

Citation: Multintel Education Ltd. (Re)  
2019 BCEST 109

An appeal

- by -

Multintel Education Ltd., carrying on business as Golden Key Education

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113 (as amended)

**PANEL:** Allison Tremblay

**FILE NO.:** 2019/65

**DATE OF DECISION:** October 17, 2019

## DECISION

### SUBMISSIONS

Stanley Xie	on behalf of Multintel Education Ltd. carrying on business as Golden Key Education
Rodney Strandberg	delegate of the Director of Employment Standards

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Multintel Education Ltd. carrying on business as Golden Key Education (“Multintel”) has filed an appeal (the “Appeal”) of a determination issued on May 9, 2019 (the “Determination”), by Rodney Strandberg, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”). The Delegate found that Multintel was the employer of Marrett Green (“Green”), that Multintel wrongfully terminated Green and so owed Green \$459.11. The Delegate also assessed \$2000 in penalties against Multintel.
2. Multintel argues that the Delegate failed to apply properly the test for whether a person is an employee or a contractor. Multintel also claimed to make a natural justice argument but failed to point to any such errors in the decision or decision-making process. Accordingly, I assess the appeal on the basis of the alleged error of law.
3. The Delegate provided submissions in response to the Appeal. Multintel was provided an opportunity to respond but did not.
4. After considering the parties’ submissions, I dismiss the appeal.

### ISSUE

5. Was Green an employee or independent contractor?

### ARGUMENT

6. Multintel argues that the Delegate failed to consider parts of the test set out in *Marbry v. Avreca International Inc.*, 1999 BCCA 172, and in particular did not consider the degrees of permanence and reliance in the parties’ relationship.
7. Multintel asks that the Tribunal “vary” the Determination. Based on the submissions, I consider that Multintel seeks to cancel the Determination.

### THE FACTS AND ANALYSIS

8. The relevant facts were set out by the Delegate in the Determination. Multintel operates a tutoring business. Parents of students contacted Multintel. Multintel entered into contracts with the parents and

dealt with billing. Multintel then put the parents in contact with tutors, one of whom was Green. The tutors would assess students' needs, prepare and present lessons and conduct evaluations to meet educational goals.

9. Green began working for Multintel on September 29, 2017. He understood he was being hired indefinitely. His hours of work varied. He was paid monthly based on his hours worked. Twice he turned down requests from Multintel students to tutor them directly. A third time, he agreed to tutor a student who had left Multintel.
10. When Green started tutoring for Multintel, he brought with him a curriculum he had developed. Multintel signed an agreement that Green could use the curriculum and would maintain all rights to the content. On March 5, 2018, Multintel approached Green and proposed a contract. In Green's view the contract would have negated the agreement they had reached previously with respect to his ownership of the curriculum. He refused to sign the contract. On March 11, 2018, Multintel terminated Green's services without providing a reason.
11. Multintel claimed it always considered Green to be a contractor. It provided pay stubs showing no deductions were taken at source. It also provided copies of contracts that other tutors had signed which state that the tutors are independent contractors. It could not explain why it did not have a signed contract with Green. Multintel expected that Green would provide services personally. It did not guarantee hours because hours depended on the contracts signed with parents.
12. Multintel was disappointed that Green had agreed to tutor privately the student who had left Multintel. Multintel felt this was a breach of trust.
13. Finally, Multintel provided a copy of a Canada Revenue Agency ("CRA") ruling that found another Multintel worker was a contractor, not an employee.
14. The Delegate observed that the Director interprets the *ESA* so as to extend basic employment standards to as many people as possible. The wording of the *ESA* governs but is informed by common law tests. The Delegate put no weight on Multintel's unilateral characterization of the relationship or on the CRA ruling that dealt with another employee and which was based on different legislation.
15. The Delegate found Green was integral to Multintel's business and that Multintel could not operate without tutors like Green. Multintel controlled Green's workload and income, which was a straight hourly rate. Green had no opportunity to maximize his profits by working more efficiently. He did not invest his own resources and had to perform services personally. The Delegate found that the only indicator that Green was a contractor was that he had agreed to tutor a student privately; however, he had previously turned down two other opportunities. On balance, the Delegate considered the factors led to the conclusion that Green was an employee, not a contractor.
16. The Delegate then considered whether Green was entitled to compensation under section 63 of the *ESA*. The Delegate considered whether Green's decision to tutor a student privately could constitute just cause for dismissal, but observed that after learning of the decision, Multintel presented Green with the contract, indicating it wished to preserve, not end, their relationship. The Delegate held that Multintel did not meet its onus to establish that it had just cause to terminate Green's employment.

17. Accordingly, the Delegate ordered Multintel to pay to Green one week's compensation for length of service pursuant to section 63 of the *ESA*, vacation pay pursuant to section 58 of the *ESA*, and accrued interest under section 88 of the *ESA* for a total of \$459.11. The Delegate also assessed penalties under sections 17 (paydays), 27 (wage statements), 58 (vacation pay) and 63 (liability resulting from length of service) of the *ESA* for a total of \$2,000.
18. The Appellant bears the burden to demonstrate that the Delegate made an error of law. The relevant test is found in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 - Coquitlam)*, [1998] BCJ No. 2275 (BCCA). There is an error of law when the tribunal, in this case the Delegate:
1. misinterprets or misapplies a section of the relevant legislation,
  2. misapplies a principle of general law.
  3. acts without any evidence,
  4. acts upon a view of the facts that cannot be reasonably entertained, or
  5. adopts a method of assessment that is wrong in principle.
19. As observed in *Re: Zip Cartage*, BC EST # D109/14, reconsideration refused BC EST # RD005/15, the definition of "employee" contained in section 1 of the *ESA* must be broadly interpreted. While tests developed under the common law may be helpful to determine the factors that may be considered, "[t]he only appropriate "test" is whether the relationship of the putative employee and employer can be found within the relevant provisions and purposes of the *Act*."
20. Multintel attacks many of the foundations of the Delegate's decision, for example, that Green's work was integral to Multintel's business. These conclusions are findings of fact that cannot be challenged on appeal: *Britco Structures Ltd.*, BC EST # D260/03.
21. The Delegate clearly considered the relevant provisions of the *ESA* and applied those provisions to the established facts. The Delegate took notice of all relevant factors and reached an appropriate conclusion.
22. With respect to Multintel's specific complaint that the Delegate did not consider the length of the parties' relationship, that is not a relevant factor to be considered under the *ESA*. The *ESA* does not prescribe a minimum length of time before a person can become an employee. Further, the Delegate found as a fact that Green was hired for an indefinite period.
23. With respect to Multintel's complaint that it did not have control over Green, the Delegate found several factors indicating a significant degree of control: Multintel assigned students to Green, set Green's hourly wage rate, and expected Green to perform the work it assigned.
24. Multintel claimed that Green was working for other employers and this was evidence of his being a contractor. There is no evidence in the section 112(5) record to suggest this was the case except for Green's agreement to tutor one former Multintel student.
25. I find that the Delegate identified the correct test, appropriately considered and weighed the relevant evidence when it found Green to be Multintel's employee. I find the Delegate made no error of law.

26. Finally, Multintel claims that the Delegate failed to observe the principles of natural justice because Green improperly “poached” a client from Multintel. This is not a natural justice argument. I will consider it as if Multintel is alleging a second error of law.
27. The Delegate found as a fact that Multintel knew Green had agreed to tutor a former student prior to approaching Green with the proposed contract. The Delegate found that Multintel did not discharge its onus to establish that it had just cause to terminate Green. I find no error of law in the Delegate’s conclusion.
28. For the above reasons, I dismiss the appeal.

### **ORDER**

29. Pursuant to section 115 of the *ESA* I confirm the Determination together with any interest that has accrued under section 88 of the *ESA*.

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**Allison Tremblay**  
**Member**  
**Employment Standards Tribunal**