

An appeal

- by -

Shawnee Venables carrying on business as Momentum Gymnastics  
("Momentum")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the

*Employment Standards Act* R.S.B.C. 1996, C.113 (as amended)

**TRIBUNAL MEMBER:** Carol L. Roberts

**FILE NO.:** 2017A/133

**DATE OF DECISION:** January 31, 2018

## DECISION

### SUBMISSIONS

Shawnee Venables	on her own behalf carrying on business as Momentum Gymnastics
Colin McKay	on his own behalf
Michael Thompson	on behalf of the Director of Employment Standards

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Shawnee Venables carrying on business as Momentum Gymnastics (“Momentum”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on October 12, 2017. In that Determination, the Director found that Momentum had contravened sections 18 and 58 of the *ESA* in failing to pay its former employee Colin McKay (“Mr. McKay”) wages and vacation pay. The Director determined that Mr. McKay was entitled to \$352.86 in wages and interest. The Director also imposed two administrative penalties in the total amount of \$1,000 for the contraventions, for a total amount owing of \$1,352.86.
2. Momentum appeals the Determination on the ground that the Director erred in law.
3. This decision is based on the written submissions of the parties, the section 112 (5) record and the Reasons for the Determination.

### FACTS AND ARGUMENT

4. Ms. Venables is the sole proprietor of Momentum, which operates a gymnastics facility. Mr. McKay was employed as a coach from October 28, 2014, until June 4, 2017. His tasks included coaching young athletes in gymnastics and trampoline, visiting schools and, on occasion, cleaning. He had no regular hours of work.
5. On June 3, 2017, Momentum held a fundraiser to raise money for gymnastics equipment. That day was not a regular workday, and a number of parents and supporters volunteered their time. Ms. Venables also asked the employees to volunteer, and specifically asked them when they would be available to do so in order to plan the day’s events. Elise Vanderhoek, another Momentum coach, organized the event.
6. An incident at the end of the day caused Ms. Venables to terminate Mr. McKay’s employment. Briefly, Mr. McKay had a verbal dispute with Brielle Webb, a junior coach, and then with Ms. Webb’s father. The interactions involved shouting and swearing at Ms. Webb and her father in front of the gymnastics students.
7. Following the termination of Mr. McKay’s employment, Mr. McKay filed a complaint alleging that, although he had volunteered for the fundraiser, Momentum had failed to pay him wages. Mr. McKay also claimed compensation for length of service.

8. The delegate conducted a hearing on September 14, 2017. After hearing evidence from a number of witnesses as well as from Ms. Venables and Mr. McKay about the events of June 3, 2017, the delegate concluded that Momentum had just cause to terminate Mr. McKay's employment and that Mr. McKay was not entitled to compensation for length of service. Neither party appealed that aspect of the Determination.
9. In determining whether Mr. McKay was entitled to wages for the time he spent on the fundraiser, the delegate considered the following evidence.
10. Ms. Vanderhoek testified that after his employment was terminated, Mr. McKay asked about being paid for the time he spent on this event. Although Ms. Vanderhoek said that she would inquire into whether Mr. McKay could be compensated, she told him that everyone else had volunteered their time and it would not be fair to pay only Mr. McKay.
11. Mr. McKay said that he spent 21 hours organizing, planning and preparing for the fundraiser. He said that he put together the silent auction, contacted businesses about donations, picked up donations and drove Ms. Vanderhoek around on fundraiser business. He believed that organizing the fundraiser would take less time than it actually did. He said that while he stated in his complaint that he spent 15 hours on the fundraiser, after a careful review of his time, he concluded that he in fact spent 21 hours.
12. The delegate analyzed the definition of "work" in the *ESA* and noted that Mr. McKay's unchallenged evidence was that he spent 21 hours organizing the fundraiser, including requesting and collecting donations and helping run the event. She determined that the purpose of the fundraiser was to raise money for new equipment for Momentum. She concluded that Mr. McKay's work was for Momentum's benefit and that Mr. McKay was entitled to wages for that time.
13. The delegate noted that neither party submitted a record of Mr. McKay's hours and that the only evidence of the hours worked was that of Mr. McKay and determined that evidence to be the best evidence. Based on Mr. McKay's revised estimate, the delegate determined that Mr. McKay was entitled to wages for 21 hours, plus annual vacation pay on those wages.
14. The delegate imposed an administrative penalty on Momentum for its failure to provide records that complied with section 27 of the *ESA*. The delegate noted that, in response to a Demand for Employer Records, Momentum submitted printouts from Canada Revenue Agency's Payroll Deductions On-Line Calculator which did not show Mr. McKay's rate of pay, the hours he worked each day, or Momentum's full information.

## **Argument**

### *Error of Law*

15. Momentum contends that Mr. McKay is not entitled to any wages, as all people involved with the fundraiser were expected to volunteer their time. Ms. Venables argues that Mr. McKay was made aware of the fact that time spent on the project would not be compensated, and that he was not obliged to volunteer. Given that the time spent was done on a voluntary basis, Ms. Venables also seeks to have the Tribunal cancel the administrative penalty imposed for Momentum's failure to record those hours as work.

16. The Director submits that the time Mr. McKay spent preparing for the fundraiser was to benefit Ms. Venables' business, and that Mr. McKay later asked to be paid for his time, indicating that he did not freely offer his services with no expectation of remuneration, as would be expected of a volunteer.
17. Mr. McKay submits that he never agreed to solicit donations without being paid for his time in doing so. Mr. McKay notes that Ms. Venables stated in her appeal submission that Mr. McKay requested her permission to solicit local businesses for donations, which she granted. He contends that her approval was indicative of an employment relationship rather than a volunteer. In reply, Ms. Venables contends that Mr. McKay was not required to perform the services he did. She also says that Mr. McKay provided his services without remuneration for the previous years' fundraiser. Ms. Venables also argues that Mr. McKay did not ask to be paid for his services until after his employment ended.
18. Ms. Venables also argues that, even if Mr. McKay's time was to be paid, his estimate of time spent performing the tasks was "grossly out of line."
19. The Director submits that although Ms. Venables was provided with notice of Mr. McKay's claim, she provided no evidence to dispute his estimate of hours worked. Therefore, the Director submits, the delegate did not err in accepting Mr. McKay's evidence of his hours of work as well as his explanation of the discrepancy between the hours claimed on his Complaint form and those hours claimed at the hearing.
20. Finally, Ms. Venables submits that her failure to comply with section 27 of the *ESA* was an oversight. She says that she understood she was to submit proof of wages, all documents relating to the termination and a copy of Mr. McKay's Record of Employment. She says that she does have a proper record of hours worked and would be able and willing to supply that information if required.
21. The Director submits that the delegate found a contravention of the *ESA* not because Ms. Venables failed to keep a record of the hours Mr. McKay worked, but because the pay statements she submitted did not record the hours Mr. McKay worked each pay period, his rate of pay, or Ms. Venables' business address.

## ANALYSIS

22. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:
- the director erred in law;
  - the director failed to observe the principles of natural justice in making the determination;
  - evidence has become available that was not available at the time the determination was being made.
23. Acknowledging that most appellants do not have any formal legal training and, in essence, act as their own counsel, the Tribunal has taken a liberal view of the grounds of appeal. As the Tribunal held in *Triple S Transmission*, (BC EST # D141/03), while
- most lawyers generally understand the fundamental principles underlying the "rules of natural justice" or what sort of error amounts to an "error of law", these latter terms are often an opaque mystery to someone who is untrained in the law. In my view, the Tribunal must not mechanically adjudicate an appeal based

solely on the particular “box” that an appellant has--often without a full, or even any, understanding--simply checked off.

The purposes of the *Act* remain untouched, including the establishment of fair and efficient dispute resolution procedures and, more generally, to ensure that all parties receive “fair treatment” [see subsections 2(b) and (d)]. When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, *prima facie*, invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant’s explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

24. I have therefore considered whether there is any basis for the Tribunal to interfere with the decision.

*Error of law*

25. The Tribunal as adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

26. I find that the delegate erred in law in her analysis of whether Mr. McKay was an employee or a volunteer working for Momentum on June 3, 2017. The delegate concluded that an employment relationship was created because the tasks Mr. McKay was performing were for the benefit of Ms. Venables’ company. However, in my view, that is not the start or the end of the analysis.

27. Section 1 of the *ESA* defines “work” to include the labour or services an employee performs for an employer whether in the employee’s residence or elsewhere. The *ESA* also defines “Employee” as, among other things, “a person an employer allows, directly or indirectly, to perform work normally performed by an employee,” and “Employer” to include “a person... who has or had control or direction of an employee.”

28. The *ESA* does not define “volunteer” and there are few Tribunal cases which analyze the distinction between employee and volunteer in any depth. Most of the cases involve employers attempting to disguise employment by calling employees volunteers. The task is to differentiate between individuals who are in fact offering socially valuable volunteer work without any expectation of compensation from individuals who may be exploited by enterprises who mischaracterize the individual as a volunteer to avoid meeting minimum standards of employment.

29. Any analysis of whether an individual is an employee or a volunteer must consider factors similar to those in determining whether an individual is an employee as opposed to a self-employed contractor can be used (see, for example, *Wiebe Door Services Ltd. v. Canada (Minister of National Revenue MNR* [1986] 3 F.C. 553 and *671122 Ontario Ltd. v Sagaz Industries Canada Inc.* [2001] S.C.R. 983) - the essence of the search is for the total relationship of the parties: elements of ownership of equipment and degree of control are but two factors to consider. Nature of the relationship is most important.
30. Volunteers are typically individuals who volunteer their services for civic, charitable or humanitarian reasons, without expectation of pay, and offer their services freely and without coercion. Volunteer services are not usually offered on a consistent full-time schedule; rather, they are required on an “as-needed” basis, and their services are different in scope, duties and expectations from paid positions. Volunteers are often subject to specific conditions, including, for example, criminal record or credit checks, and must be reliable. Volunteers may be offered reimbursement for out of pocket expenses.
31. The nature of the enterprise is also a factor to consider, although whether the organization is a civic, charitable or non-profit organization is not the only determining factor.
32. Momentum was Ms. Venables’ business. She owned the equipment and engaged the coaches. There was no evidence she employed any individuals on a full time basis. There was no evidence whether the fundraiser was an annual or even regular event, although in her reply submissions Ms. Venables suggests that there were at least two fundraising events.
33. Mr. McKay’s primary employment duties for Momentum were as a coach although there was some evidence he also performed janitorial duties. The services he provided leading up to, and on the day of June 3, were not those of a coach. The services were not like the work any Momentum employees performed.
34. There was some evidence that although Ms. Venables asked the employees to volunteer, Mr. McKay was not compelled to perform any services for Momentum on June 3. There was no evidence that he was coerced into providing his services. The record does not indicate that Mr. McKay was required to perform any specific tasks or work any specific hours. The record also discloses that in his complaint, Mr. McKay stated that he was “volunteering” his services on that day. In other words, there was some evidence before the delegate, including Mr. McKay’s complaint and Ms. Vanderhoek’s testimony, that there was no expectation Mr. McKay would be paid for his services on June 3.
35. In light of the absence of a full analysis of all of these factors, I remit the matter back to the delegate for an assessment of Mr. McKay’s claim for wages.
36. Ms. Venables says that she misunderstood the documents she was to provide the delegate. I note, however, that she appeared at a hearing and did not explain her confusion. To submit additional records at this time would constitute new evidence.

#### *New Evidence*

37. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:

- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- (b) the evidence must be relevant to a material issue arising from the complaint;
- (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
- (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

38. I find that Momentum's offer to submit new evidence does not meet the test for new evidence. The documents were all available at the time of the hearing and ought to have been presented to the delegate for her consideration. In any event, I am not persuaded that the "new evidence" would have led the delegate to a different conclusion on a material issue, although it may have caused the delegate not to impose an administrative penalty. As the Director notes, the administrative penalty was imposed not for a failure to provide records, but for a failure to provide records that complied with section 28 of the *ESA*.

39. I deny the appeal of the administrative penalty.

## **ORDER**

40. Pursuant to section 115(1)(b) of the *ESA*, I allow the appeal of Mr. McKay's entitlement to wages and send the matter back to the delegate for reconsideration of this issue.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**