellyn was integrated into Warbrick's business.

The Delegate calculates that Llewellyn should have been paid \$6,521.71 based on his undisputed record of days and hours of work. Llewellyn received \$4,253.96 and, therefore, he is owed \$2,267.75, which represents the unauthorized deduction, vacation pay and overtime pay.

At the hearing, Llewellyn testified he was interviewed by George Milne ("Milne"), the owner of Ontime, sometime prior to May 4, 1995, for a job as a driver. He was not hired for this job. Milne later called him, however, and said one of the trucks needed a driver and he asked if he could refer Llewellyn to Warbrick. Llewellyn agreed. He subsequently met Warbrick and Warbrick hired him as a driver.

Llewellyn said that his rate of pay was set by Warbrick. Warbrick gave him a choice of working for a percentage of the truck's earnings or being paid by the hour. Llewellyn chose to be paid by the hour and Warbrick established the rate at \$13 per hour. Pay stubs were entered which read that Warbrick is the employer and Llewellyn is the employee. The stubs also indicate that no deductions for CPP, UIC and income tax were made by Warbrick. Llewellyn stated he asked Warbrick to take these deductions off his pay, but Warbrick told him he was not allowed to do so.

Llewellyn stated that Warbrick gave him a cellular phone and a Petro Canada card (in Warbrick's name) for diesel and oil purchases. Llewellyn said that Warbrick told him to use the phone to keep in touch with the Ontime dispatcher, and if there were any problems with the truck, he was to advise Warbrick. Llewellyn stated that the cost of repairs on the truck were paid by Warbrick.

Llewellyn said that he only had one job during May to June 1995, which was driving for Warbrick, and he understood he could only work for Warbrick during this time. Llewellyn said that he never had any discussions with Warbrick about being an independent contractor.

According to Llewellyn, when he was hired, Warbrick told him he was to "... talk to (Warbrick) first, and secondly to the dispatcher at Ontime". In practice, he communicated daily with

Warbrick and the dispatcher and followed directions from both. Llewellyn said that the dispatcher told him on a daily basis where to pick up and deliver loads. Each day, he would complete a pre-trip inspection report, a time log and bills of lading. The forms were provided by Ontime and Llewellyn turned the originals in to Ontime and gave copies to Warbrick. Llewellyn said if there were any problems, such as delays, accidents or overloads, he would advise the dispatcher and Warbrick. He said if he was not able to work (which did not occur) he would have advised the dispatcher and Warbrick. He could not arrange for his own substitute or subcontract his work. Llewellyn stated that if Ontime had been unhappy with his work, then he would have expected Warbrick to discipline/terminate him, and not Ontime.

Warbrick argues that Llewellyn was not his employee.

At the hearing, Sickman and Warbrick stated that Llewellyn was referred to them by Milne. Milne told Warbrick that Llewellyn was going to call him about a job. After Llewellyn called Warbrick, the two met and Llewellyn looked over the truck. Warbrick stated he “assessed” Llewellyn and “accepted” him as a driver. They agreed on an hourly rate of pay. Warbrick stated they also agreed that Llewellyn was an independent sub-contractor responsible for his own statutory deductions.

According to Warbrick, Llewellyn worked for Ontime. Warbrick paid Llewellyn and told him to keep in contact with Ontime via the cellular phone, but he had no control over Llewellyn. Warbrick stated that the direction and control of the truck and Llewellyn was entirely in the hands of Ontime and its dispatcher. The time behind the wheel and the number of deliveries the truck made in a day were at the discretion and control of the dispatcher and Llewellyn. Ontime told Llewellyn what to do, and where, when and how to do it. Llewellyn was ultimately responsible for reporting to Ontime and not to Warbrick. Warbrick stated that he had no supervisory or disciplinary powers over Llewellyn. If Llewellyn could not work, he would have to let Ontime know. Llewellyn could not arrange for his own substitute or subcontract his work. Warbrick, however, could arrange for a substitute and had the right (just as Llewellyn had the right) to terminate their agreement. Warbrick stated that if Milne told him there was a problem with a driver, then it was his job to terminate the driver. This occurred on one occasion prior to Llewellyn working as a driver. Warbrick stated that his sole contract at the time was with Ontime and it was his job to please Ontime.

Warbrick and Sickman stated that all they did was provide a truck and keep it in working condition and tell Llewellyn to drive it safely and let them know if there was a problem. Warbrick stated that Llewellyn only told them of problems with the truck after he told Ontime. Llewellyn, in turn, provided them with his hours of work and they paid him straight time for all hours worked. Vacation pay was not paid as Llewellyn was considered to be a sub-contractor. Sickman stated that she and Warbrick kept no invoicing records. All the records were kept by Ontime. They did no bookkeeping for Llewellyn, other than write him cheques for the hours he submitted.

According to Warbrick, other factors which indicate Llewellyn was not his employee are: a) he did not provide insurance, tools, forms, or benefits to Llewellyn; b) he made no statutory deductions from his wages and did not pay him overtime wages or vacation pay; c) there was no

formal agreement between them; d) he did not provide WCB coverage for Llewellyn; e) Llewellyn performed the same work as other drivers of Ontime; f) although it was intended that Llewellyn would put in a full day driving the truck, this was controlled by Llewellyn and Ontime; g) Llewellyn was not responsible to Warbrick for his activities after work; h) Llewellyn would have had a chance of profit or risk of loss if he had chosen to be paid a percentage of the truck's earnings; i) while the work done by Llewellyn affected the payment received by Warbrick, Llewellyn's activities more appropriately relate to the business of Ontime; j) he did not require Llewellyn to wear a uniform; and k) if a customer had a problem, s/he contacted Ontime, and all payments from customers went directly to Ontime.

Warbrick stated that the money he deducted from Llewellyn's wages consisted of the cost of repairs to Ontime's equipment which was caused by Llewellyn's negligence and money for WCB payments made on Llewellyn's behalf by Ontime which Ontime had deducted from him and Sickman. Warbrick contends that if Llewellyn disputes the validity of these deductions he should take action against Ontime. According to Warbrick's calculation, the deductions amount to \$1,157.29 as Llewellyn earned  $\$13 \times 416.25 \text{ hours} = \$5,411.25$ .

## ANALYSIS

The *Act* defines "employee", "employer" and "work" as follows:

"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.

In addition to the above statutory definitions, various common law tests have been developed in order to determine whether a person is an employee. These include the "control test", which determines whether a person is subject to the control and direction of the employer in respect of the manner in which the work is to be done, when it will be done and how the employee must do it; the "four-fold test" which looks at control, ownership of tools, the chance of profit and risk of loss; and the "organization" or "integration" test which suggests that if an individual's work is an integral part of the business operations, that individual will be found to be an employee.

By applying the evidence presented at this hearing to the statutory definitions of “employer”, “employee” and “work” and to the various tests, I find, on the balance of probabilities, that Llewellyn was an employee and Warbrick his employer.

I am satisfied that Llewellyn performed labour for Warbrick and that Warbrick was in ultimate control of Llewellyn and responsible for his employment. Llewellyn was hired and paid wages by Warbrick. I accept that Warbrick set the pay rate. Warbrick retained the right to terminate Llewellyn and to find a substitute for him when he could not work. Llewellyn could not subcontract his work. Llewellyn was economically dependent on Warbrick as this was his only job at the time. Although Llewellyn received daily instructions from the Ontime dispatcher, on the whole, the foregoing factors indicate an employee-employer relationship existed between Warbrick and Llewellyn, rather than that of a sub-contractor relationship, and that Warbrick, and not Ontime, was the employer of Llewellyn.

Other elements of the four-fold test suggest Llewellyn was not a subcontractor and that he was an employee of Warbrick. Although Ontime provided various forms to Llewellyn, the principal tool, or means by which Llewellyn performed his work, was the truck, and it was provided by Warbrick. Furthermore, Llewellyn had no chance of profit or risk of loss given he was on an hourly pay rate which was established in advance by Warbrick .

Finally, I find that the work performed by Llewellyn was an integral part of, rather than incidental to, the business of Warbrick. Warbrick was in the business of providing his truck to Ontime in order that the latter could transport goods. The work provided by Llewellyn was central to this business. Granted that with Ontime’s name on the truck, an ordinary person could view Llewellyn as an employee or subcontractor of Ontime, but the reality is he was part and parcel of Warbrick’s business. Without Llewellyn, Warbrick would not get paid by Ontime. Such integration suggests an employee-employer relationship existed between Warbrick and Llewellyn.

It is conceded that other factors are suggestive of an independent contractor relationship, such as the absence of statutory deductions, compensation payments, overtime and vacation pay, benefits, and a uniform. On balance, however, these factors do not create independent contractor status out of the parties’ employer-employee relationship .

Given the above, I conclude that Llewellyn was an employee of Warbrick. Section 21 (1) of the *Act* prohibits deductions from wages without the authorization of the employee. The deductions made by Warbrick from Llewellyn’s wages were not authorized and accordingly they are in contravention of the *Act*. Llewellyn is entitled to recover these wages and he is entitled to be paid overtime wages and vacation pay.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order that Determination No. CDET 000194 be confirmed in the amount of \$2,267.75

March 4, 1996

---

**Norma Edelman**  
**Registrar**  
**Employment Standards Tribunal**

**Date**

:jel