

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-

Loong Heng Education Ltd. operating as Canadian Berkley College of Computer
Education
("Canadian Berkley" or the "employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 99/116

DATE OF DECISION: May 3rd, 1999

DECISION

OVERVIEW

This is an appeal brought by Loong Heng Education Ltd. operating as Canadian Berkley College of Computer Education (“Canadian Berkley” or the “employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 3rd, 1999 under file number 091-458 (the “Determination”).

The Director’s delegate determined that Canadian Berkley owed its former employee, John McGrath (“McGrath”), the sum of \$3,648.50 on account of 2 week’s unpaid regular wages, statutory holiday pay, vacation pay and interest. By way of the Determination, the Director also levied a \$0 penalty pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation*.

ISSUES TO BE DECIDED

The employer appended a letter to its notice of appeal, addressed to the Tribunal and dated February 23rd, 1999, in which it particularized its grounds of appeal. While the grounds of appeal are not as clearly delineated as they might be, so far as I can gather (the various statutory references referred to below were not set out in the employer’s appeal documents), the employer appeals on the following grounds:

- McGrath was an independent contractor and not an “employee” as defined in section 1 of the *Act*;
- part-time employees are not entitled to statutory holiday pay and vacation pay;
- during the course of the investigation the Director’s delegate failed, contrary to section 77 of the *Act*, to give the employer a reasonable opportunity to respond to McGrath’s allegations;
- McGrath, by reason of having quit his employment without notice, is disentitled from advancing a claim under the *Act*, or, alternatively, his claim ought to be set off against those losses incurred by the employer by reason of having to hire a replacement employee to complete the tasks McGrath was hired to do; and
- the amount of wages the Director ordered the employer to pay to McGrath does not account for mandatory statutory deductions such as income tax, employment insurance and C.P.P. premiums.

It should be noted that the employer's February 23rd letter contains a number of other allegations and assertions, none of which constitutes a valid ground of appeal. I also note that the employer's assertion that McGrath failed to give notice of his intention to quit substantially undermines, and is inconsistent with, the employer's first position that McGrath was not an employee.

FACTS AND ANALYSIS

This appeal borders on the frivolous. Certainly, there is ample evidence to show that McGrath was an employee as defined in section 1 of the *Act*. In a letter dated November 6th, 1998 from the employer to the delegate, the employer enclosed what it called a "staff payment record" which detailed payments (hourly wages) to McGrath and various deductions from McGrath's pay on account of C.P.P., employment insurance and income tax. In that same letter McGrath was characterized as a "part-time computer instructor" who "quit his teaching job" without "any formal resignation". In a letter of reference dated November 5th, 1997, the employer stated that McGrath "is now being employed...as a computer instructor". From the employer's own documents it is overwhelmingly clear that McGrath was an employee and not an independent contractor and, further, that in all material respects the employer treated McGrath as an ordinary employee and not an independent contractor

McGrath's part-time employment status does not disentitle him to either statutory holiday pay or vacation pay (see section 3). I have reviewed the delegate's calculations--which are appended to the Determination--with respect to McGrath's entitlement to statutory holiday pay and vacation pay and these calculations appear to have been made in accordance with the *Act*.

The record before me shows that the delegate made every reasonable effort to allow the employer to respond to McGrath's complaint. These efforts included telephone calls to the employer's principal and correspondence to that same individual.

Under the *Act*, employees are not required to give notice of termination although, in practice, many employees do so. In any event, McGrath's failure to give notice has absolutely no bearing on his entitlement to be paid wages for the work which he undertook on the employer's behalf.

Finally, the Determination is expressed in terms of the gross wages that are payable to McGrath; the employer is, of course, upon payment to McGrath, entitled to withhold any required statutory deductions for income tax, CPP or employment insurance so long as such deductions are properly accounted for and itemized--see section 21(1) of the *Act*. I also note with respect to this point that the Determination, at page 3, contains the following statement immediately after the "order to pay": "if statutory deductions are required, please include a statement with your payment indicating the individual amounts remitted to Revenue Canada". Thus, the employer's assertion that it was ordered, by way of the Determination, to pay McGrath a gross amount without regard to statutory deductions is quite erroneous.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$3,648.50** together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance. The employer clearly contravened the *Act*; accordingly, the \$0 monetary penalty is also confirmed.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal