



An appeal

- by -

American Canadian Consultants Inc. Operating as American Business College
("ABC")

- 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: Irene Peters

FILE No.: 2000/775

DATE OF DECISION: May 16, 2001

DECISION

OVERVIEW

This is an appeal by American Canadian Consultants Inc. Operating as American Business College ("ABC"), the employer, pursuant to Section 112 of the Employment Standards Act (the "Act"), against a Determination of the Director of Employment Standards (the "Director") on October 20, 2000, which determined, inter alia, that Dean Darling ("Darling") was an employee of ABC, between October 1, 1999, and December 31, 1999, and was owed the amount of \$551.20 pursuant to Section 34(2) of the Act.

ISSUE(s) to be decided

1. Did the Delegate err in law in finding that Darling was an employee of ABC?
2. Did the Delegate err in finding that Darling was not a teacher or a teacher as defined by the Act and was not an excluded instructor pursuant to Section 34(1)(u), of the Employment Standards Regulations (the "Regulations")?

FACTS

In summary, the Delegate's findings and conclusions are as follows:

1. The Delegate found that Darling was hired to teach for ABC. ABC set out the pay rate and established hours of work and after reviewing the job duties, the Delegate found that Darling was an employee within the definition of the Act.
2. The Delegate found that Darling was not a teacher as defined by the Act, nor was Darling an excluded instructor as defined by Section 34 (1)(u) of the Acts Regulations.
3. There were a number of other issues raised by both parties and dealt with by the Delegate, which were not appealed by either party.

The appellant's three reasons for appeal can be summarized as follows:

1. Darling did not have any income tax deducted from his paycheque, and was told he would have to do his own income tax return.
2. Darling was doing private tutoring, as well as teaching at ABC.
3. Darling never complained about the paycheques received.

The Director's submissions, forwarded December 6, 2000, addressed the reasons for Appeal as follows:

1. While the Act provides that deductions can be made by the employer, it is noted that income tax deductions are within Federal jurisdiction and not the subject or an issue in this case.
2. Whether or not a person has two jobs is not indicative of whether or not the person will be considered an employee or a contractor. Employees can work and/or have two jobs.
3. An employee can file a complaint while still employed, or up to 6 months after employment ends and it is the employer's responsibility to meet the minimum pay requirements of the Act. By this, I take it that the Director's Delegate means that the positive duty required under the Act is not waived by silence of the employee.

I did not have evidence before me of the legislation governing the educational aspect and licensing of ABC, and the question was put to both parties, and further submissions invited. As a result, the Employment Standards branch provided, and I reviewed, the following additional material:

1. Description of the Private Post-Secondary Education Commission of British Columbia.
2. A copy of the general directives of the Commission (the "Commission").
3. Results of a search of the Commissioner's website confirming that ABC is a registered institution, and institution and program information about ABC.
4. Page from ABC website confirming it's registration with the Commission.
5. Private Post-Secondary Educational Act, R.S.B.C. 1996, c.375.

ANALYSIS

In an appeal under the Act, the burden is on the appellant, in this case, the employer, ABC, to demonstrate an error in the Determination such that I should vary or cancel the Determination. After reviewing the material provided on the Appeal, I have determined that:

1. Darling is an employee within the definition of the Act. In the matter of interpretation of the Act, I rely upon cases such as Valley Janitor Supplies Ltd. (BCEST DO39/99) that determine:

"the basic purpose of the Act is the protection of employees through minimum standards of employment, and that an interpretation which extends that protection

is to be preferred over one which does not. . . Section 4 of the Act specifically provides that an agreement to waive any of the requirements is of no effect".

Therefore, I reject the implication by ABC that Darling somehow waived the requirements of the Act, by failing to complain about paycheques received and that he should have known that he was a contractor because there was no income tax taken off his paycheque.

2. I agree with the Delegate that Darling is not a teacher as defined by the Act, and after reviewing the additional material submitted describing the legislative structure under which ABC operates, I am satisfied that Darling does not fall under the excluded definition of the Regulations.

ORDER

Pursuant to Section 115 of the Act, I confirm the Determination dated October 20, 2000.

Irene G. Peters
Adjudicator
Employment Standards Tribunal