

An appeal

- by -

Karla Phillips operating as Student Works Painting
("Phillips")

- 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

ADJUDICATOR: M. Gwendolynne Taylor

FILE No.: 2003/9

DATE OF DECISION: April 23, 2003

DECISION

This is an appeal by Karla Phillips (“Phillips”) from a Determination by the Director of Employment Standards (the “Director”) dated July 22, 2002, concerning complaints filed by four individuals who claimed to be her former employees (the “employees”). I reviewed the appeal based on written submissions and, by decision dated December 17, 2002, referred the case back to the Director for further investigation. The Director has provided a reply report dated February 7, 2003, to which the parties have had an opportunity to respond.

Briefly, the background to the case is that Karla Phillips (“Phillips”) entered into a Franchise Agreement with Student Works Painting (“SWP”) in October 2000, when she was under the age of majority. She hired painters who eventually quit due to non-payment of wages and filed a complaint against her with the Director of Employment Standards (the “Director”). The Director’s delegate found that Phillips was the employer of the complainants and ordered her to pay outstanding wages. Phillips appealed that decision on the grounds that she was an employee of SWP and that, since she was a minor, her contract with SWP is void and unenforceable.

I found that Phillips was a franchisee, not an employee, and I dismissed that portion of the appeal.

On the issue of being a minor, I observed that although Phillips’ argument was directed to the contract with SWP, that was not relevant since there were no enforcement issues *vis a vis* SWP. Rather, the issue was the enforceability of the contracts with the employees. The Director had submitted that the issue was not ‘enforcement’ but statutory obligations. I noted, however, since statutory obligations arise through contract, the issue still comes back to enforcement.

I referred the case back to the Director for a consideration of the provisions of the *Infants Act*, the *Employment Standards Act* and the facts of this case, and further investigation and fact finding, if necessary.

The Director’s Report Back

The Director’s delegate considered the facts of this case in light of the provisions of sections 19 and 21 of the *Infants Act* and concluded that the *Infants Act* covers contracts of employment. The delegate then considered the definition of “employer” in the *Employment Standards Act* and concluded that SWP was at least indirectly the employer of the employees who worked for Phillips and is responsible for the unpaid wages.

There were two previous decisions of the tribunal, referred to below, which had considered contracts between SWP and its franchisees. The delegate had referred to, and followed, those decisions in the original Determination.

In the Director’s report back to the tribunal, the delegate (different person than the original delegate) stated:

In this case, 3717 Investments Ltd. operating Student Works Painting had information before it in the form of Karla Phillips date of birth and therefore should have known that she was incapable of forming legal contracts of employment with it or with the painters. 3717 Investments Ltd.

operating Student Works Painting ignored that information and permitted Karla Phillips to participate in an arrangement whereby Karl Phillips hired painters to do work. That resulted in financial benefit to 3717 Investments Ltd. operating Student Works Painting. 3717 Investments Ltd. operating Student Works Painting was, at least indirectly, the employer of the painters in these particular factual circumstances, despite what the 2 previous Tribunal decisions state.

Response to the Director's Report

SWP was the only party who responded. In part of its submission, SWP argued:

The implication of there not being an enforceable contract puts Karla Phillips and her painters at an even further distance from having any relationship with 3717. If Karla did not have any contractual relationship with 3717, then 3717 certainly had no employment or any other sort of relationship with any of the four claimants whom 3717 never met, interviewed, hired, supervised or paid.

SWP also denied receiving any financial benefit from Phillips' franchise.

Analysis and Decision

Infants Act

Unfortunately, I find that the Director's report back has not addressed the concerns I had expected to be addressed. It has not adequately considered the legal aspects raised by section 19 and does not refer at all to sections 26 and 27. It is not apparent that the delegate undertook any further investigation or sought any legal advice on these issues.

In my view, the main issues of enforceability of the employees' contracts against Phillips are whether Phillips affirmed or repudiated the contracts.

Section 19 provides:

When infants' contract enforceable

- 19** (1) Subject to this Part, a contract made by a person who was an infant at the time the contract was made is unenforceable against him or her unless it is
- (a) a contract specified under another enactment to be enforceable against an infant,
 - (b) affirmed by the infant on his or her reaching the age of majority,
 - (c) performed or partially performed by the infant within one year after his or her attaining the age of majority, or
 - (d) not repudiated by the infant within one year after his or her reaching the age of majority.

In the report, the delegate referred to s. 19(1)(b) and found it had no applicability because Phillips had resigned her position with SWP before reaching the age of majority. Similarly, the delegate considered that s. 19(1)(d) had no bearing since Phillips resigned from SWP before reaching the age of majority. With respect, I think that is a misinterpretation of the subsections. The section does not speak to whether the contract was current, but whether the infant (s. 19(1)(b)) affirmed the contract or, (s.19(1)(d)), did not repudiate the contract after reaching the age of majority. Is there anything Phillips has done since attaining the age of majority that would constitute legal affirmation? Or negate repudiation?

Sections 20, 25, and 26, raise issues about whether the other parties to the contract have taken any action on the contract, other than through Employment Standards. It is not apparent that the delegate investigated that.

The issue for me has been whether to send this back again to the Director for further investigation. I note that neither Phillips nor the employees made any further submissions. I am mindful that one of the purposes of the *Act* is to provide efficient procedures for resolving disputes. The contracts between the parties involved here terminated in June 2001. It is time for closure on this dispute.

Clearly, Phillips was a minor when she entered into these contracts and, in the absence of evidence showing that she either affirmed or failed to repudiate the contracts, they are not enforceable against her. She has been staunch in her position that SWP is the responsible party and that alone could suggest repudiation. In these circumstances, I am going to accept that as conclusive on this aspect of the case.

Responsibility of SWP

In the previous decision, I stated:

The Tribunal has twice dealt with appeals concerning the legal relationship between SWP and its franchisees: *Re 3717 Investments Ltd. operating Student Works Painting*, BC EST #D337/98 and *Robyn Bourgeois operating Robyn Bourgeois Painting and 3717 Investments Ltd. operating Student Works Painting*, BCEST #D466/01. In both cases, the Director had placed financial liability on SWP for employment contracts entered into by franchisees. In both cases, the Tribunal determined that SWP did not have the degree of control or direction over the franchisees to support the conclusion that there was an employer/employee relationship or to support the conclusion that SWP and the franchisees were associated under s. 95 of the *Act* (see below). Accordingly, the Tribunal cancelled the Director's Determinations.

In this case, the Director relied on both of those decisions and found that the facts in this case are similar, if not identical, to the facts in both Tribunal decisions. Following those cases, the Director found that Phillips was a franchisee of SWP, and that she was the employer of the 4 employees.

Now that it is clear that the employees cannot enforce the contract against Phillips, the Director finds that SWP is an employer. The Director bases that on the definition of "employer" – "includes a person

- (a) who has or had control or direction of an employee, or
- (b) who is or was responsible, directly or indirectly, for the employment of an employee.

The Director has not provided any analysis or case precedent to support the conclusion.

In *Re 3717 Investments Ltd. operating Student Works Painting*, BC EST #D337/98 ("the 1998 decision"), the Tribunal considered the definition of "employer" as well as the common law tests for determining employer/employee relationships. After a thorough analysis of the case law and the facts, the Tribunal found that SWP was not the employer of the painters. The Determination dated July 22, 2002 followed that decision.

I also concurred with the result of that case, and the *Bourgeois* case, and found that SWP was not an employer. I found that the Director did not err in determining that Phillips entered into a franchise

agreement with SWP and that Phillips, not SWP, was the employer of these 4 employees. Nothing has been presented by the Director or any party that would alter my decision. I find that the Director's conclusion that SWP is an employer of the painters is not tenable.

I Order that the Determination dated July 22, 2002 be cancelled. The effect of this Order is that there is no enforceability through the Employment Standards Act for the wage arrears for the employees.

ORDER

Pursuant to section 115 of the *Act*, concerning the Determination dated July 22, 2002, I reconfirm that I dismiss that aspect of the appeal dealing with whether Phillips was an employee of SWP. On the remaining aspect of whether the contract between Phillips and the employees is enforceable, I cancel the Determination.

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal