

An appeal

- by -

303627 BC Ltd., DSIS Database Storage and Information Systems Ltd.,
operating as The Data Base File Tech Group
("the Company")

- 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: David B. Stevenson

FILE No.: 2001/414

DATE OF DECISION: September 12, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by 303627 BC Ltd., DSIS Database Storage and Information Systems Ltd. operating as The Data Base File Tech Group (“the Company”) of a Determination that was issued on May 9, 2001 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded the Company had contravened Part 7, Section 57 of the *Act* in respect of the employment of Allain McCallum (“McCallum”) and ordered the Company to cease contravening and to comply with the *Act* and to pay an amount of \$1,567.00.

The Company has appealed on the basis that certain facts were not considered. The reasons for the appeal are stated as follows:

- #1 Under the other issues on page 6, it appears the contractor and the employer agreed, and they are not allowed to.
- #2 Our enclosed information (marked “Point #2”) shows that if Michael Weston did not fraudulently redo the letter (enclosed) so that he would not have to make payments on his loan, he threatened that he would deal with it through a different avenue.

ISSUE

The issues in this appeal are whether the Determination was wrong not to give effect to an agreement between the Company and McCallum that he would be a “contractor” and whether an alleged threat by McCallum should impact on his ability to claim rights under the *Act*.

FACTS

The Company is a secure data storage system. McCallum worked for the Company from June 7, 1999 to September 30, 2000 in sales positions at varying rates of pay. The main issue addressed during the investigation and in the Determination was whether McCallum was an employee under the *Act*. The Determination contains an extensive analysis of the terms of the relationship between the Company and McCallum on that issue, including a consideration of the facts against a number of tests that are commonly used to assist in determining whether an employment relationship or an independent contractual relationship exists. No issue has been taken with that analysis. Nor has the Company challenged particular findings of fact made in the Determination.

On page 6 of the Determination, it states:

The company has provided information that McCallum actively participated in designating himself as a contractor for reasons that benefited him. McCallum himself has supplied correspondence that shows he actively participated in these discussions and had stated that he preferred the contractor role. However, it is not the company and the employee who decide who is and who is not a self employed contractor. These designations must comply with statutory requirements. Section 4 of the Act clearly establishes that the requirements of the Act cannot be waived, notwithstanding agreement between the parties to do so.

In September and early October, 2000, there was some communication between the Company and McCallum about the terms on which the relationship would be ended. The Company asks that the Tribunal interpret the content of those communications as a demand from McCallum that Mr. Michael Weston, the Company's president, commit a fraud, with threatened consequences if he did not. I do not intend to grace this ground of appeal with anything but a perfunctory response. The allegation made is a serious one. I have carefully read the portions of the communications that form the basis for these allegations and find no support for them at all. The allegations are, in any event, irrelevant to McCallum's entitlement to the minimum statutory entitlements in the *Act*.

ARGUMENT AND ANALYSIS

While it is not entirely clear from the appeal, I have accepted that the remaining ground of appeal takes issue with the decision to not give effect to the agreement between the Company and McCallum designating him as a contractor. This ground of appeal has either ignored, or wishes the Tribunal to ignore, the effect of Section 4 of the *Act*. Reference was made to that provision in the impugned passage of the Determination as the statutory foundation for giving no effect to the agreement between the Company and McCallum. It was also set out on page 4 of the Determination. For reference, that provision states:

4. *The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.*

The above statutory provision applies four-square to the agreement between the Company and McCallum to designate him as a contractor and there was no mistake made by the Director in applying it to that agreement and reaching the result she did.

This ground of appeal is also dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated May 9, 2001 be confirmed in the amount of \$1,567.00, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal