BC EST #D123/97
(Reconsideration of BC EST #D234/96)

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration

pursuant to Section 116 of the

Employment Standards Act S.B.C. 1995, C. 38

- by -

Noramtec Consultants Inc.

("Noramtec")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Lorna A. Pawluk

FILE NO.: 96/330

DATE OF DECISION: March 17, 1997

DECISION

OVERVIEW

This is an application by Noramtec Consultants Inc. ("Noramtec") pursuant to Section 116(2) of the *Employment Standards Act* (the"*Act*") for reconsideration of Decision BC EST #D234/96 (the "Decision") which was issued by the Employment Standards Tribunal (the "Tribunal") on August 28, 1996. The adjudicator concluded that Determination #CDET 002214 correctly found Juan Elevancini to be an employee. The grounds for this application are that there are "errors of fact contained in the decision" while others were overlooked in the written decision and will be reiterated here.

FACTS

Noramtec provides engineers, draftspersons and technicians to its customers to businesses requiring these services and these customers in turn pay Noramtec a fee. Elevancini worked as a draftsperson for a Normantec customer from November 30, 1994 until January 23, 1995. The Employment Standards Officer who investigated Elevancini's complaint concluded that Elevancini was an employee rather than an independent contractor and was owed $677.99 for unpaid wages, overtime, vacation pay and holiday pay. She found that Noramtec exerted extensive control over Elevancini's day to day activities; required Elevancini to submit weekly time sheets; made most of the standard wage deductions; provided Elevancini with a T-4 slip of employment income; and offered an hourly rate on a "take it or leave it" basis. She noted that the customer and not the employer provided the equipment and that Elevancini ran no chance of profit or risk of loss. The Determination also set out numerous factual differences between this case and *TEG International Limited* v. *Minister of National Revenue*; umpire's decision dated October 22, 1981 and Pension Appeal Board decision dated December 20, 1982.

The employer appealed to the Tribunal which upheld the initial determination in Decision 234/96. The Decision applied the common law test of control, ownership of tools, chance of profit and risk of loss and concluded that Elevancini was an employee. The adjudicator also found that the Employment Standards Officer had correctly applied the integration or organization test. Although the adjudicator found it "somewhat disturbing" that Elevancini signed a contract agreeing to be subcontractor, he noted Section 4 of the *Act* which prohibits parties from waiving their rights.

The adjudicator said that his conclusion to find Elevancini an employee was based "in part" on the fact that the latter "did work that employees of Noramtec regularly do and that he received wages." The adjudicator also concluded that even though Noramtec exerted little day to day influence over Elevancini, who worked in the customer's premises, they ultimately controlled whether he would work and continue to work. He found Elevancini's work "integral" to Noramtec's temporary help business and that concluded that Elevancini "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 adjudicator considered *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.) but concluded they were not binding as they considered unemployment insurance rather than employment standards matters.

ANALYSIS

Section 116 of the *Act* provides for reconsideration of orders and decisions of the Tribunal:

> 116(1) On application under subsection (2) or on its own motion, the tribunal may:
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> (a) reconsider any order or decision of the tribunal, and
> (b) cancel or vary the order or decision or refer the matter back to the original panel.
>
> (2) The director or a person named in a decision or order of the tribunal may make an application under this section.
>
> (3) An application may be made only once with respect to the same order or decision.

This Tribunal, in *Zoltan Kiss* (1996), BC EST. #D122/96 set out grounds for reconsideration: (1) breach of natural justice; (2) mistake of fact; (3) decision is inconsistent with prior decisions indistinguishable on their facts; (4) significant new evidence not available before the first adjudicator; (5) mistake of law; (6) misunderstanding of or failure to deal with a serious issue; and (7) clerical error in the decision. This power is to be used cautiously and not simply to re-argue the Decision on the merits.

Noramtec argues that the facts of *TEG* are identical to the facts of this case so that the outcome of each case should be identical. This argument was made to the Employment Standards Officer in the first instance and once again before the adjudicator. With respect, this argument misconstrues the reasons why *TEG* was not binding on the adjudicator. Even if the facts are "identical" (and they are not), it is not merely factual similarities that make a decision of one tribunal "binding" on another, or even persuasive. *TEG* involved the *Income Tax Act* rather than the *Employment Standards Act*. As these are two widely divergent pieces of legislation, the definition of “employee” in one is not binding on the other. Refusing to follow *TEG* is certainly not a "mistake of law" and the inconsistency in decisions referred to in *Kiss* means inconsistent decisions under this *Employment Standards Act* and not differing decisions under two different acts. This does not provide grounds for reconsideration.

Noramtec points out that the adjudicator referred to the Thompson report and its discussion of abuses which result from the conversion of employees into contractors simply to avoid Workers' Compensation, Canada Pension and Unemployment Insurance premiums. Noramtec implies that because there is no "abuse" in their treatment of Elevancini, the common law definition of employee is not applicable. This argument takes the discussion in D234/96 out of context as the adjudicator simply referred to the Thompson report as background only. The adjudicator correctly selected the common law test as the basis for determining the scope of the *Act* and then correctly applied those factors to conclude that Elevancini was an employee rather than an independent contractor. Noramtec also argues that the adjudicator wrongly used "control" as a factor in his determination, but "control" is the single most important factor in determining whether a worker is an employee or an independent contractor. Not only is the adjudicator correct in his analysis of "control", he would have been wrong to ignore it as urged by Noramtec. Similarly, this does not provide successful grounds for reconsideration.

Noramtec criticizes the adjudicator for disregarding the agreement signed by Elevancini to be an independent contractor rather than an employee. However, the adjudicator quite rightly concluded that despite his personal misgivings, he was bound by Section 4 of the *Act* which prohibits an employee from agreeing to waive rights under the *Act*. This does not provide successful grounds for the employer's reconsideration request.

Noramtec also attempted to raise certain questions regarding Elevancini's entitlement to over time but did not raise such issues before the adjudicator. Thus, they will not be considered here. Mr. Wheeler also charges that "from a moral standpoint it would be patently unreasonable to find Noramtec in contravention of the *Act*" but that in any event there was no legal contravention. He charges that the definition of "employee" is vague and thus is a denial of fundamental justice. He also accuses the Employment Standards Branch of using "the *Act* to snare in its net a company or individual when it is considered expedient to do so but may let another escape when it is deemed inexpedient to pursue the matter". He also points to "countless examples. . . where the definitions of employee and employer in the *Act* are not consistent with established practice." It is difficult to meaningfully respond to such rhetoric but it suffices to say that it does not provide successful grounds for reconsideration.

In summary, I find no error in the Decision which would substantiate the request for reconsideration.

ORDER

Pursuant to Section 116 of the *Act*, I decline to vary or cancel the Decision.

Lorna Pawluk
Adjudicator
Employment Standards Tribunal