

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 -

American Canadian Consultants Inc.
("American Canadian")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Michelle Alman

FILE No.: 2000/577

DATE OF DECISION: October 20, 2000

DECISION

OVERVIEW

This decision addresses an appeal filed pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by American Canadian Consultants Inc. (“American Canadian”) from a Determination issued July 20, 2000 by a delegate of the Director of Employment Standards (“the Director”). The Determination concluded that American Canadian had contravened section 46 of the *Employment Standards Regulation* (the “*Regulation*”) by failing to produce payroll records for Lynn Stevens (“Stevens”) in response to a Demand for Employer Records. The Determination ordered American Canadian to cease contravening and to comply with the *Act*, and, pursuant to section 28(b) of the *Regulation*, ordered American Canadian to pay a \$500.00 penalty.

American Canadian appeals from the Determination, alleging that it had no records and was not obliged to keep payroll records for the complainant, because she was “hired as a self-employed commissioned advertising sales executive... on probation...with a Verbal Agreement that she would be paid only on commission...”. American Canadian further alleges that Stevens made no sales, and American Canadian, therefore, had no employment records or payroll records to produce in response to the Director’s Demand for Employer Records. American Canadian attached certain records concerning Stevens and other employees to its appeal.

The parties made written submissions in these appeals. American Canadian offered no submissions in reply to the Director’s submissions.

ISSUE

The issue to be decided is whether Stevens was American Canadian’s employee such that American Canadian should have kept payroll records of her employment as required by the *Act* and produced those records in response to a Demand for Employer Records.

THE FACTS AND ANALYSIS

American Canadian apparently operates as a magazine publishing enterprise called “Study Abroad Publishing.” Its president, Richard Li, Ph.D. (“Li”), alleges that he “hired” Stevens as a “self-employed” advertising sales executive. Li says that he made a verbal agreement with Stevens that she would be paid only on a commission basis, which Stevens understood and accepted. Li further alleges that Stevens said she wanted to work on a freelance basis because she was continuing with another job as a telemarketer. He asserts that after she was hired, Stevens never came to work in the office except to pick up business cards and send a few faxes, and that he never saw “any sales she made for the Magazine.”

Li alleges that he last saw Stevens when she came to obtain an “Advance Cheque” for \$600.00 to buy food and pay rent. He says that Steven promised to repay the advance, but she never did. Li states that American Canadian could rarely reach Stevens after giving her the advance, “except the few messages we left on her answering machine.” When Li last spoke with Stevens by phone, he says he asked her to repay the \$600 advance. Stevens then allegedly told Li that she

was unable to meet her expenses with her other job, which prompted Li to offer to put her on a base salary plus commissions, doing work from the office. Li alleges he prepared an employee time sheet and a contract that Stevens promised to come to sign the next day to put the new arrangement into effect, “but she never showed up.” Thereafter, Li says his office phoned Stevens “many times demanding the \$600.00 she owed to us.”

With the appeal documents, American Canadian attached “copies of Lynn Stevens’s Employment Records we could possibly keep at Study Abroad Publishing.” The copied documents include:

- an “Employee Profile” for which Stevens provided personal information;
- a pre-interview questionnaire dated October 1, 1999 in which Stevens provided information on her education background, work experience, explanation for why she was looking for a new job, what she was looking for in a new job, her preference for full- or part-time work, and her salary requirements;
- Lynn Stevens’s application letter dated September 29, 1999 addressed to a “Personnel Dept.” in response to a September 26, 1999 *Province* newspaper advertisement for a Marketing Executive position, and a copy of her resume; and
- three Employee Time Sheets completed for someone other than Stevens, each stamped, “Sample Only - Study Abroad,” with the company telephone number.

No copies of the employment contract and time sheet Li prepared for Stevens’s signature were provided.

The essence of the appeal is that Stevens was an independent contractor who agreed to be paid only her commissions, and that American Canadian therefore would not have any payroll records for Stevens. The documents American Canadian provided clearly imply a very different relationship than that of an applicant for a self-employed, freelance marketing executive arrangement. To resolve these differences, I must decide issues of credibility. In deciding who is telling the story that is most likely true, I rely not on the style of the written assertions of the interested witnesses presenting their accounts, but on my assessment of which versions of events were most likely to have occurred in all of the circumstances. I must determine which story was most probable in each of the then-existing circumstances, and “its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions...”: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.).

There is here no evidence whatsoever of Stevens agreeing to be employed in an independent contractor capacity. She clearly states in the pre-interview questionnaire produced by American Canadian that she preferred to be employed full-time, had specific salary requirements of “\$25,000 +, depends on the position,” and was “looking for a new job because contract ended.” Stevens’s application letter indicates an expectation that she could become “a great asset to your team.” The noted contents of these documents, together with the absence of any written contract

along the lines of Li's alleged offer to change the relationship, indicate to me that Li's story is not probable or credible. I find, therefore, that Stevens was an employee of American Canadian and not an independent contractor. Given that finding, American Canadian should have kept for Stevens the payroll records required to be kept for all its employees pursuant to s. 28 of the *Act*. American Canadian also should have produced those records, and the records it did produce in this appeal, in response to the June 28, 2000 Demand for Employer Records served on it on June 30, 2000.

Where the Director finds a violation of the *Act* or *Regulation*, section 98 of the *Act* provides:

98. *Monetary penalties--(1) If the director is satisfied that a person has contravened a requirement of this Act of the regulations or a requirement imposed under section 100, the director may impose a penalty on the person in accordance with the prescribed schedule of penalties.*

Here, the Director's delegate properly applied the 3-step analysis described in *Narang Farms Ltd.*, BC EST Decision No. D482/98 by finding in this case a contravention of s. 46 of the *Regulation*, exercising her discretion to determine whether a penalty was appropriate in the circumstances, and assessing the penalty prescribed in accordance with the provisions of s. 28 (b) of the *Regulation*. In response to the June 28, 2000 Demand for Employer Records, American Canadian failed to produce any records, despite having the records it finally produced in this appeal. American Canadian's refusal to cooperate with the Director's delegate's investigation is exactly the type of conduct for which s. 98 of the *Act* permits penalties to be levied. The Director's delegate did no more than apply s. 28(b) of the *Regulation* in assessing the \$500.00 penalty against American Canadian.

ORDER

Pursuant to s. 115 of the *Act*, the Determination issued July 20, 2000 is confirmed and American Canadian's appeal is dismissed.

Michelle Alman

Michelle Alman

Adjudicator

Employment Standards Tribunal