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 -

Knight Piesold Ltd.
("Knight Piesold" or the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Ib S. Petersen
FILE NO.:	98/803
DATE OF HEARING:	February 24, 1999
DATE OF DECISION:	March 5, 1999

APPEARANCES

Mr. Jeff Howard	on behalf of the Employer
Mr. Jay L. Johnson ("Johnson")	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 December 2, 1998 which determined that Knight Piesold was liable for overtime wages, annual vacation and statutory holiday pay to Johnson. The Director's delegate found that Johnson was owed $4,695.73.

The Employer argues that the Determination is wrong for the following reasons:

1. Johnson was an independent contractor;

2. In the alternative, if he is found to be an employee, the remuneration paid was in accordance with the *Act*. Johnson was paid a daily rate of $160 inclusive of "overtime, vacation time and public holidays". The daily rate was for a 10 hour work day, seven days a week. Johnson worked 20 days and had 10 days off.

3. In the further alternative, the award of compensation in the Determination should be adjusted to take into account that Johnson did not, in fact work 10 hours per day and, in addition, was paid a $25 per day "tax-free site allowance for each day on site".

FACTS AND ANALYSIS

The Employer is an engineering consulting firm. Johnson worked as a technician between May 6, 1997 and August 29, 1997 at the Kemess mine site. The Employer provided consulting services to the mine under two agreements with the mine owner, Royal Oak Mines Inc.

The first issue is whether Johnson was an employee or an independent contractor.

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;

First, it is well established that these definitions are to be given a broad and liberal interpretation.

Second, my interpretation must take into account the purposes of the *Act*. The Tribunal has on many occasions confirmed the remedial nature of the *Act*. Section 2 provides:

> 2. The purposes of this Act are as follows:
>
> (a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;
>
> (b) to promote the fair treatment of employees and employers;
>
> (c) to encourage open communication between employers and employees;
>
> (d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;
>
> (e) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia;
>
> (f) to contribute in assisting employees to meet work and family responsibilities.

Deciding whether a person is an employee or not often involve complicated issues of fact. The law is well established. Typically, it involves a consideration of common law tests developed by the courts over time, including such factors as control, ownership of tools, chance of profit, risk of loss and "integration" (see, for example, *Wiebe Door Services Ltd. v. Minister of National Revenue* (1986), 87 D.T.C. 5026 (F.C.A.) and Christie et al. *Employment Law in Canada* (2nd ed.) Toronto and Vancouver: Butterworth). As noted by the Privy Council in *Montreal v.*

Montreal Locomotive Works, <1947> 1 D.L.R. 161, the question of employee status can be settled, in many cases, only by examining the whole of the relationship between the parties. In some cases it is possible to decide the issue by considering the question of "whose business is it". The Employer refers me to a decision of the Tribunal, *Western Cheese Ltd.*, BCEST #365/97, which summarizes some of these principles.

On or about May 6, 1997, Johnson entered into an agreement with Knight Piesold. The agreement provided as follows:

1. You will be employed as a contract employee through your company Jay Johnson.

2. The place of employment ...

3. All travel, room & board, and site transportation will be provided by Knight Piesold Ltd.

4. You will be paid C$160 per day for all days on site plus one full day at either end of each work period for travel. Your remuneration will be invoiced to us by your company on a bi-monthly basis. In addition, you will be paid a $25.00/day tax-free site allowance. No receipts are required for this allowance.

5. The daily rate is deemed inclusive of overtime, vacation time, and public holidays

6. You are responsible for your own taxation and as such Knight Piesold will not make deductions from the daily rate on your behalf.

7. You are also responsible to provide your own medical health insurance. However, Knight Piesold will reimburse you the basic monthly rate if included by your company on the monthly invoice.

8. Knight Piesold will pay Workers Compensation on your behalf.

9. You are required to work, in general, a rotation of 20 days on site with 10 days away from the site, which may be adjusted by the Resident Engineer.

> 10. Termination of this contract would be subject to 14 calendar days notice on either side.

There was no disagreement between the parties that the above constituted the basic parameters of their agreement. Despite the references to employment in the agreement, it was clear that both Knight Piesold and Johnson were of the view that he was an independent contractor and not an employee. Johnson explained that he did not consider himself an employee until quite some time after he left the Employer.

I accept that the intent of the parties was that Johnson was an independent contractor. As well, I accept that the relationship was established in good faith. The Employer relies on a decision of the Supreme Court of British Columbia, *Straume v. Point Grey Holdings Ltd.*, <1990> B.C.J. No. 365, for the proposition that weight should be given to the parties' intentions. In that case the court found that a farm manager was an independent contractor (contract for service) and not an employee (contract of service). The decision, which arose out of a claim for wrongful dismissal, *i.e.*, an action in common law, appears to be based to a large extent on the degree of control exercised by the alleged employee: he had great flexibility in his hours of work, when he took vacations, and he successfully resisted control over reporting weekly hours. In my view he decision does not reflect the law applicable to this case. If I am wrong in that respect, I find that the facts of that case can nevertheless be distinguished from those in the case at hand. Moreover, this case concerns employee status under the *Act*. In *Straume* the court noted, at page 3, that "the declared intention and classification of the contract parties may not bind statutory or third parties not party to the contract as against its true nature". As noted in *Christie et al.*, *above*, at page 2.1-2.2 with respect to the common law tests of "employee" status:

> "In each of these contexts the purpose of characterizing a relationship as employment is quite different from the purpose of the characterization in the action for wrongful dismissal, the traditional common law action in which the two-party relationship that is the subject of this service is elaborated, to say nothing of the purpose of particular statutes in which the term may appear. ... It follows that precedents arising under common law or under a particular statute can be legitimately rejected or modified when the question of "employee" status is asked for a different purpose."

While the parties intent is relevant in an action for wrongful dismissal, *i.e.*, an action founded in contract, and may be a relevant factor before the Tribunal, I do not agree, in view of the remedial nature of the statute, that much weight should be placed on this factor. It is well established that 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 (see, for example, *Machtinger v. HOJ Industries Ltd.*, <1992> 1 S.C.R. 986). As well, Section 4 of the *Act* specifically provides that an agreement to waive any of the requirements is of no effect.

With the statutory purpose in mind, the traditional common law tests assist in filling the definitional void in Section 1. The Employer argues that Johnson is an independent contractor under these tests. I do not agree. In my view, considering the relationship between the parties as a whole, including the factors of control, ownership of tools, chance of profit/risk of loss and integration, there is little doubt that Johnson was an employee of Knight Piesold.

Johnson worked under the control of Knight Piesold. Johnson explained that "Knight Piesold oversaw everything I did "day-to-day". This included the preparation of the site diary which recorded in some detail the work done by Johnson, including concrete pours and test results. There was no dispute between the parties that Johnson was a competent technician who for the most part worked unsupervised. He reported to Charles Stuart ("Stuart"), the site manager, and Russel Thatch, an experienced technician. I understood both to be contractors of Knight Piesold. The degree to which the hours worked was controlled by the Employer was illustrated by an example provided by Brouwer. The mine owner wanted the technicians to cover both a day and a night shift. The mine owner discussed the matter with Stuart who told the owner that it would have to pay for the additional work. The owner did not want to pay for the additional work. Mr. Brouwer ("Brouwer"), one of the principals of the Employer, explained that "Stuart would ensure that the technicians did not work more than 10 hours a day".

The employer owned all the equipment used by Johnson in his work. Brouwer testified that Knight Piesold purchased and supplied the equipment on the basis that the owner of the mine would make regular payments and, at the end of the project, would own it. The fact that, at the end of the project, the Employer was going to turn the equipment over to the mine owner is, in my view, irrelevant. Johnson testified that the equipment bore Knight Piesold's name, including the hard hats and safety equipment.

Brouwer did not hire Johnson. He explained how the daily rate of $160 was arrived at on the basis of a 70 hour work week or 10 hours per day. The Employer calculated backwards from the $160 and arrived at an hourly rate of $11.20 or $11.66 (including 4% vacation pay). He testified that he had told the individuals responsible for hiring technicians that they should impress upon each of the persons who worked for the Employer that the hourly rate was approximately $11.66 and not $16.00. Brouwer was understood that each of the technicians hired had been told that they were independent contractors at the flat rate of $160 per day "all in"and that the hourly rate was not $16.00.

Stuart hired Johnson. He was hired to do quality assurance services. Stuart's affidavit states that he advised Johnson that the daily rate had been calculated to include all premiums for overtime, vacation and statutory holiday pay. The affidavit does not state that the hourly rate, as explained by Brouwer, was explained to Johnson. Johnson, on the other hand, denied that he was told that the hourly rate was approximately $11.66 and not $16.00. He explained that it was his understanding that the hourly rate was $16.00. Insofar as there is conflict between the affidavit evidence of Stuart and Johnson's, I prefer the latter's testimony with respect to the hiring and events at the mine site.

I agree that the Employer under the *Act* is not prohibited from paying a daily rate based on certain guaranteed or specified hours of work. I refer to my comments in *Kask Bros. Ready Mix Ltd.*, BCEST #311/98, at page 4:

> "While I accept that Mr. Bailey agreed to work the hours for the stated salary (but not the hourly rate), and the Employer questions the propriety of subsequently asserting a claim for overtime, that agreement is void under Section 4 of the *Act*. In my view, the Employer is not prohibited from agreeing with an employee to work or a certain hourly rate, with pay for a guaranteed or minimum number of hours, including overtime hours, and set out the wages on an annualized basis, provided the agreement otherwise meets the requirements of the *Act* and the *Employment Standards Regulation*. However, the hourly rate must be clearly explained to the employee."

In other words, there must be an agreement between the parties. I accept Johnson's evidence that the hourly rate of approximately $11.00 was never explained to him and I am of the view that there was no agreement to that effect.

The Employer did not explain how statutory holiday pay would fit into the calculation of the hourly rate. In my view, the Employer cannot calculate an hourly rate to be inclusive of statutory holiday pay and, in that regard, I refer to the comments in *Monday Publications Ltd.*, BCEST #D296/98, reconsideration of #D059/97, at pages 3-4:

> The Adjudicator concluded that including statutory holiday pay in the commission contravened the *Act* and that he was bound by Mr. Justice Braidwood's decision in *Atlas Travel Service Ltd. v. British Columbia (Director of Employment Standards)* (1994), 99 B.C.L.R. (2d) 37 (S.C.) referred to in the original Decision, at page 8:
>
> > "The argument fails on a logical basis. By the Employment Standards Act, s. 36(1)(b), after five years of employment, an employee shall be entitled to three weeks of vacation. By the contracts the travel agent signed with Atlas Travel, after two weeks of employment, an employee would be entitled to three weeks of vacation. Assuming a base commission of 50 percent, the Employment Standards Act provides for 2 per cent vacation pay per week. Therefore, with 2 weeks of vacation the employee is receiving 46 per cent commission. With 3 weeks of vacation, that commission drops down to

> 44 per cent. This is an absurd result, for an employee's "total wages" ought not to decline with seniority in order to fund a statutory obligation which rests with the employer.
>
> The *Employment Standards Act* sets up a scheme whereby an employer is obligated to pay an employee something in addition to their wages for annual vacations and general holidays. Section 37(1) states that the annual vacation pay shall be calculated on the employee's total wages. Therefore the appellant's attempt to have the employee's commission include their vacation and holiday pay does not comply with the *Employment Standards Act*"

The Adjudicator considered that he was bound by Mr. Justice Braidwood's decision. He found that the as well, at page 8-9:

> "I note that this Tribunal has considered this issue in *W.M. Schultz Trucking Ltd.* (BCEST #D127/97, in the context of a pay structure that was based on a percentage of revenues generated by trucks, inclusive of statutory holiday and vacation pay. The inclusion of statutory holiday pay in a piecework structure does not comply with the requirements of the *Act*: *Foresil Enterprises Ltd.*, BCEST #201/96. While the parties apparently did agree that the commission structure included holiday pay, it appears that it is an agreement which is void, because it breaches the provisions of s. 4 of the *Act*.
>
> The purpose of the statutory holiday provisions of the Act is to ensure that employees are able to take their statutory holidays, with pay, or alternatively receive compensation if they are directed by the employer to work their holiday. The Act characterizes commission or hourly payments as wages (s. 1). In pay periods when statutory holidays fell, there was no opportunity for an employee to work and generate commissions. While regular employees would be paid for the day they didn't work, the commissioned sales person would not have the opportunity to generate commissions

> because of the closure of the business. While hourly employees would be paid wages for that same day, the opportunity to generate commissions would be lost because of the holiday."

Section 40 of the *Act* provides for overtime wages for hours worked in excess of 8 in a day or 40 in a week. Overtime pay is based on the employee's regular wage. Section 1 defines "regular wage", if the employee is paid on a flat rate basis as the employee's wages in a pay period divided by the employee's total hours of work during that pay period. The delegate found the "regular wage" to be $16.00 based on the daily rate of $160 and working 10 hours per day.

Stuart's affidavit, and this is the Employer's evidence, states that "Johnson generally worked a 10 hour day". Brouwer's evidence was that the flat daily rate was based on Johnson working 10 hours a day. While Brouwer went to the mine site on average once a month for three to five days, and he did recall meeting Johnson briefly a couple of times, he did not have any direct knowledge of Johnson's working conditions at the time. The only time records received in the Employer's Vancouver office were the time sheets submitted by Johnson. These time sheets indicated only that he had worked one shift per day. Generally, Johnson testified, he worked 10 hour days. In cross examination, he maintained that he never worked less than 10 hours, except on a few occasions, including travel days where he might not work a full shift. He explained that when he was hired he was told by Stuart that his hours were from 7:00 a.m. to 7:00 p.m. He mentioned that he on three occasions worked in excess of those hours. The delegate based his award on only two days. As Johnson did not appeal the award, I am not going to disturb that result. I agree with the calculation and accept that the hourly rate, therefore, is $16.00.

It follows that I do not accept the Employer's argument that the actual hours worked each day was less than 10 when adjusted for lunch and coffee breaks. Johnson's evidence was that he would often "eat on the run".

The $25.00 per day "site allowance" was paid to the Johnson because, as Brouwer explained, the "lousy conditions" at the remote site. It was provided to "alleviate and compensate for the hardship" of the conditions under which the technicians worked. In my view, the amount Johnson is entitled to on account of overtime, vacation pay and statutory holiday pay should not be reduced by an amount on account of the daily allowance. Under Section 1 of the *Act*, "wages" do not include allowances.

In short, I am not persuaded to interfere with the Determination.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated December 2,
1998 be confirmed in the amount of $4,695.73 together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

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Ib Skov Petersen
Adjudicator
Employment Standards Tribunal