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 -

Noramtec Consultants Inc.

("Noramtec")

- of a Determination issued by -

The Director Of Employment Standards

(the "Director")

ADJUDICATOR:	Lorne D. Collingwood
FILE NO.:	96/330
DATE OF HEARING:	August 8, 1996
DATE OF DECISION:	August 28, 1996

DECISION

OVERVIEW

The appeal is by Noramtec Consultants Inc. ("Noramtec") pursuant to Section 112 of the Employment Standards *Act* ("the *Act*") against Determination #002214 issued by the Director of Employment Standards (the "Director") on May 7, 1996. The Determination was issued as a result of a complaint by Juan Elevancini ("Elevancini"), found by the Director's delegate to have been an employee of Noramtec. The company claims that the Determination is in error, that statutory holiday and vacation pay, pay for overtime work and pay where less than four hours of work was done on a day, is not owed Elevancini because he was not Noramtec's employee but engaged as a subcontractor.

APPEARANCES

Geoffrey Wheeler	President of Noramtec
Dave Burneli	Manager of Noramtec
Juan Elevancini	On His Own Behalf
Diane MacLean	For the Director

FACTS

Noramtec is a supplier of engineers, draftspersons and technicians to other companies needing the services of such people. Elevancini is a draftsman and he worked in the office of a client of Noramtec from November 30, 1994 to January 23, 1995 as a result of his entering into a contract with Noramtec.

The contract between Elevancini and Noramtec is signed by Elevancini and a Harvey Fishman ("Fishman") of Noramtec. It is entitled, "TERMS AND CONDITIONS OF CONTRACT BETWEEN NORAMTEC CONSULTANTS INC. (hereinafter called THE COMPANY) AND JUAN ELEVANCINI (hereinafter called THE SUB-CONTRACTOR) and it is dated November 29, 1994. The document sets out, and I quote from it, that *"It is agreed and understood that THE COMPANY will subcontract design and drafting work to be carried out for J. Kaehne & Associates on the premises of J. Kaehne & Associates (hereinafter called THE CLIENT) at $18 per hour worked to THE SUB-CONTRACTOR."* Elevancini is referred to as the subcontractor throughout the document. The document goes on to say, among other things, that the subcontractor is to submit invoices. Where payment for overtime work is to be specified, the document is silent, lines having been drawn through the spaces where one would enter rates of pay and points at which overtime would start.

Noramtec has what it calls "employees" and also 'subcontractors', workers like Elevancini that it also calls "independent contractors". Employees are paid less than its 'independent contractors', $16.80 versus $18.00 per hour. Only Unemployment Insurance premiums and Canada Pension Plan premiums are deducted from 'independent contractors' whereas income tax is deducted from the 'employees' as well as UIC and CPP premiums. Noramtec says that in Western Canada, it has many more 'independent contractors' than 'employees' but in Eastern Canada the reverse is true.

It is the testimony of Elevancini that he was never offered a choice between working as an employee at $16.80 an hour and, signing the contract and working at $18.00 per hour. He also says that on raising the matter of overtime with Fishman, he was told that the pay was $18 an hour no matter how many hours were worked. That Noramtec was not going to pay overtime was clear at the time Elevancini signed his contract.

Elevancini worked off and on at the office of J. Kaehne & Associates ("JKA") for eight weeks. He did not work at JKA on some days in November because he took some courses. That was acceptable to JKA. It was also acceptable to Noramtec who says that Elevancini's hours of work were a matter between him and JKA and not its concern, Elevancini being an independent contractor.

Elevancini worked in excess of 8 hours on some days and as many as six days and 50 hours in one week but as few as 13 hours in another week, the week of the Christmas and Boxing day holidays. On one day he only worked three hours. He also worked statutory holidays.

Elevancini supplied none of his own equipment, nor any software, nor did Noramtec supply equipment or software. That was supplied by JKA.

Noramtec charged JKA $23 for every hour worked by Elevancini.

Elevancini submitted invoices. All give a figure for total hours worked in a week running Saturday to Friday. All say that they are for CAD services. On each is what is called the "price" at $18 and an amount that is to be paid which is the number of hours worked in the Saturday to Friday week multiplied by $18. One invoice, the first, has "Micro Ware Link" printed above Elevancini's name and his address. Only "Juan Elevancini" and his address is on the other invoices.

It is the testimony of Elevancini that Micro Ware Link is the name of a company that "he hoped one day to open".

Elevancini did not complain of being paid at $18 per hour for all hours worked until after the job was over. He says that he needed the work and that he feared losing the work at JKA.

ISSUE TO BE DECIDED

Was Elevancini's work that of an independent contractor or an employee? If he is an employee, what moneys are owed him given the *Act*?

ARGUEMENT

Noramtec argues that its 'independent contractors' are true independent contractors. In that regard Noramtec says that its 'independent contractors' are free to negotiate their fee, that they choose not to be 'employees', that they are specialists who run their own businesses, working for different firms and individuals as they wish, that its contract is what Lord Denning termed a 'contract for services', and it notes that its 'independent contractors' are responsible for the paying of income tax, not Noramtec, and that fringe benefits are excluded, that they submit invoices, and that Noramtec provided Elevancini with no tools or software.

Noramtec argues that the finding of the Director's Delegate, that Elevancini did not have a GST number, is not important, that having such a number "is not a factor to consider when determining whether or not a person is self-employed" as small businesses which have under $30,000 of revenue need not register for GST purposes.

Noramtec argues that it is the same as a company called TEG Engineering Limited ("TEG"), a company that was found to be a placement agency for technicians and engineers in the decision *TEG Engineering Limited v. The Minister of National Revenue*, (N.R. 1010) and a subsequent decision by the Pensions Appeal Board, dated December 20, 1982 (U.I. - 72, P.A.B.). Noramtec argues that just as in those decisions certain workers were found to be "specialists" working as independent contractors, Elevancini should be found to be an independent contractor.

Elevancini argues that no one gave him an option of working as an employee or signing the contract that he did. He says that self-employed draftspersons will earn $25 per hour and more, not $18 an hour and that drafting companies charge more than that.

ANALYSIS

The *Act* has no application in the absence of an employer-employee relationship. Is there one? Of paramount importance is the *Act.*

The *Act* defines "employee", "employer", and "work". Employee is defined 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 the 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,*

The *Act* defines an employer as follows:

> *"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.*

The *Act* defines work as follows:

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

The above definitions are to be given a liberal interpretation. That is the view of the B. C. Court of Appeal [*Fenton v. Forensic Psychiatric Services Commission* (1991) 56 BCLR (2d) 170]. The court noted, *"that the definitions in the statute of "employee" and "employer" use the word "includes" rather than "means". The word "includes" connotes a definition which is not exhaustive. Its use indicates that the legislature casts a wide net to cover a variety of circumstances."*

In addition to the statutory definitions, various tests have been developed in the common law that are of assistance in deciding whether a person is an employee. The importance of those tests in the workplace of the 1990's was stressed by the Commission charged with reviewing employment standards for the purpose of developing the current *Act*. The Commissioner, Mark Thompson, in his report, Rights and Responsibilities In A Changing Workplace: A Review of Employment Standards in British Columbia, noted that the definition of employee was a cause of concern. He states in the report, *"A significant issue under the definition of employee is the use of so-called 'contractors' to evade coverage by the law"*, at page 32. He terms the practice of converting employees into contractors so as to avoid paying Workers' Compensation assessments, Canada Pension Plan taxes or Unemployment Insurance premiums as an "abuse". He goes on to say that *"these practices deprive employees of their rightful protections under the law. Therefore, the definition of 'employee' should be expanded to reflect the prevailing judicial view of employee status. The long established definition of an employee in the common law is relevant in this respect. The distinction between an employee and a contractor turns on: control, ownership of tools, chance of profit and risk of loss."*

Clearly, the matter of whether a person is an employee is not the most straightforward of matters, many factors must be taken into account, a point eloquently made by Professor Paul Weiler as Chair of the Labour Relations Board of B. C., in the decision *Hospital Employees' Union, Local 180 v. Cranbrook & District Hospital,* [1975] 1 Can. L.R.B.R. 42 at 50. He noted,

> The difficulty is that there is no single element in the normal makeup of an employee which is decisive, and which would tell us exactly what point of similarity is the one which counts. Normally, these various elements all go together but it is not uncommon for an individual to depart considerably from the usual pattern and yet still remain an employee ... But while the legal conception of an employee can be stretched a fair distance, ultimately

> there must be some limits. It cannot encompass individuals who are in every respect essentially independent of the supposed employer.

In the case at hand the parties have entered into a contract and Elevancini is referred to as the subcontractor. And it is clear to me that Elevancini knew what he was agreeing to, including working all hours at a straight time rate of $18 per hour, on signing his contract. And I must say that I find his later complaint to the Employment Standards Branch somewhat disturbing even though I know how difficult it is to get work these days. The *Act* is of primary importance, however, and given the *Act*, the contract is by itself not enough to make Elevancini an independent contractor. Noramtec may have been operating under a burden of misconception in that regard. As the Director's Delegate correctly notes, Section 4 provides, and I quote, *"The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69"*. In other words Elevancini may not agree to accept less than the *Act* provides, if he is an employee. Where an employee enters into a contract which provides for less than what the *Act* provides, it is void to the extent that it provides for less. Sections 43, 49, 61 and 69 pertain to employees covered by collective agreements.

The Director's Delegate in attempting to determine whether the relationship between Elevancini and Noramtec was one of employer/employee applied the usual tests, the "control" test, the "four-fold test" set out in *City of Montreal v. Montreal Locomotive Works* (1947) 1 D.L.R. 161, and the "organisation" or "integration" test. Despite making an error, an error that might have been avoided I might add, had Noramtec been more forthcoming with information, I conclude that the tests were properly applied, nothing turns on the discovery that invoices were in fact submitted by Elevancini. I agree, Elevancini is an employee.

My conclusion, that Elevancini is an employee given the *Act* and tests, is in part based on my concluding that Elevancini did work that employees of Noramtec regularly do and that he received wages. It is also based on my assessment of the control that Noramtec had over Elevancini. I accept that Noramtec exercised very little in terms of daily control but in my view that was merely assigned to JKA. I also find important the fact that Noramtec selected Elevancini for work and that in the final analysis, it had control over whether he would work and continued to work.

I accept that Elevancini submitted invoices, that he had at least intentions of operating his own company, was responsible for income tax, submitted invoices and may in theory have been able to work for various people or firms, important considerations to be sure. But I find that Elevancini's work was an integral part of Noramtec's temporary help business, his work is hardly an accessory to it, that he had no prospect of profit, was not open to suffering a loss, had no power to delegate and no greater control over his hours and how work was to be done than does a typical employee. The latter factors are more important and they convince me that Elevancini is an employee.

I should add that while not bound by the decision *TEG Engineering Limited v. The Minister of National Revenue*, (N.R. 1010) and a subsequent decision by the Pensions Appeal Board, dated December 20, 1982 (U.I. - 72, P.A.B.), they dealing with Unemployment Insurance matters as they

do, not employment standards matters and the requirements of the Act, they were considered by me. I have also considered *Jean Sheridan O/A Accent Nurses Registry v. The Minister of National Revenue*, a decision rendered March 21, 1985, unreported as far as I know. My reading of those decisions is that the TEG decision is not consistent with the *Act* or *Fenton*, of the B. C. Court of Appeal, cited above. Beyond that I find that the TEG workers that were found to be independent contractors differed from Elevancini in that they shared in profits and losses, were not an integral part of TEG's business, were freely able to work for others while working for TEG, and truly ran their own businesses.

Having found Elevancini to be an employee, I now turn to the amount owed. This is necessary because a finding that Elevancini is an employee is to find that Noramtec has employees at two rates of pay, $16.80 and $18.00, per hour. It is illogical to think that Elevancini, as a casual employee, would earn more than regular employees. I find that he was paid $16.80 per hour plus another $1.20, seven percent, in lieu of benefits.

Recalculating the amount owed I find that Elevancini earned wages at $16.80 an hour for a total of, not $5,283 but $4,930.80. That vacation pay of 4 % is owed on that, $197.23, for a total of $5,128.03. The employer paid $4,842 in paying $16.80 plus another $1.20 in lieu of benefits, leaving $286.03 as the amount of wages owed. To that must be added interest which I calculate as $11.26. The amount of wages owed plus interest is $297.29.

ORDER

I order, pursuant to section 115 of the *Act*, that Determination # CDET 002214 be confirmed in that it is a finding that Elevancini was an employee but that it be varied so that it shows the employee as having earned $16.80 plus another $1.20 in lieu of benefits and that Noramtec owes Elevancini the sum of $297.29 as a result of interest, overtime work, the working of statutory holidays, the employer's failure to provide the daily minimum number of hours of work required by the *Act* and a failure to pay vacation pay.

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Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

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