

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113

-by-

CMTC Client Management Training Centers Inc.

-of a Determination issued by-

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Fernanda Martins

FILE NO.: 97/926

DATE OF DECISION: August 11, 1998

DECISION

OVERVIEW

This is an appeal by CMTC Client Management Training Centers Inc. (“CMTC”) pursuant to Section 112 of the Act. The appeal is from the Determination issued by the Director on December 5, 1997. The Director found Robert Munn to be an employee of CMTC, and to be entitled to one week’s compensation for length of service and vacation pay. CMTC was found to have contravened sections 58 and 63 of the Act.

Mr. Munn was employed by CMTC as a director of franchise development.

CMTC gave the following as reasons for making this appeal:

We believe Mr. Munn was a contractor as he worked independently of our supervision.”

The Appeal is now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal.

ISSUES TO BE DECIDED

This appeal requires me to decide whether the Director is in error in finding Mr. Munn to be an employee of CMTC.

FACTS

CMTC is a B.C. registered company formed in 1996 for the purpose of developing an associate and franchise program around the business concepts of the CMTC Client Management Training Center of Vancouver which has operated as a computer training centre since 1989.

Mr. Munn was described in a CMTC Executive Summary as having joined CMTC as director of franchise development. He worked for CMTC from February 24, 1997 until June 16, 1997 when his employment was terminated by CMTC.

In a letter dated June 13, 1997, Brad Desaulniers, President of CMTC advised Mr. Munn that he was considered an independent contractor and therefore not entitled to any notice or severance pursuant to the Act.

During the Director's investigation, Mr. Munn claimed that he was not informed until one week after his hiring that CMTC intended to treat him as an independent contractor. Despite his reluctance to do so, he obtained a G.S.T. number as CMTC had directed. Although he requested a written contract from CMTC, none was ever provided.

After CMTC refused to provide him with severance pay, Mr. Munn obtained opinions from Revenue Canada regarding his employment status vis à vis Employment Insurance and Canada Pension coverage.

Mr. Munn has provided copies of two letters from Revenue Canada both dated July 28, 1997. The letter regarding Employment Insurance states that Mr. Munn was considered an employee for purposes of the Employment Insurance Act. The letter regarding the Canada Pension Plan advises that during Mr. Munn's association with CMTC, he was employed in pensionable employment.

Mr. Munn provided a great deal of information to the Director and to this Tribunal in the form of a summary, various letters and CMTC literature. During the Director's investigation, CMTC was given the opportunity to review the information provided by Mr. Munn and to respond to it. The Director states that CMTC neither provided any reasons supporting their claim that Mr. Munn was an independent contractor, nor any response to Mr. Munn's well documented allegations.

In addition to CMTC's claim in its Reasons for Appeal that Mr. Munn worked independently of their supervision, the only other submissions were made by way of a letter to the Tribunal dated January 21, 1998, where receipt of Mr. Munn's documents is confirmed. Jane Poulston, Field Services Manager of CMTC states:

We have always thought of Bob Munn as a Contractor, however if he is classified as an employee we would like to note that No Notice or Compensation is Required under the Act if the employee was dismissed for just cause.

Mr. Munn was given three months to sell a franchise, he was given more time and several warnings before he was dismissed having been unable to fulfill his role.

We have paid tax on his behalf and will accept paying 4% vacation Pay, however we should not be paying \$807.68 for one weeks compensation. CMTC is owed \$361.44 from Mr. Munn ($\$807.68 - \$446.24 = \361.44).

ANALYSIS

The onus is on the Appellant, CMTC, to demonstrate error or a basis for the Tribunal to vary the Director's Determination that Robert Munn was an employee. __

CMTC did not provide any evidence to support its reasons for appeal that Mr. Munn was a “contractor as he worked independently of [their] supervision”. CMTC did not dispute any of the allegations made by Mr. Munn despite two separate opportunities offered by the Director. Those allegations remain undisputed in this appeal.

Even if there was evidence to support this assertion, it would have been only one factor outweighed by the other factors which the Director considered.

The Director concluded that Mr. Munn was an employee of CMTC by using the “four-fold test” which examines control, ownership of tools, chance of profit and risk of loss and the “organization or integration test”. The Director stated:

Taking into consideration the above criteria, there is evidence to support that Mr. Munn’s position was an integral part of the organization. The intention of the Company, as communicated in their interoffice communiques, was to include Mr. Munn as an important and integral part of the ‘management team’. He did not run the risk of loss or stand to profit over and above the commission rate established by the Company. Mr. Munn was required to report to work in person and could not assign another individual to perform work on his behalf. There was sole economic dependence with a monthly salary being paid.

The “just cause” argument raised in the Appellant’s submissions by way of letter dated January 21, 1998, is also not supported by any documents or facts. There is no specific information which might support the general assertions that Mr. Munn was “given several warnings”. This argument was advanced well after the Notice of Appeal was filed. There is no indication in the Determination that this formed part of the Appellant’s position. There is nothing in Mr. Munn’s materials from CMTC which suggests that this might have been a factor in his dismissal. The letter from CMTC dated June 13, 1997, which gave him notice of his termination stated:

With regards to our conversation in CMTC offices on Friday June 13th 1997, it is the opinion of CMTC that the services provided to us by you and billed to us by Robert G. Munn and associates were provided as an independent contractor. As such the employment standards act requires that we not provide you with any notice or severance at the time of termination of any agreement between your company and CMTC.

I find that CMTC has not met its evidential burden to show that the Director’s Determination is incorrect.

ORDER

After careful consideration, I find that the Director's Determination is correct and the appeal should be dismissed. Pursuant to s. 115 of the Act, I order that the Determination dated December 5, 1997 is confirmed.

Fernanda M. R. Martins
Adjudicator
Employment Standards Tribunal