

An appeal

- by -

Select Introductions Inc. ("Select")

- of a Determination issued by -

The Director of Employment Standards (the "Director")

pursuant to Section 112 of the Employment Standards Act R.S.B.C. 1996, C.113

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2004A/174

DATE OF DECISION: January 13, 2005





DECISION

SUBMISSIONS

Amanda Sakve on behalf of Select Introductions Inc.

Ivy Hallam on behalf of the Director

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "Act") brought by Select Introductions Inc. ("Select") of a Determination that was issued on August 31, 2004 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Select had contravened Part 3, Section 18, and Part 7, Section 58 of the *Act* in respect of the employment of Stacey McAllister ("McAllister") and ordered Select to pay McAllister an amount of \$575.74, an amount which included wages and interest. The Determination also found that Select had contravened Section 46 of the *Employment Standards Regulation* (the "Regulations"), having failed to comply with a Demand for Employer Records issued under Section 85 of the *Act*.

The Director also imposed administrative penalties on Select under Section 29(1) of the *Regulations* in the amount of \$1000.00.

Select has appealed the Determination on the ground of evidence having become available that was not available at the time the Determination was made.

Select has indicated an oral hearing is necessary, stating a belief that "justice was not given" to the case. The Tribunal has reviewed the appeal, the Determination and the materials on record and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

The issue in this appeal is whether Select has shown the Director made an error in the Determination that would justify the intervention of the Tribunal under Section 112 of the *Act*.

THE FACTS

McAllister filed a complaint with the Director claiming she was owed wages by Select. In response to the complaint, Select took the position that McAllister was not an employee. The Director issued a Demand for Employer Records and delivered it to Select. No records were produced.

As part of the complaint process, the Director decided to hold a hearing and notified the parties. The representative for Select, Amanda Sakve, attended at the appointed date and time. McAllister attended by telephone. The Director attempted to mediate the complaint. That effort lasted for approximately one hour and was unsuccessful. The matter was referred to a complaint hearing, at which time Ms. Sakve indicated she had an appointment with a client which she was not prepared to miss and requested an adjournment. The request was denied for the reasons stated in the Determination. In the circumstances, it



was not unreasonable to deny the request for adjournment. Ms. Sakve was offered an opportunity to call her office or her client in order to re-schedule the appointment. She declined that offer, indicating there was no staff in her office.

Notwithstanding the denial and a warning to Ms. Sakve of the potential consequences of her non-attendance, Ms. Sakve chose to leave. The hearing proceeded in her absence.

The Director found McAllister was an employee for the purposes of the *Act* and was owed wages. That finding is not appealed.

ARGUMENT AND ANALYSIS

The burden is on Select, as the appellant, to persuade the Tribunal that the Director committed some error in making the Determination and that the Tribunal should intervene to correct that error. The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

- 112. (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
 - (a) the director erred in law:
 - (b) the director failed to observe the principles of natural justice in making the determination:
 - (c) evidence has become available that was not available at the time the determination was made.

As indicated above, the appeal is grounded on an assertion that evidence has become available that was not available at the time the Determination was made. The appeal does not, however, contain anything that supports this ground of appeal. There is no indication in the appeal of what evidence is now being provided that was not available at the time the Determination was made.

There is some suggestion from comments on the appeal form that the appeal is actually seeking a review of the decision to deny Ms. Sakve's request for an adjournment of the complaint hearing, but there is no reason, in the circumstances, to find the Director erred in denying the adjournment and completing the complaint process. As noted in the Determination, Select had 30 days notice of the intention of the Director to hold the complaint hearing.

Select had already stated its position to the Director on the merits of the complaint, one which in my view was totally untenable given the nature of McAllister's employment.

The design of the administrative penalty scheme under Section 29 of the *Regulations* provides mandatory penalties where a contravention of the *Act* or *Regulations* is found by the Director in a Determination issued under the *Act*. Ms, Sakve's non-attendance had no bearing on the administrative penalties imposed on Select. It is noteworthy that Select does not appeal the finding that McAllister was an employee and was owed wages or the finding that Select had contravened Section 46 of the *Regulations*.

This appeal is dismissed



ORDER

Pursuant to Section 115 of the *Act*, I order the Determination, dated August 31, 2004, be confirmed in the amount shown, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson Member Employment Standards Tribunal