

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act S.B.C. 1995, C. 38*

- by -

Jahanbakhsh Toghiani-Rizi  
("Rizi")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Geoffrey Crampton

**FILE NO.:** 96/134

**DATE OF HEARING:** June 5, 1996

**DATE OF DECISION:** May 4, 2001

**DECISION**

**APPEARANCES**

Godfrey D. Fredericks	for	Pacwest Wall & Ceiling Systems, Inc.
Michael Fu		Director of Employment Standards
Jahanbakhsh Toghiani-Rizi		on his own behalf

**OVERVIEW**

This is an appeal by Jahanbakhsh Toghiani-Rizi (“Rizi”) under Section 112 of the *Employment Standards Act* (the “*Act*”), against Determination CDET# 001114 which was issued by a delegate of the Director of Employment Standards on February 9, 1996. The Director’s delegate concluded that Jahanbakhsh Toghiani-Rizi was an independent contractor and not an employee of Pacwest Wall & Ceiling Systems, Inc. (“Pacwest”).

Pacwest argues that Rizi was an independent contractor.

A hearing was held on June 5, 1996 at which I heard evidence under oath.

After considering all of the evidence and applying the facts of this appeal to the law, I have concluded that Rizi was an employee of Pacwest for purposes of the *Act*.

**ISSUE TO BE DECIDED**

Was Rizi an independent contractor or an employee of Pacwest?

**FACTS**

The principal reason given by the Director’s delegate for determining that Rizi was a contractor and not an employee for purposes of the *Act* was set out in the Reason Schedule in the following terms:

Toghiani-Rizi was engaged with Pacwest in the name of Northstar Painting and Decorating Ltd. or Northstar Painting. He had registered Northstar Painting and Toghiani-Rizi, Jahanbakhsh with Revenue Canada for GST purposes. The GST number was R139542237. Toghiani-Rizi was also

using the name of Northstar Painting & Decorating Ltd. to invoice Pacwest for the work done and collected GST on top of the total charges.

Pacwest does not deny that it owes money to Rizi. However, the amount owed is in dispute and Pacwest argues that it does not owe the money in the form of wages. Rizi claims \$2,195.50 is owed. Pacwest says that it owes Rizi less than the amount he claims, but does not state a specific amount.

Rizi is the sole owner of Northstar Painting and Decorating. He has business cards and advertising “flyers” showing him as the contact person. A letter dated April 13, 1995 from Revenue Canada confirms Rizi’s election to acquire Northstar Painting effective December 14, 1994. The GST number quoted on the letter from Revenue Canada is #R139542237.

In August, 1995 Rizi responded to an advertisement placed in the newspaper by Pacwest. He began painting two houses in Richmond and agreed to be paid \$15.00 per hour. This hourly amount was to be negotiated after one week. He was paid by cheque, but no deductions were taken from the total amount paid. Rizi also painted a house in West Vancouver and Vancouver.

Rizi was required to complete a time sheet to record the hours he worked each day and submit it each week to Fredericks.

Pacwest is a drywall contractor. Pacwest provided to Rizi the paint and other “consumables” which were required to complete the painting. It also provided him with a compressor (“spray machine”) and a spray gun.

## **EVIDENCE**

Rizi’s evidence was that Northstar Painting ceased operation in March, 1995 due to a dispute with his former partner.

Rizi gave evidence that towards the end of September, 1995 Fredericks came to the work site in West Vancouver and told him that Pacwest’s accountant required Rizi to submit invoices for the work performed to date. As a result of this request, Rizi submitted invoices retroactively under the name of Northstar Painting & Decorating. He included an amount for GST on each invoice and showed the GST #139766141. Certain of the invoices contain the words: “subcontracting painting services per hour”.

Pacwest did not pay the GST amount shown on the invoices submitted by Rizi. Under cross examination, Rizi agreed that Pacwest had not paid the GST amounts on the invoices because it had been informed by Revenue Canada that the GST#139766141 was invalid.

Invoice #252532 dated October 23, 1995 shows the following:

**GST#139766141**

Painting Services at Moncton, East 5th, West Vancouver	\$5,220.00
Total hours of operation 348	
+GST	\$365.40
-Payment Received	<u>\$4,266.50</u>
Please pay the balance of	<u>\$1,318.90</u>

The amount owing (\$1,318.90) is confirmed in an undated statement from Northstar Painting & Decorating which summarizes hours worked between August 29, 1995 and October 20, 1995.

Rizi's evidence was that after the painting was completed Fredericks asked him to sign a document titled "Independent Contractor Agreement." Rizi refused to sign the document. Under cross-examination, Rizi stated that the reason he submitted invoices to Pacwest was that he believed he would not be paid if he did not submit invoices. He also stated that he panicked at the time but that when he contacted the GST office he was told that he was not responsible for making GST remittances. Under further cross-examination, Rizi stated that all of the cheques he received from Pacwest were made payable to him, not Northstar Painting & Decoratorating.

Fredericks gave evidence that he made a verbal agreement with Rizi that he would work as a sub-contractor for Pacwest. He also said that there was an agreement that the verbal agreement would be reduced to writing at a later date. Fredericks also testified that Rizi wanted cheques made payable to him personally because of an on-going dispute with his former partner in Northstar Painting and Decorating.

**ANALYSIS**

The Tribunal's decision in **Larry Leuven - and - Pacwest Wall and Ceiling Systems Inc.** [BCEST #D136/96] sets out the relevant provisions of the *Act* and the common law which pertain to the distinction between an employee and contractor. As in the **Leuven** appeal, there is an advantage to both Rizi and Pacwest for Rizi to look like an employee for certain purposes and to look like a contractor for other purposes. When I apply the definitions of "employee" and "employer" when in the *Act* to the facts of this appeal, I conclude that Rizi was an employee under this *Act* for the following reasons:

- Rizi performed work normally performed by an employee;

- Fredericks exercised control and direction over the work performed by Leuven;
- Pacwest owned the tools and equipment used by Rizi in performing the work;
- Rizi had no chance of profit. He was paid \$15.00/hour for each hour he worked;
- Rizi's refusal to sign the "Independent Contract Agreement" suggests that he did not intend to be a sub-contractor;
- Rizi was integrated into Pacwest's business operation in that he was working under the direction of Fredericks and overseeing the work of Pacwest's employees from time to time;
- Pacwest, not Rizi, selected the employees to perform the work.

The evidence concerning the unusual circumstances whereby Rizi submitted invoices under the name of Northstar and Fredericks made payments to the order of Rizi leads me to conclude that it was inappropriate for the Director's delegate to rely on these invoices as the principal ground for deciding that Rizi was a contractor. I make no finding about the legality or the validity of Rizi including a GST amount on each invoice. That is a matter for Revenue Canada to determine. However, I conclude that the invoices submitted by Rizi do not establish a mutual intent to create a business relationship between two contractors. The various elements of the relationship, taken together, lead me to conclude that Rizi was an employee of Pacwest.

**ORDER**

I order, pursuant to Section 115 of the *Act*, that the Determination be varied to show that Rizi was an employee of Pacwest and that he is owed the sum of \$953.50 plus 4% vacation pay pursuant to Section 58 of the *Act*.

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**Geoffrey Crampton**  
**Chair**  
**Employment Standards Tribunal**

GC:sf