

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act* S.B.C. 1995, C. 38

- by -

Bandyln Computer Services Inc.  
("Computer Services")

- of a Determination issued by -

The Director Of Employment Standards  
(The "Director")

**ADJUDICATOR:** Richard S. Longpre

**FILE NO.:** 96/479

**DATE OF HEARING:** December 18, 1996

**DATE OF DECISION:** January 3, 1997

**OVERVIEW**

This decision addresses an appeal by Computer Services pursuant to Section 112 of the *Employment Standard Act* (the “Act”) Computer Services seeks review of Determination No. CDET 003432. The Determination concluded, that Phil Pyatt had been an employee of Computer Services. The Determination also concluded that Computer Services owed Phil Pyatt \$1086.24 for unpaid wages and vacation pay.

Computer Services and Bandyln Training Services, (the “Employer”) while separate companies, are associated corporate entities pursuant to Section 95 of the *Act*.

Pyatt is in Ontario and was unable to attend the hearing. Pyatt sent a letter endorsing the position of the Director’s representative. The Director’s representative was also unable to attend the hearing due to personal reasons. She made a representation to the Panel over the telephone. The Employer accepted that format.

**ISSUE TO BE DECIDED**

The Employer argued that Pyatt was an independent contractor while working for the Employer at its operation in Whistler. The Employer challenges the Determination’s finding that Pyatt was an employee and was owed \$1,086.24.

The Employer accepts that Computer Services owes Pyatt \$1011.00, net approximately \$800.00 as an independent contractor. The Employer’s bank accounts were frozen following the issuance of the Determination. It will pay the net of money owing, in two installments, once its bank accounts are available to it.

At issue is a small sum of money and a finding that Pyatt was an employee

**FACTS**

The Employer’s operation was established as the Whistler Language Adventures. It was not a separate company from Computer Services. The Employer attempted to start a school where people could come to Whistler and be taught to ski and to learn English. The school operated from 11:30am to 3:30pm. Half the time spent learning to ski and the other half learning English. The program lasted from January 18, 1996 to February 2, 1996.

The Determination summarized the well established tests of control, ownership of tools, chance of profit, and risk of loss. In deciding that Pyatt was an employee, the Employer focused on two tests: organization and integration. The Determination noted the following.

The Employer directed Pyatt and scrutinized Pyatt's work. Pyatt's standard of work was established by the Employer. Pyatt provided some teaching materials and the Employer provided the space where English instruction was given to the clients. Pyatt was paid an hourly rate. He stood no chance of profit or loss. The Determination concluded that the short duration of the work was of no relevance. Pyatt was found to be an employee of the Employer.

The Employer noted that Computer Services operated the Language Adventures business for eleven days. Language Adventures was 1.6% of Computer Services' operation in 1996. Pyatt was one of several instructors. The Employer notes that none of the other instructors have suggested they were employees of Language Adventures.

The Employer argued that it placed each instructor with a group to teach them skiing and English. The hours of instruction were set for the week. The instructor was provided with a classroom but the materials, supplies and the time spent on each area of the work were up to the instructor. Depending on their experience, each instructor was paid a different amount for the hours worked. The client paid Language Adventures. The clients were told the amount of time that would be spent on skiing and learning English. While parameters for time spent in each area were set, the instructors were not checked

In the past, Pyatt worked for the Employer in other positions as an employee. In this case, the Employer says that he did not represent them. He operated as a separate business with business cards. He pursued work as an independent contractor. He was hired in that capacity.

## **ANALYSIS**

Numerous decisions of the Tribunal have referred to the review by Mark Thompson of the employment standards legislation: *Rights and Responsibilities in a Changing Workplace*. I start my review of the Determination from that premise. Further, the Determination is seen to be correct. The Employer bears the onus to prove the Determination is inconsistent with the law and the policy of the *Act*.

A short term work assignment may effect employee status in certain circumstances. That is not the case here. The project had a short term because it was not successful. The project's success is not a relevant consideration in whether Pyatt was hired and worked as an employee. The issue is the terms on which he was working between January 18 and February 2, 1996.

Similarly, Pyatt carrying on a business in the Whistler area might be a relevant consideration in determining employee status. While Pyatt had business cards and advertised, I had no evidence that he carried on a business related to the nature of the project's business. Further, a contractor, particularly in a small business, may accept employment opportunities between contracts. Again, the issue is the terms Pyatt was working for the time period.

Also, the Employer raised a number of factors to be considered in determining employee status. These factors were set out in a memo provided to the Employer from Employment Standards. The Tribunal has addressed the definition of employee in several applications in the past year. Our decisions focus on specific factors. The Determination addressed these factors. While other factors may be relevant in some circumstances, the main criteria in establishing employee status are: control or direction, ownership of tools, chance of profit or loss and organization and integration.

The Employer set up a business in Whistler teaching English and skiing. Its clients paid for participation in the course. Pyatt was hired to do specific work for a specific number of hours and at a specific wage rate. The Employer had significant control over the entire business. Pyatt had some flexibility but that flexibility was within the specific guidelines set down by the Employer. Each day started and concluded at the same time for all instructors. Further, Pyatt had no chance of profit nor risk of loss. Pyatt may have brought material to the English classes but the Employer provided the room in the hotel.

The Employer argued that Language Adventures was a small part of Computer Services, business. That is true. However, Language Adventures was set up as an independent operation. Pyatt's participation in Language Adventures was, as the Determination concluded, an integral part of that business. He provided the service the Employer sold at the time and place the Employer sold it .

I find that Pyatt was an employee of the Employer as concluded in the Determination. Finally, the Employer did not establish that the Determination's conclusion of the amount owing to Pyatt was incorrect.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination No. 96/479 be confirmed.

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**Richard S. Longpre**  
**Adjudicator**  
**Employment Standards Tribunal,**