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 -

J. Duperron Timber Co. Ltd

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: April Katz

FILE No.: 2000/429

DATE OF DECISION: October 18, 2000

DECISION

APPEARANCES:

For the Employer John Duperron by Written Submission

For the Employee Dave Yadernuk by Written Submission

For the Director Robert W. Joyce by Written Submissions with Attachments

This Appeal came before me based on written submissions from all the parties.

OVERVIEW

The Appellant, J. Duperron Timber Co. Ltd. ("Duperron") is appealing a Determination in which the Duperron was found to be the employer of Dave Yadernuk ("Yadernuk"). Duperron's appeal is based on its belief that Yadernuk was hired as an independent contractor not an employee. On this basis Duperron denies that it owes Yadernuk overtime pay as claimed.

ISSUES

1. Was Yadernuk an employee of Duperron within the meaning of employee under the *Employment Standards Act*?

2. If Yadernuk is an employee, is he entitled to compensation for overtime?

FACTS

The basic facts are not in dispute. Yadernuk is a loader operator. Duperron hired Yadernuk from September 23, 1998 to February 5, 1999. Duperron expected Yadermuck to operate the loader at the site, to maintain the loader and to haul fuel for the loader to the work site. Yadernuk used his own pick up truck to travel to the work site and haul the fuel and maintenance tools for the loader.

The parties agreed that Duperron would pay Yadernuk $25 per hour as loader operator and $100 a day rental for the use of Yadernuk's pickup. The parties agreed that Duperron would pay Yadernuk's WCB premiums. Yadernuk was expected to work regular hours.

Yadernuk was told which jobs to do. Duperron takes the position that Yadernuk could reject any job. Yadernuk did not believe he could reject an assignment without losing his position.

A dispute arose because Duperron did not think Yadernuk was efficient as a loaderman. When Yadernuk picked up his last paycheque he found that he was paid at the rate of $18 per hour not $25 for the previous pay period. He left his employment immediately.

Yadernuk filed a complaint with the Director of Employment Standards on March 5, 1999 which stated his complaint as

> "Dropped wages from 25 hr to 18 hr and no overtime pay"

The Director's Delegate wrote to the Appellant on November 18, 1999, January 18, 2000 and February 8, 2000 setting out the conclusion that this was an employee relationship and the calculations of overtime wages. The Appellant did not dispute any of the findings or respond to any of the letters.

The Director's Determination found that Yadernuk was Duperron's employee and ordered Duperron to pay Yadernuk $1537.78 plus interest for overtime wages not paid contrary to section 40 of the *Act*.

THE LAW

The onus is on the appellant in an appeal of a Determination to show on a balance of probabilities that there is an error in the Determination, which ought to be varied or cancelled. When an appeal comes before the Tribunal an adjudicator will not disturb a finding in the Determination unless there is **new** evidence that was **not available** at the time of the investigation.

The primary issue in this appeal is whether Yadernuk was Duperron's employee or if Yadernuk was an independent contractor. The criteria for determining whether a person is an employee is well established and the Tribunal has applied them in many situations. The Tribunal relies on the statutory definitions and the long established criteria at common law.

In *Nationwide Business Centre* (1989) Ltd. (Re) BC EST #D356/96, Adjudicator Edelman dealt with a person who the appellant had hired through an advertisement looking for an independent contractor. No deductions were made from the person's wages and the person was paid through a corporation. Applying the following analysis she concluded that the Director had not erred in finding the person was an employee within the meaning of the *Act*. Her analysis is as follows.

> 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

(f) who has or had control or direction of an employee, or

(g) 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 am satisfied that, notwithstanding the intent of the parties, Atizado was an employee and Nationwide his employer.

I am satisfied that Atizado performed labour for Nationwide and that Nationwide was in ultimate control of Atizado and responsible for his employment. Atizado was hired and paid a salary by Nationwide. The evidence does not support the claim that Atizado was paid on a draw basis and he was to invoice Nationwide. There was no evidence that Atizado employed anyone, nor was there any evidence to challenge his claim that he was almost totally dependent on Nationwide for his income. I accept that he was expected to be on the job at the Nationwide offices on a regular basis. Although he may have occasionally used his own computer programs, Nationwide, for the most part, provided him with the necessary equipment to do the job. He also had no chance of profit or risk of loss given that he was paid a fixed salary. Finally, I find that the work performed by Atizado was an essential aspect of Nationwide's business

> operations. All of these factors indicate an employee-employer relationship existed between Atizado and Nationwide.
>
> It is conceded that the absence of statutory deductions and being paid through a limited company are factors which are suggestive of an independent contractor relationship, but on balance these factors do not create independent contractor status out of the parties' employer-employee relationship. When considering the whole of the Actual relationship between Nationwide and Atizado, Atizado was clearly an employee of Nationwide.

In *Park Ridge Homes Inc. (Re)* BCEST #D251/00, Adjudicator Peterson applied the tests in a situation where both parties acknowledged that they had agreed that the worker would be independent. The worker' rate of pay was increased over time from $9 per hour to $14 per hour. The worker submitted invoices twice a month and was paid on an hourly basis without deductions. In concluding that the Determination was not in error in finding an employment relationship the Adjudicator stated:

> It is well established that the definitions are to be given a broad and liberal interpretation. 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 (Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986). Moreover, 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 8 of the Interpretation Act).

In *Horwath (c.o.b. Cedar Crest Mobile Home & RV Park) (Re)* BCEST #D148/96, Adjudicator Roberts looked at the issue as follows.

> It is clear that regardless of what label parties attach to their employment relationship, the nature of their daily relationship will be assessed to determine whether an employee/employer relationship exists or that of an independent contractor. (Castlegar Taxi v. Director of Employment Standards (1988) 58 BCLR (2d) 341).
>
> I have reviewed several common law tests of whether a person is an employee or an independent contractor, (the four fold test, the integration test, and the control test), the definition of the Act, and the Tribunal decisions in Christopher Sin v. Director of Employment Standards (#D015/96), Warbrick v. Director of Employment Standards (#D019/96) and Larry Leuven v. Director of Employment Standards (#D136/96).
>
> I have also noted the report of the Commission charged with reviewing Employment Standards (Rights and Responsibilities In a Changing Workplace: A review of Employment Standards in British Columbia) in which the Commission noted that the definition of employee was a cause

> for concern. It was the Commission's recommendation that the term employee be broadly defined so that employers could not escape coverage of the law by identifying employees as contractors. The report recommended that 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." (page 32). The report went on to say that "...legitimate independent contractors normally should be excluded from coverage under the Act."(page 33)

Roberts looked at the time place and way the work was to be done and who controlled those factors. On the facts before her she found that there was an independent contractual relationship.

EVIDENCE AND ANALYSIS

Duperron's submission in support of this appeal makes several points. One of the points is that Duperron believes that the complaint filed in Dawson Creek is different from this complaint. The Director's submission clarifies that Yadernuk filed one complaint which led to this appeal.

1. The first point is that the parties entered into an agreement that Yadernuk was to provide loading services, machine maintenance and fuel hauling. Duperron states that Yadernuk provided invoices from Dave Yadernuk Contracting Co. The copies of the invoices attached to this appeal show that they are headed "D. Yadernuk" and are time slips.

   There are no copies of pay stubs or cancelled cheques paid out to the corporation to support the balance of the assertion. If Duperron did pay Dave Yadernuk Contracting Co as shown in the case of *Nationwide Business Centre* (1989) Ltd. it is not definitive of the relationship but merely an indicator. Even where the arrangement to pay a person through a corporation is made, the relationship may still be found to one of employee and employer under the *Act*. 'Person' is understood to include corporations. The mind and control of a corporation is frequently found to be in a person.

   Duperron states that when Yadernuk was unable 'to meet the requirements in the time allotted' a lower rate was negotiated. Yadernuk's evidence is that when he found out he had been paid a lower rate he quit immediately. There is no evidence of any negotiations.

2. The appeal's second point is that Yadernuk was an independent contractor based on the criteria of control, integration, specific result, ownership of tools, chance of profit and risk of loss.

Control

Duperron submits that while the location of the work was determined by them the how to was generally determined by Yadernuk. Duperron indicates that Yadernuk was free to hire employees. Yadernuk and Duperron agree no employees were hired.

The quality of the performance however seems to be an issue for any employee. The submission states that Duperron was required to "provide suggestions to Mr. Yadernuk to improve his loading time"; "hours would be determined by job rather then by the employer"; "daylight hours and truck schedules determine the hours that are required."

These points suggest that Duperron saw itself as the 'employer' and that J. Duperron was giving direction and exercising control over how Yadernuk did his work.

Duperron goes on to say that Yadernuk "always had the option of rejecting a job as any contractor does". Yadernuk's evidence is that he needed to do what he was told because he would not continue to have the work if he refused to do a job.

Integration

Duperron states that Yadernuk was minimally involved in the operation of Duperron. This is not disputed by anyone. Yadernuk's involvement was no more or less than an employee.

Specific Result

This submission states that Yadernuk was free to obtain future contracts in other areas once this job was done. "The fundamental nature of the business is short term and on a contractual basis." There is nothing in this statement that assists the Appellant. Yadernuk could have been a short term employee or contractor.

Ownership of Tools

Duperron states that 'Mr. Yadernuk's ownership of tools and use of the truck for fuel transport was incidental to the job he was hired for." The fact that Yadernuk had a truck influenced the hiring but it was not relevant to the performance of the job which involved operating Duperron's equipment.

Chance of Profit

The submission provides no evidence that Yadernuk had a chance of profit that would be any different from a normal employment situation where someone decides if they want to work for certain wages.

Risk of Loss

Duperron suggests that Yadernuk had a risk of loss if his costs exceeded the price he was charging but provides no basis of this except the normal employee costs related to employment.

Yadernuk went to work each day at Duperron's place of work and did what he was asked to do by Duperron. His performance was monitored and he was directed by Duperron how to do the work. He was expected to work exclusively for Duperron and could look at future contracts with others but was exclusively Duperron's worker during the term of the relationship. There is nothing in this Appeal that suggests that the Determination was made in error that requires a variation or cancellation. In fact the submission of the Duperron that they were the 'employer' and directed the work supports the conclusion in the Determination.

Having found that Yadernuk was an employee the calculations for overtime are not disputed. Duperron suggests other deductions would have been made but there was an agreement to pay $25 per hour to Yadernuk. The Determination's calculations are based on this agreement not another agreement with another employee. The obligations to pay the statutory deductions do not mean that the employee should have a reduced order.

The submission from the Appellant did not introduce any new evidence that was not available at the time of investigation. The argument on the facts appears to have been considered by the Delegate in preparing the Determination. I cannot find any basis on which to disturb the Determination.

ORDER

Pursuant to section114 (1)(a) the appeal is dismissed.

Pursuant to section 115 of the Act, the Determination ER: 087-177 dated March 3, 2000 is confirmed. J. Duperron Timber Co. Ltd. must pay any additional interest due from the date of the Determination under Section 88 of the Act.

April D. Katz

April D. Katz
Adjudicator
Employment Standards Tribunal