

An appeal

- by -

Dean Beitel op/as The A.V. Group
(“The A.V. Group”)

- 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: James Wolfgang

FILE No.: 2000/859

DATE OF DECISION: March 27, 2001

DECISION

OVERVIEW

This is an appeal by Dean Beitel (“Beitel”) operating as The A. V. Group (“A. V. Group” or the “employer”) under Section 112 of the *Employment Standards Act* (the “Act”) from a Determination dated November 22, 2000 issued by the Director of the Employment Standards Branch (the “Branch”).

Mason R. Schmitt (“Schmitt”) filed a complaint with the Branch claiming the A.V. Group had failed to pay him wages and vacation pay.

The Determination found A. V. Group had contravened Sections 18(2) and 58 of the *Act* and ordered them to pay Schmitt \$1,010.89.

ISSUES TO BE DECIDED

Was Schmitt a contractor or an employee?

If Schmitt is found to be an employee is he entitled to be paid wages and vacation pay in accordance with the Determination?

Was the deduction of \$775.00 by the A.V. Group from the wages of Schmitt in accordance with the *Act*?

FACTS

The A. V. Group operates a speciality Acoustic/Audio/Video/Lighting company. They claim they do not have any employees, only hiring workers when they have a contract to work on. They take the position Schmitt is not an employee and is owed no money.

The A. V. Group claim Schmitt was hired as a contractor and had his own company, billing them for work he performed on their behalf. In a letter to the delegate dated August 3, 2000 they stated in part:

..... We paid him for each job as we were being paid. However, at the same time he was responsible for any problems on these jobs and/or lost materials or equipment.

Further they claim while working for them he also worked for another company and had messages from that company left at their office.

There was no written contact outlining the terms of employment. The employer did not make any deductions for EI, CPP or Income Tax and when they made the final payment to Schmitt it was

reduced by \$775.00. The deduction was for failing to properly install some wiring on one project and for a lost ladder owned by the employer. They claimed if any money is owed it should be used to offset the above losses.

The A.V. Group are appealing the ruling by Canada Customs and Revenue Agency that Schmitt was an employee. If they lose that appeal they would be required to pay for EI, CPP and Income Tax for Schmitt. They claim if the Tribunal awards money to Schmitt this would, in effect, be forcing them to pay twice.

Schmitt was employed as an audio repairperson from January 15, 2000 until April 04, 2000 when he quit. He admits that both parties agreed they would not pay any EI, CPP, or Income Tax. Schmitt claims he was an employee and paid at the rate of \$11.50 per hour. In support of this position he has submitted a copy of a letter from Canada Customs and Revenue Agency in which they ruled he was an “employee under a contract of service”.

He further submitted a copy of an e-mail from the A.V. Group dated May 16, 2000 stating, in part:

..... Went over your hours and figure we owe you \$767.75 which includes the receipt you mailed. (emphasis added)

Schmitt claimed he was not recalled to correct the wiring mistake, which would be the case if he were a contractor. He also claimed his duties included many personal jobs for the company such as organizing and cleaning the shop, office, truck and doing yard work etc. He would not have been asked to do these as a contractor.

Schmitt claims he left the ladder inside a locked building at the last job he worked on.

ANALYSIS

The ruling by Canada Customs and Revenue Agency that Schmitt was an employee is not determinative for the Tribunal. It may be of assistance, however the Tribunal operates under different legislation and rules and a determination by Canada Customs and Revenue Agency does not bind the Tribunal.

The Tribunal has made a number of decisions in which the question of whether a person was an employee or a contractor is addressed.

The question is not the title or name given a worker that determines their status but the duties they perform. The 4-fold test has often been used to make that evaluation.

1. Does the employer retain the power to hire and fire?
2. Who supplies the tools and material?

3. Is the person under the direction and control of the employer, hours of work, job location etc?
4. Is there a possibility for profit or loss by the worker?

In the case of Schmitt all evidence points to the fact he was an employee. There was an attempt by both parties to avoid paying certain employee benefits. It appears there was a façade to have it appear as though Schmitt was billing A. V. Group as a contractor but, in fact, it was a claim for hours worked.

Even if Schmitt was working on a contract basis i.e. piece work, if his sole employer or the substantial majority of his time was working for A. V. Group he would be classified as a dependant contractor and treated as an employee.

The A.V. Group charged Schmitt \$750.00 for having to rewire some microphone leads and for the loss of a ladder.

Section 21 (2) of the *Act* states:

- (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.

That clearly indicates the cost of business cannot be passed on to the employee, in this case Schmitt, and the deduction of the \$750.00, as indicated in the Determination, is disallowed.

Before the Tribunal can change a Determination there is an obligation on the appellant to prove the delegate erred in fact or in law. The appellant failed in that regard and the Determination is upheld and A.V. Group must pay Schmitt wages and vacation pay as determined less any deductions for EI, CPP and Income Tax.

ORDER

In accordance with Section 115 of the Act the Determination dated November 22, 2000 is confirmed and A.V. Group is ordered to pay Schmitt the amount of \$1,010.89 less any statutory deductions plus additional interest as prescribed in Section 88.

JAMES WOLFGANG

**James Wolfgang
Adjudicator
Employment Standards Tribunal**