

An appeal

- by -

Regent Christian Academy Society, carrying on business as Regent Christian
Online Academy
("RCOA")

- 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 (as amended)

TRIBUNAL MEMBER: Robert E. Groves

FILE No.: 2013A/72

DATE OF DECISION: February 19, 2014

DECISION

SUBMISSIONS

Gregory Heywood

counsel for Regent Christian Academy Society, carrying on business as Regent Christian Online Academy

OVERVIEW

1. This is an appeal by the Regent Christian Academy Society, carrying on business as Regent Christian Online Academy (“RCOA”). RCOA challenges a determination (the “Determination”) of a delegate (the “Delegate”) of the Director of Employment Standards issued on August 13, 2013.
2. In the Determination the Delegate decided that RCOA had contravened section 58 of the *Employment Standards Act* (the “Act”) when it failed to pay vacation pay in the amount of \$98.88 to one Cicely McLachlan (the “Complainant”). The Delegate determined that the Complainant was entitled to this sum, together with interest. The Delegate also imposed an administrative penalty of \$500.00 pursuant to section 29 of the *Employment Standards Regulation* (the “Regulation”).
3. I have before me RCOA’s Appeal Form and submissions of its counsel, the Determination and the Delegate’s Reasons for the Determination, the record the Director has delivered to the Tribunal pursuant to section 112(5) of the *Act*, a response from the Delegate, and a submission from the Complainant.
4. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 8 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic, telephone and in person hearings when it decides appeals. I find that the matters raised in this appeal can be decided on the basis of a review and consideration of the materials now before me.

FACTS

5. RCOA is a provincially funded online education service. It provides education courses from kindergarten to Grade 12 to those families who wish to educate their children at home.
6. RCOA hired the Complainant as a Special Education Assistant (“SEA”). The intent of RCOA was to hire the Complainant as an independent contractor. The Complainant challenged this interpretation, and filed a complaint asserting that the proper characterization of her status vis-a-vis RCOA was that of employee.
7. The record contains a document dated October 12, 2011, and headed “To Whom It May Concern”, which summarizes the activities of RCOA. The document contains no attribution as to its author, but subsequent correspondence from counsel for RCOA indicates that it was prepared on behalf of RCOA. The document says this, in part, regarding RCOA’s mandate, and the manner in which it conducts its business:

Regent Christian Online Academy (RCOA) is a fully accredited Distributed Learning (DL) school with the BC Ministry of Education. Our 800+ students are all homeschooled children. Our office is located in Victoria, BC and we support students all over BC... We contract BC Certified teachers as Home Learning Support Teachers (HLST) to oversee the academic programs of each enrolled student.

We also support a growing number of students with mild to severe learning disabilities. In addition to the regular grant monies RCOA receives, RCOA also applies for special educational grant monies for

students with significant learning challenges. Upon notice of funding approval, our contracted Special Needs Coordinators (SNC) meet with a team to design an individualized learning plan (IEP) to meet the needs of each of our special needs students. Those invited to be part of the team include the parents, the Special Needs Director (SND), the SNC, the Home Learning Support Teacher (HLST), the SEA, and any other therapists working with the student. Once a budget has been approved for a student, RCOA will arrange payment for a variety of programs such as private swim lessons, therapeutic riding lessons, social therapy classes, etc. as well as many specialized resources according to the budget plan. RCOA contracts with a variety of therapists to support parents provide a learning environment in their homes. RCOA will define the amount of time that the OT therapists, hearing/speech therapists, etc. can spend with the student according to the budget laid out for the individual special needs student. RCOA requires assessment reports from all therapists.

RCOA also contracts, with input from the parent, a number of Special Educational Assistants (SEAs) to work in the homes with these families. These SEAs are hired as contractors, and this arrangement is made very clear in the interview process as well as in the contract signed by both parties. As stated, most SEAs work in the home with the family, while others at times work in their own homes with the student or in the community at various venues. The SEAs that work in their own homes do buy their own equipment and resources for the students to use when in their homes.

RCOA will set the maximum number of hours the SEA can work with the family each week according to the pre-approved budget. The SEA then meets with the parent to work out the actual hours and days that are most convenient for both parties. Changes to the hours due to vacations or other scheduled appointments are worked out between the parent and the SEA.

The parent will direct the SEA according to the IEP. The SEA is required to report to the SNC on a weekly or monthly basis. The SND asks for weekly reports for the first 6-8 weeks after hire and then monthly after that. At times a family may decide that the needs of their child are greater than the amount of time allotted for the SEAs by RCOA. In these cases, the families and the SEA may contract together to work additional time and the family would then pay the SEA directly with their own monies or monies provided by other funding options available to these families. If an SEA would like more hours, they can express their desire to the SND and if an opportunity comes up with another family, the SND could recommend this SEA to the parents as a possible fit for their special needs child. If a family is not satisfied with the fit of the SEA and their family, the contract is ended immediately by the family. RCOA cannot guarantee any other work for the SEAs.

RCOA offers weekly classes for all students. These classes are completely optional. They are generally offered in three 8-week sessions in nine locations.... The classes are 2½-3 hours long one day a week. If a parent chooses to have their special needs child attend the sessions the SEAs would operate as they would in any other community program setting. In this setting the teachers rely on the SEA to advocate for their own students, to help the teacher become aware of the student's needs and to help the teacher adapt the lessons to work for the student. The SEA will know the student better than the teacher does and is ultimately responsible for the student, i.e., an SEA can decide to take them out of class if they are being disruptive, chooses what and how much to do for the student, as the teacher doesn't usually know what to expect in terms of reading/writing and communication from the student.

RCOA offers a place on our website for SEAs to submit their hours worked. These hours are not supervised by RCOA staff, but they are approved by the Special Needs Director (SND) according to the approved budget hours. The SEAs are asked to submit their hours by a certain time frame in order to be paid by direct deposit at the end of the month. RCOA also pay our regular vendors and therapists by direct deposit, if they so choose.

8. The Complainant signed a contract prepared by RCOA, and dated August 27, 2011 (the "Contract"). The Contract says the following, in part:
 - The intent is that the Complainant will be associated with RCOA "on a self-employed contractual basis."

- The Complainant agrees to carry out to the best of her ability “such reasonable assignments and extra-curricular duties as are required by the Special Needs Coordinator which are subject to change as deemed necessary by the SN Coordinator” in consultation with the Complainant.
 - The Complainant agrees to the days and hours as outlined by the SN Coordinator. Hours worked “must be submitted to the SN Coordinator for approval, ...”
 - As it is understood that the Complainant is a “self employed contractual worker, ... termination of work due to unsatisfactory performance of duties can occur at any time.”
 - The Complainant is to be paid by direct deposit on the last day of each month “based on approval of timesheets by the SN Coordinator. As a self employed contractual worker no deductions will be withheld. It is the responsibility of the SEA to keep their own record of pay, and to pay their own personal income taxes. The wage and the schedule of work are set by the coordinator, and are subject to change upon satisfactory performance.”
 - Regarding future work, it was agreed that “[u]pon satisfactory performance through the year by the SEA, that SEA shall be given priority for the anticipated assignment for the next academic year.”
9. A Special Education Assistant Handbook (the “Handbook”) issued by RCOA also forms part of the record. The Handbook describes the role of the Special Education Assistant in this way:

Special Education Assistants (SEAS) will support parents and the school team in providing a well balanced, Christian education to special needs children learning at home, enabling them to reach the potential that God has given them in a wide range of areas including physical, social, emotional, academic, communication and adaptive living skills.

10. Under the heading “Job Description”, the Handbook says this, in part:

The SEA is a contract position. Under normal circumstances, contracted services will be provided to students from early September to late June. In special circumstances services are extended into the summer. Time sheets for hours worked are to be submitted during the last week of the month. You will be advised of cut off dates by the SNC. Only hours that have been worked are billed for ...

The duties and job expectations are outlined by the SNC when the SEA is hired. Usually the SEA will work with a child for 10-15 hours per week, depending on the child’s funding level and the type of services they require.

The duties of the SEA typically include:

- Working with the student at home on their Individualized Education Program (IEP); the goals, academics and life skills contained within
- Providing instruction to the child and using remedial methods to improve skills as appropriate under the direction of the student’s HLST (Home Learning Support Teacher)
- Supervising and supporting learning and therapy activities in all situations, in and out of the home as outlined by the student’s IEP and SNC
- Implementing a program and monitoring the student’s progress
- Record keeping and writing of a monthly report of significant milestones
- Transporting and supporting the student with therapies (Speech, Occupational, Physio, etc.), Resource Centre classes and community recreation programs
- Following up on the therapy programs with the student at home
- Helping the student to develop social, play and daily living skills

- Providing feedback to the family and to the SNC on a regular basis
- Attending to the student's personal or physical care needs
- Attendance at the student's IEP team meeting

It is not expected that the SEA will replace the family's role in supporting the child's education. Rather it is a team effort and most meetings with the SNC should include the SEA if at all possible. The SNC will also meet with the SEA when needed to assist in the implementation of the program and to monitor progress.

11. The Handbook refers to "Training" for Special Education Assistants. It says this:

RCOA encourages the SEA to get additional training as needed and the school will cover up to \$100.00 per school year for pre-approved training. There are summer training sessions that are held over a two day period, usually in Victoria, in late August which are **mandatory**. SEA's are paid \$200.00 for their time at the summer training session days plus related travel expenses.

12. A reporting requirement for Special Education Assistants is prescribed as part of the discussion under the heading "Roles & Expectations."

A mandatory monthly report explaining some of the major highlights and lowlights is required and must be sent to the home learning support teacher and the SNC. This should include some of the major areas in which you worked directly with the student, areas that you may have seen some growth or areas where you might want suggestions from the SNC. This report can also be used to give a general impression of how things are progressing with and for the student and an opportunity to ask any questions of the SNC related to your student.

13. Of the items appearing under the heading "Parent/SEA Responsibilities" the following are noteworthy:

Beyond providing support to the student and his/her family as stated above, the SEA is responsible for:

- Transportation of self and any required student transportation. This means it is essential that you check with your insurance company regarding appropriate car insurance. Be sure to mention that you are not charging for use of your car, like a taxi, but that it is part of your job.
...
- Supervision and support of your student in the Resource Centre classes. The child should never be left unattended. One of the purposes in these classes is to provide social interaction; the success and positive learning of this interaction may be dependent on your intervention. In this environment the SEA must be the advocate for their student to be sure their needs are being met. The SNC can assist you in this area. Only when your own student is well taken care of and engaged can you provide additional assistance to others in the classroom.
- As you are considered to be a contractor, you are self-employed. As such the school does not retain any of your pay for taxes, Employment Insurance, or benefits. It is your responsibility to consult the Revenue Canada website, an accountant or tax professional if you have questions about this type of employment.

The parent/guardian of the student, as well as having responsibilities to the child and teachers, is responsible to the SEA for:

- Providing clear daily expectations and a daily/weekly timetable of scheduled work.
- Supplies, equipment and adequate work area necessary in support of the child's education.

- Payment to the SEA in advance, for field trip expenses for the SEA and the student.
- At least 12 hours notice for cancellation of scheduled SEA time with the child. (If the call is made less than 12 hours before the scheduled time, then the SEA can still record the hours for that one day. This time can be spent writing reports to the SNC, preparing materials for another school day, researching a subject or topic relevant to the education/support of the child.)...

In the rare event that the Special Needs Coordinator decides, in consultation with the family, Special Education Director and Principal that the SEA is not a good fit for work with the student they have been assigned to, the contractual arrangement will be terminated. As this is a contract position no additional pay will be forthcoming after the last day worked with the student.

After a one month probation period, under the SEA's contractual agreement, it is expected that the SEA will commit themselves to working with their assigned student for the full school year. If for some rare and unexpected reason (i.e. serious health issues) an SEA must terminate their contractual position, sufficient notice must be given to allow for the student to make a successful transition.

14. The educational services provided to a special needs student who is assisted by RCOA are delineated in the IEP. Under the heading "Individual Education Plan (IEP)" the Handbook says this:

An Individual Education Plan (IEP) is a documented plan developed by educational professionals, and support professionals for a student with special needs. It describes individualized goals, curriculum adaptations and modifications, the services to be provided and includes measurements for tracking achievement. In general an IEP lists the goals or outcomes set for that student for that school year, a list of the support services required to achieve goals established for the student and possibly a list of the materials needed and any adaptations or modifications to educational materials, instructional strategies or assessment methods needed to achieve the goals. The IEP also includes the present levels of educational performance of the student, the names of the personnel who will be providing the educational and support services, and plans for the next transition point in the student's education, or post education.

The SEA will likely be asked to attend and provide input at the student's IEP meeting. The position title 'SEA' or the SEA's name may appear in the IEP as being responsible for carrying out certain aspects of the plan for the student. If you have not attended the IEP meeting, ask for the IEP and review it with the parents and/or the SNC to become familiar with both short and long-term goals for this student. Being aware of the goals and the strategies that are suggested will help you to do your job more effectively and will assist in placing emphasis on areas of concern. As you are on the front line with your student, along with the parents, be sensitive to how the IEP is working, or not. If you perceive problems, or see that something needs to be changed, be sure to discuss this with SNC and the parents.

15. The Complainant's description of the nature of her relationship with RCOA does not depart significantly from the discussion set out above insofar as it relates to the general factual context. It does, however, contain differences in nuance which bear on the question whether she was an employee of RCOA, or an independent contractor.
16. In her original Complaint Submission, and in later correspondence with the Delegate, the Complainant asserts that she was retained by RCOA to work with a home schooled child under the direction of RCOA and the child's parents. There is an Individual Education Plan ("IEP") developed for the child by the Special Needs Director ("SND") at RCOA, in cooperation with the teacher assigned by RCOA to the child – called a Special Needs Coordinator ("SNC") – and the child's parents. The Complainant has input into the IEP, but does not decide what the child will be taught. She describes her participation in the development of the IEP as "incidental, not professional." She is in no way "in charge" of the decisions made regarding the IEP.

17. The number of hours the Complainant spends with the child is determined having regard to the budget for the child administered by RCOA. As between the SND, the SNC, and the SEA, the SEA has the most contact with the child during the school year. However, the scheduling of the Complainant's hours with the child is decided by the child's parents, in general, based on their preferences, and the availability of the child, subject to the approval of the SNC or the SND.
18. While the Complainant is not told how to do her work, she is required to make use of the materials identified in the IEP and to follow the plan laid out in it so as to achieve its goals, based on the curriculum requirements for the level of the child mandated by the Province. In so doing, the Complainant believes that she acts under the direction of the child's parents, the SNC, and the SND. In the weekly classes at the RCOA, in particular, she says she acts under the specific direction of the SNC teaching the class. Whenever the SEA encounters problems with an area of teaching, she has been instructed to seek advice from the SNC.
19. The Complainant told the Delegate that RCOA also requires her to attend annual training workshops in Victoria, at which issues in special needs learning, and techniques for the instruction of special needs students are reviewed and discussed.
20. While the Complainant advised the Delegate that she was directed not to sub-contract her SEA work to other SEA's, she is permitted to hire third parties to perform administrative work such as typing reports.
21. The Complainant stated that she does not provide her own tools in order to perform her work. The child has his or her own books and computer. However, the Complainant did acknowledge that she makes use of her own books, and her personal computer, when she teaches the child in her own home. She also drives her own vehicle to and from the child's home, and also, on occasion, when she is asked to transport the child to classes or therapeutic activities at other locations.
22. The Complainant alleged that she has no chance to make a profit from her work, as she is paid a fixed rate for the hours she spends attending to the educational needs of the child. In order to establish her entitlement to remuneration from RCOA, she is required to submit timesheets at the end of each month.
23. The Complainant stated that her relationship with RCOA can be terminated if either the parents or the RCOA become unhappy with her work.
24. The Delegate investigated the complaint and determined that the Complainant was an employee, and not an independent contractor. In doing so, he considered the factual matrix presented, several submissions from both parties, the relevant definitions in the *Act*, and the various criteria for resolving the issue that appear in the authorities.
25. The RCOA now appeals that determination.

ISSUE

26. Is there a basis on which the Determination should be varied or cancelled, or referred back to the Director?

ANALYSIS

27. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:
- 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 being made.
28. Section 115(1) of the *Act* should also be noted. It says this:
- 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
- (a) confirm, vary or cancel the determination under appeal, or
 - (b) refer the matter back to the director.
29. RCOA appeals the Determination on the grounds that the Delegate erred in law and failed to observe the principles of natural justice. It asks that the Tribunal either cancel the Determination, or refer it back to the Director.
30. With respect to errors of law, RCOA submits that the Determination is reviewable on the grounds that the Delegate acted without any evidence, or on a view of the facts which could not reasonably be entertained (see *Gemex Developments Corp. v British Columbia (Assessor of Area #12 – Coquitlam)* [1998] BCJ No. 2275 (BCCA); *Jane Welch operating as Windy Willows Farm*, BC EST # D161/05).
31. RCOA argues further that the Delegate breached natural justice by failing to consider relevant evidence, or by failing to provide reasons which indicate he considered the appropriate legal tests or the full scope of relevant evidence. In the result, RCOA submits that it is placed in the position that it does not have a fair opportunity to appeal the Determination (see *Welch, supra; Hilliard*, BC EST # D296/97).
32. Counsel for RCOA has provided a lengthy submission identifying a series of items bearing on these matters, to which I will refer in a moment. The Complainant has delivered a response to the RCOA submission. The Delegate, however, confirmed that there would be no submission from the Director regarding the appeal.
33. Before considering the submissions of the parties, I wish to make some comments regarding the grounds of appeal relied upon by RCOA.
34. It is trite to say that an appeal under the *Act* is not a hearing of a complaint *de novo*. Instead, it is a process designed to correct reviewable errors in the proceedings resulting in the issuance of a determination. The Tribunal has no jurisdiction to hear appeals based on errors of fact unless those errors amount to errors of law. Moreover, an appellant bears the burden of demonstrating that a delegate has committed a reviewable error. Appeals are not intended to be re-hearings of matters decided by a delegate within jurisdiction, based on the hope that the Tribunal will come to a different conclusion (see *MSI Delivery Services Ltd.*, BC EST # D051/06).

35. In his submission on this appeal, counsel for RCOA cited a passage from *Welch, supra*, in which the Tribunal stated, correctly in my view, that when it decides whether a delegate has committed an error of law based on the assertion that he acted without any evidence, or acted on a view of the facts which could not reasonably be entertained, the test is stringent. The formulation offered by Hood J. in *Delsom Estates Ltd. v British Columbia (Assessor of Area No. 11 - Richmond/Delta)* [2000] BCJ No. 331 is often cited. It reads:
- ... that there is no evidence before the Board which supports the finding made, in the sense that it is inconsistent with and contradictory to the evidence. In other words, the evidence does not provide any rational basis for the finding. It is perverse or inexplicable. Put still another way, in terms analogous to jury trials, the Appellant will succeed only if it establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination, the emphasis being on the word “could” ...
36. *Welch, supra*, is also instructive on the issue whether the rules of natural justice are violated if a delegate fails to consider relevant evidence. In that case, the Tribunal said that such a failure can raise natural justice concerns, but that caution must be exercised when deciding whether the failure justifies remedial action, for three reasons. First, as pointed out in D.J.M Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at paragraph 12:3700:
- ...any attempt to determine whether an administrative decision-maker has considered “all of the evidence” as a matter of procedural fairness, can come very close to the reassessment of the actual findings of fact, which would be inconsistent with the usual deferential approach to review of findings of fact.
37. Second, it is trite law that reasons for a decision need not recite all of the evidence that is considered when a decision is made, and so the Tribunal should be reluctant to find that a delegate has failed to consider relevant evidence merely because it is not mentioned, expressly. The Tribunal’s reluctance may weaken, however, in direct proportion to the degree to which the evidence that is omitted can be said to be relevant or probative. The more relevant or probative the evidence, the greater is the expectation that it will receive express attention in the delegate’s reasons.
38. Third, proof that a delegate failed to consider relevant evidence does not inexorably lead to a conclusion that there was a failure to observe the principles of natural justice. It depends, rather, on the impact the failure to consider the evidence has on the fairness of the proceeding. In order to decide that question, the Tribunal should consider factors like the importance to the case of the issue upon which the evidence was sought to be introduced, and the other evidence that was available on that issue (see *Universite du Quebec a Trois-Rivieres v Larocque* [1993] 1 SCR 471).
39. The adequacy of the Delegate’s reasons is also a relevant consideration when one reflects upon the grounds of appeal specified by RCOA in this proceeding. The quality of those reasons may raise, or eliminate, concerns that the Delegate acted without any evidence, acted on a view of the facts that could not be reasonably entertained, or failed to consider relevant evidence.
40. If reasons are deficient, the parties cannot assess a determination in the sense of coming to an understanding of the basis for it. This in turn undermines their ability to decide with confidence whether there are valid grounds for an appeal. Inadequate reasons on their own may, therefore, constitute an error of law, or a failure to observe the principles of natural justice (see *Hilliard, supra; Walter E. Johnson*, BC EST # D122/04; *Grant Howard*, BC EST # D011/07).
41. Finally, with regard to the question whether the Complainant was an employee, or an independent contractor, it must be remembered that a decision as to a person’s status is based on an application of the provisions of

the *Act*. It is trite to say that the *Act* casts a wider net for employment than does the common law (see *North Delta Real Hot Yoga Ltd.*, BC EST # D026/12, and the cases referred to therein). Part of the reason for this is to be found in the policy objectives of the *Act*. As stated in *Machtiger v HOJ Industries Ltd.* [1992] 1 SCR 986, concerning the employment standards legislation in Ontario, but in terms equally applicable to the *Act*:

...an interpretation of the Act which encourages employers to comply with minimum requirements of the Act, and so extends its protection to as many employees as possible, is favoured over one that does not.

42. Another reason for the subordination of the common law tests is the expansive language used to describe what an “employee” and an “employer” are defined to mean in the *Act*. In section 1, “employee” is defined to include, among other things, a person “receiving or entitled to wages for work performed for another” and a person “an employer allows, directly or indirectly, to perform work normally performed by an employee”. An “employer” is defined as including a person “who has or had control or direction of an employee”, or “who is or was responsible, directly or indirectly, for the employment of an employee”.
43. Still, the common law tests are of assistance in determining questions of status. They can provide some useful criteria for determining the manner in which the statutory definitions should be applied.
44. In the case of *671122 Ontario Ltd. v Sagaž Industries Canada Inc.* [2001] 2 SCR 983, a case involving an issue of vicarious liability, the Supreme Court of Canada stated that there is no single, conclusive test that can be universally applied to determine if a person is an employee or an independent contractor. Instead, there are several factors which need to be considered including:
- the level of control over the worker’s activities that is exercised by the employer;
 - whether the worker supplies tools;
 - the degree of financial risk undertaken by the worker;
 - the degree of responsibility for investment and management resting in the hands of the worker; and
 - the worker’s opportunity for profit or loss arising from the work.
45. The relative weight of these factors, and any others that may be relevant to the inquiry, will depend on the particular facts and circumstances of the case at hand.
46. Having regard to these legal principles, I turn now to a consideration of the arguments presented by RCOA on this appeal. There are eleven of them.

1. The Intention of the Parties

47. RCOA asserts that the Delegate discounted entirely the fact that the working relationship between it and the Complainant was based, expressly, on the intention that the Complainant would be a contractor. While RCOA acknowledges that this factor should not be given significant weight, it must be weighed at least to some extent in the balancing of the factors that should determine the status of the Complainant.
48. I do not discern that the Delegate departed from this approach when he considered the significance of the parties’ intentions. I infer that the Delegate must have attributed some weight to the express provisions of the Complainant’s arrangement because he referred to Tribunal decisions in *Love Again Network Inc.*, BC EST # D105/12, and *Knight Piesold Ltd.*, BC EST # D093/99. In both of those decisions, the Tribunal made it

clear that an express intention to form a contractor relationship should not be ignored when determining an employee's status.

49. Further, the Delegate's statement that there might be doubt about a party's true intention where the party has no option but to sign a contract in order to obtain work demonstrates that the Delegate did consider the issue of intention, but attributed little weight to it in the circumstances. In doing so, I cannot say that the Delegate misapplied the relevant legal principles.

2. *Whose Business is it?*

50. Under this head, RCOA asserts that the Delegate made several findings that are either unsupported by any evidence or are unreasonable.
51. First, the Delegate's Reasons state that clients perceive RCOA as providing the full spectrum of home schooling. RCOA submits that there was no document or other evidence before the Delegate that supports this statement, and that in any event it cannot be correct because home schooled children are by definition educated in large measure by their parents.
52. I cannot attribute the same degree of significance to the Delegate's statement as RCOA gives to it. The statement must be read in context. There is no question that RCOA provides services for students from kindergarten to Grade 12. In the same paragraph, the Delegate's Reasons go on to refer to the Handbook, which says that the main role of an SEA is to support the student's learning, as directed by the SNC and the IEP for the student. That juxtaposition makes it clear to me that the Delegate was referring to the full spectrum of home school support services when he made the impugned statement.
53. Second, RCOA takes issue with the Delegate's statement in his Reasons that it maintains total direction and control over the services provided by the Complainant. The Delegate lists several factors which would weigh in favour of such a conclusion, including the fact that the Complainant is required to submit timesheets for hours worked, her duties and the expectations of her are set out for her by the SNC, she is required to follow the IEP for the student, her activities are overseen by the SNC, and she is required to submit monthly reports.
54. What RCOA alleges, however, is that other factors tending to support a more limited form of control by it over the activities of the Complainant are not referred to in the Delegate's Reasons. These include the fact that the Complainant arranges her own teaching and vacation times with the student's family, she is empowered to sub-contract certain non-teaching aspects of her work, she makes use of her own vehicle and computer in her work, and she is permitted to contract for extra services directly with the parents of the student. In addition, RCOA submits that the Complainant chooses her own teaching strategies, and there is no evidence that anyone at RCOA exercises a supervisory function in respect of the Complainant while she is actually teaching. Finally, RCOA says that the Delegate's statement ignores the fact that the parents of the student have significant control over the work performed by the Complainant.
55. As there was some evidence on the basis of which the Delegate could conclude that RCOA exercised the type of control the authorities suggest will imply a relationship of employment, I cannot conclude that the Delegate erred in law in the sense of acting without any evidence. Nor can I say that the Delegate acted on a view of the facts which could not reasonably be entertained, at least as regards the facts that the Delegate referred to.

56. The concern is, however, that the Delegate's Reasons do not indicate that he considered all the relevant facts on this issue. The Delegate carefully listed all the facts to which I have alluded which support the Delegate's conclusion relating to the issue of control. That list does not, however, identify the facts supporting RCOA's submission that its control over the Complainant is not as "total" as the Delegate's discussion suggests.
57. Given that the issue of control over the Complainant's work appears to have been a significant factor in the Delegate's decision that the Complainant is an employee, and since the analysis of the level of control is an exercise that is highly nuanced, factually, it is my view that the Delegate's Reasons should also, in fairness, have canvassed those facts identified in the submissions of RCOA that support a finding that the Complainant is a contractor. In my opinion, the Delegate's failure to do this was significant enough in the circumstances of this case to constitute a failure to observe the principles of natural justice.

3. Scheduling of Teaching Times

58. In his Reasons for the Determination the Delegate expresses the opinion that there is an "inherent flexibility" to home schooling that cannot be duplicated in an institutional setting. Notwithstanding this, the Delegate notes that RCOA establishes the number of RCOA hours an SEA is allotted for each student. The Delegate's Reasons say nothing further on the topic.
59. RCOA challenges the Delegate's statement regarding flexibility, asserting that it is speculative. It says there was no evidence for the conclusion and that it may be that parents will stipulate quite strict time schedules, resulting in very little flexibility.
60. More importantly, RCOA submits that the Delegate failed to discuss the issue of scheduling in depth in relation to the question whether the Complainant was an employee or independent contractor. It argues that since the hours an SEA works, or takes off from work, are largely the result of discussions between the SEA and parents, it means that RCOA has limited, if any, control over when the work occurs. That, it says, is an indicator that its SEA's are contractors.
61. Another indicator of contractor status, it says, is the fact that the SEAs may contract directly with the parents to supply extra time with the student, in addition to the hours allotted through the funding administered by RCOA.
62. RCOA submits that all these factors should have been weighed in the balance by the Delegate when he considered the issue of scheduling. Since the Delegate did not do that, RCOA argues that the Delegate's Reasons are deficient in a way that constitutes a failure to observe the principles of natural justice.
63. I agree. If the matter of scheduling and vacations are largely, if not entirely, questions to be resolved between SEAs and parents, it means that RCOA exercises less control over when the work is to be done. The ability to establish when work is to be done is a factor that is often at issue when deciding whether a worker is a contractor. It is also a mark of a contractor relationship if the contractor has the ability to contract for other services with the client, as that ability weighs in favour of a conclusion that the person is, at least to a degree, in business for herself.
64. I note that at least one of the submissions made by the Complainant to the Delegate refers to language in her Contract with RCOA to the effect that SEAs agree to days and hours that are outlined by the SNC. Evidence from RCOA also states that it will set the maximum number of hours the SEA can work with the family each week, according to a pre-approved budget. Elsewhere in the record, however, the Complainant

states that it is the SEA and parents who work out the number of hours the SEA is to work, and on which days of the week. However, this schedule is set with the approval of the SNC or SND.

65. I do not say that the Delegate's conclusion would, of necessity, have been different had he expressly dealt with these matters in his Reasons. I do say, however, that they are of sufficient importance that he should have addressed them.

4. Ownership of Tools

66. RCOA submits that it was an error for the Delegate to state, in his Reasons, that "[n]owadays, both employees and contractors regularly use their home computer and vehicle in relation to work." RCOA says that there was no evidence for this conclusion. Moreover, it asserts that it is a mark of contractor status that the Complainant was expected to make use of her own computer and vehicle in her work, and required, indeed, to purchase special vehicle insurance to transport students.

67. I do not think that the Delegate over-reached in his analysis of this aspect of the evidence. The ownership of these types of "tools" by an employee, and employed by the employee in the work without reimbursement in respect of the attendant cost, is doubtless a reality in some employment relationships. I believe that the existence of this as a fact is something that would be known by intelligent persons generally, and so it was a fact of which the Delegate was entitled to take judicial notice.

68. Nor am I convinced that the Delegate decided that the Complainant's use of her vehicle and home computer tends to support a finding that she was an employee. What the Delegate said was that of the several factors to be weighed, the ownership of tools was not a factor that was determinative in this instance. That was probably because there was other evidence, principally from the Complainant, to the effect that all the supplies and equipment necessary for the purposes of providing the education to a child outlined in an IEP are provided by RCOA or the parents, pursuant to the budget established for the child.

5. Billing Additional Teaching Time

69. RCOA takes issue with the Delegate's finding that while SEAs are permitted to contract for additional instructional time with parents, and be paid directly for it, this only occurs because RCOA allows it. It also challenges the Delegate's statement that any additional instructional time would be subject to the same RCOA oversight as the contracted work.

70. While it is not expressly stated in the Delegate's Reasons, the implication embedded in the Delegate's comments is that an SEA's ability to contract on his or her own account is really an indicator of employment status, rather than contractor status.

71. RCOA rejects this analysis on several grounds, and I have concluded that RCOA's objections are well founded.

72. RCOA argues, and I agree, that it is speculation for the Delegate to find that an SEA's ability to contract for additional work with parents really suggests an exercise of control of the SEA's work because RCOA could have prohibited it. The Delegate refers to no evidence supporting such an interpretation, and I fail to discern any in the record. Put simply, it is unknown whether RCOA could have prohibited the Complainant, or any other SEA, from contracting with parents on their own to supply additional services. It is, however, a fact that SEAs could make such arrangements with parents.

73. I believe RCOA is right to say that the ability to contract with clients on one's own account, while performing other services to those clients on behalf of another, points to a person's being in business for themselves, and not to a conclusion that he or she is an employee. Employees do not normally "moonlight" in this way.
74. Given the expectation that such an ability would be a mark of a contractor relationship, I think it was incumbent on the Delegate to refer specifically to the evidence that would support a conclusion that this aspect of the relationship was but a further example of the control that RCOA exercised over the Complainant, and that it therefore suggests a relationship of employment. The type of evidence that might be expected in a discussion of that sort would identify the aspects of parties' relationship that would indicate that RCOA had the power to dictate whether an SEA like the Complainant could perform additional work at all, and if so, on what terms.
75. The same concern arises regarding the Delegate's statement that any additional services provided by an SEA would be subject to the same oversight by RCOA as the contracted services. The Delegate provides no evidentiary support for this statement, and so I must agree with RCOA that it is also speculative. As RCOA argues, it may be that parents and an SEA might agree to RCOA supervising the additional work, but that is a different thing from saying that the SEA's agreement with RCOA requires that it must happen.
76. Absent evidence addressing these concerns, one is driven to the conclusion that the Delegate's conclusions under this heading were based on no evidence at all, or that they were unreasonable. Alternatively, the Delegate's Reasons are deficient, as they do not make reference to the evidence that would support the conclusions he has drawn.

6. *Investment in Training*

77. In his Reasons the Delegate notes that RCOA requires its SEAs to attend mandatory training sessions annually, for which they are paid. I see no basis for criticizing the Delegate's reference to this requirement, as it tends to blunt RCOA's assertion that SEAs like the Complainant are trained professionals who are hired as such, that it is incumbent on them to maintain their credentials, and that these factors suggest they are retained as contractors.
78. In this instance, the Delegate refers specifically to the provision in the Handbook that speaks of the training sessions arranged by RCOA. There was, therefore, evidence that supports the inference to be drawn from the Delegate's discussion that this is one of the aspects of the Complainant's working arrangement that suggests she is an employee.

7. *Termination*

79. RCOA argues that the Delegate committed an error of law in deciding that it is the party that is in a position to decide whether an SEA should be terminated. RCOA says that it is the parents who make that decision. It relies on a submission to the Delegate from the Complainant which states that if a parent is unhappy with an SEA, it is understood that the SEA can be dismissed. It also relies on its own submissions to the Delegate to the effect that if a family is not satisfied with the fit with a particular SEA, the contract is ended immediately by the family.
80. I do not discern from the Delegate's Reasons that he failed to understand that parents have significant, and probably conclusive, input into a decision whether a particular SEA will continue to work with their child. However, that is a different question from the one the Delegate was required to answer. The question for the

Delegate was the impact the wishes of the parents would have on the relationship between the SEA and RCOA. On that question the evidence is more equivocal.

81. The submissions from RCOA say that it cannot guarantee further work for SEAs. That implies, of course, that there may, indeed, be other work available for the SEA in question. I note also that counsel for RCOA, in a submission to the Delegate dated February 16, 2012, states that upon notice by the family that it would prefer a different SEA, the SEA is immediately removed from that contract, but is then offered other available contracts. Again, this implies that the relationship between the SEA and RCOA may be a continuing one, notwithstanding that the relationship with a particular family has ended.
82. In its submission on appeal RCOA acknowledges that it has the power to terminate its relationships with SEAs. There is also evidence from the Complainant that if she were to have a problem, or want to discontinue her relationship with a family, she would go to RCOA to have the matter dealt with, and not to the parents. This evidence suggests at least some significant power in RCOA to determine whether an SEA will continue to work with a family, or another family, or at all.
83. In his Reasons, the Delegate referred to the following language contained in the Handbook, reproduced earlier:

In the rare event that the Special Needs Coordinator decides, in consultation with the family, Special Education Director and Principal that the SEA is not a good fit for work with the student they have been assigned to, the contractual arrangement will be terminated.

84. This quote indicates that it may not be a unilateral decision of the family to dispense with the services of an SEA. It also says that the contractual arrangement will be terminated, but it is unclear whether this refers to the contractual arrangement between RCOA and the family, or the contractual arrangement between RCOA and the SEA.
85. For the same reason, the admission by the Complainant to which RCOA refers, to the effect that an SEA can be “dismissed” if the family is unhappy with his or her performance, is equivocal. It may mean dismissed in the sense that the SEA is dismissed by RCOA, but it may also mean that the SEA will continue in a working relationship with RCOA, but not in a way that involves him or her in the provision of educational services to that particular family.
86. For these reasons, I cannot conclude that the Delegate acted in the absence of evidence, or on a view of the facts that could not be reasonably entertained, when he rejected the submission of RCOA that it is the families, and not RCOA, who terminate the services of an SEA.

8. Performance Evaluation

87. The Delegate’s Reasons acknowledge that there is no formal performance evaluation procedure that RCOA employs in its dealings with the Complainant, or SEAs generally. However, the Delegate alludes to the monthly reports the Complainant is obliged to provide to the SNC. This suggested to the Delegate that there is, in fact, a form of ongoing evaluation of the Complainant’s performance by RCOA.
88. RCOA refers to the following excerpt from the Handbook in support of the assertion that the reports are simply descriptions of the student’s progress, and are not focused on the performance of the SEA:

A mandatory monthly report explaining some of the major highlights and lowlights is required and must be sent to the home learning support teacher and the SNC. This should include some of the major areas

in which you worked directly with the student, areas that you may have seen some growth or areas where you might want suggestions from the SNC. This report can also be used to give a general impression of how things are progressing with and for the student and an opportunity to ask questions of the SNC related to your student.

89. RCOA also submits that it was prejudicial for the Delegate to conclude that the reports incorporate a performance evaluation component in the absence of other evidence showing that RCOA ever makes use of the reports to evaluate the Complainant's performance.
90. In my view, the terse comments in the Delegate's Reasons concerning performance evaluation of SEAs demonstrate that it was not as critical an element in the Delegate's analysis as RCOA says it was. The Delegate did, after all, acknowledge that there is no formal evaluation process for SEAs.
91. At the same time, I do not think it was unreasonable for the Delegate to make reference to the submission of reports by SEAs. Even if their primary focus is the educational progress of students, it is logical to assume that the quality of the learning environments to which they refer, for which the SEAs will at least in part be responsible, will be reflected in the contents of the reports.
92. Moreover, on the issue of performance, the Contract states expressly that "termination of work due to unsatisfactory performance of duties can occur at any time." It also states that the SEA's wage and schedule of work are set by the SNC "and are subject to change upon satisfactory performance." Regarding future work, the Contract says that "[u]pon satisfactory performance through the year by the SEA, that SEA shall be given priority for the anticipated assignment for the next academic year." It seems right to infer from this language that RCOA is entitled to evaluate the performance of an SEA, and will do so in order to decide if his or her services should be continued, or dispensed with.
93. It follows that I see no reviewable error arising from the Delegate's comments in this portion of his Reasons.

9. Who Controls the Work Environment?

94. The Delegate's comments in his Reasons under this heading are also quite brief. They read as follows:

On all of the evidence I find that RCOA very much controls the relationship. The family may inform RCOA about the SEA but the ultimate authority over the SEA resides with RCOA.

95. RCOA submits that these statements contain no actual reasons for the conclusions drawn, and so the parties are left to speculate as to the factors the Delegate found persuasive. RCOA further submits that this must result in a finding that the Delegate failed to observe the principles of natural justice. It says that the Delegate was required to give reasons so as not to preclude further avenues of appeal.
96. In the circumstances, I must disagree. The Delegate's comments under this heading relate to topic headings he identified in the submissions he had received from RCOA in anticipation of his issuing a Determination. Certainly, if this was all the Delegate had said in his Reasons about the issue of control, RCOA would be on stronger ground. However, I prefer to conclude that the Delegate is merely summarizing the import of many of the factors he discusses in more detail earlier in his Reasons. I have decided, therefore, that the Delegate's comments, laconic though they may be, do not, when considered in context, demonstrate reviewable error.

10. *Sub-contracting work*

97. RCOA argues that the Delegate failed to consider the fact that the Complainant is able to sub-contract certain of her non-teaching duties. It says that when a person can sub-contract work it points to contractor status. It says further that a failure to deal with this aspect of the evidence at all means that the Delegate failed to observe the principles of natural justice.
98. I agree with the submission of RCOA.
99. There was evidence before the Delegate suggesting that the Complainant is able to sub-contract portions of her work that do not involve direct contact with a student. Examples of the tasks that might be sub-contracted include accounting and bookkeeping work, scheduling, preparation of instruction, business promotion, and typing reports.
100. In *Welch, supra*, the Tribunal said this, after referring to some of the pertinent authorities:
- ... the ability to sub-delegate the work to be performed indicates that the putative employer lacks control over how the work is performed, and it militates powerfully against a finding of an employment relationship. Although I am not aware of any absolute rule that a person who may sub-delegate his or her work without obtaining consent cannot be an employee, in my view it is a factor that, if present, must be expressly considered and weighed in the balance in assessing whether a person is an employee or an independent contractor.
101. In addition, the Tribunal said that in the circumstances of that case evidence relating to the ability of the complainant to sub-delegate work was sufficiently probative on the issue of control to warrant its being mentioned and expressly considered in the delegate's reasons for the determination.
102. For the same reasons, I am of the view that the Delegate's Reasons should have expressly dealt with the matter of the Complainant's ability to sub-contract at least some of her duties. This is not to say that after doing so, the result expressed in the Determination would be different. It does mean, however, that given the importance of the sub-contracting issue to the resolution of the question whether the Complainant was an employee, it was a failure to observe the principles of natural justice for the Delegate to ignore it.
- ### 11. *The Tax Court Decision*
103. In its submissions to the Delegate, RCOA made reference to the decision of the Tax Court of Canada decision in *Kelowna Christian Center Society v MNR* 2008 TTC 80. In that case, in circumstances similar to those present in the case now before me, the court decided that a teacher retained to assist home schooled students to achieve prescribed learning outcomes was an independent contractor, and not an employee.
104. In correspondence to the parties dated April 12, 2013, the Delegate referred to the *Kelowna Christian Center* decision and stated, in part, that it was to be distinguished because it was based on a finding that the parties intended to purposely strike a contractor relationship rather than an employment relationship. That conclusion on the part of the Delegate was, for RCOA, an incorrect reading of the *Kelowna Christian Center* decision. RCOA's submission on appeal includes a discussion of the case, and provides a compelling argument that the Delegate misapprehended the parties' intentions in the *Kelowna Christian Center* case.
105. RCOA appears to argue on appeal that since the Delegate misapprehended the court's finding when he considered the *Kelowna Christian Center* case, his ability to properly consider the relevant factors indicating contractor or employee status in the case before me should be doubted.

106. If that is RCOA's argument, I reject it, for the following reasons.
107. After receiving the Delegate's April 12, 2013, letter, RCOA delivered at least two further submissions before the Determination was issued. Each of those submissions canvassed in detail the considerations RCOA thought the Delegate should deem relevant. In one of the submissions, dated May 1, 2013, RCOA acknowledged, correctly, that decisions of the Tax Court are not binding on the Tribunal.
108. None of RCOA's later submissions to the Delegate alleged, specifically, that he had misinterpreted the court's finding regarding the parties' intentions in the *Kelowna Christian Center* case. Instead, RCOA encouraged the Delegate to give at least some weight to the intentions of RCOA and the Complainant expressed in the Contract that the Complainant was being retained as an independent contractor.
109. The Delegate does not refer to the *Kelowna Christian Center* decision in the Determination. It was not necessary for the Delegate to do so. The *Kelowna Christian Center* decision dealt with legislation designed to effect different policy objectives from those contained in the *Act*. As I have noted, the legal tests relating to a person's status under the *Act* are different than the common law tests, and are based on the statutory definitions contained within it. Moreover, the authorities have consistently expressed the view that the *Act* should be interpreted expansively so as to extend, rather than restrict, the protections it provides to persons who perform work.
110. As discussed above, the Delegate's Reasons do address the issue of the parties' intentions when they entered into the Contract. I have found that the Delegate did not err in law in the manner that he approached this issue. In light of this, the fact that the Delegate may have misapprehended a factual finding of the court in the *Kelowna Christian Center* case is of limited significance.

CONCLUSION

111. In summary, I have decided that RCOA has demonstrated that the Delegate erred in law or failed to observe the principles of natural justice in some, but not all, of the subject areas discussed in the Delegate's Reasons for the Determination.
112. More particularly, I have identified error in the Delegate's treatment of the following components of his rationale for the Determination:
- item 2 – whose business it is
 - item 3 – scheduling of teaching times
 - item 5 – billing additional teaching time
 - item 10 – sub-contracting work
113. Given that in cases of this sort a decision-maker must weigh all the relevant factors against each other, and cumulatively, in order to arrive at a decision as the status of a person performing work, I have decided that the errors noted warrant the intervention of the Tribunal.
114. In my view, the appropriate remedy is to cancel the Determination and refer the matter back to the Director so that the complaint may be considered afresh and a further determination issued, having regard to the reasons given in this decision.

115. It follows from what I have said that I have not decided whether the Complainant is an employee of RCOA, or an independent contractor.

ORDER

116. Pursuant to section 115 of the *Act*, I order that the Determination be cancelled, and that the complaint be referred back to the Director so that it may be considered afresh and a further determination issued, having regard to the reasons given in this decision.

Robert E. Groves
Member
Employment Standards Tribunal