Employment Standards TRIBUNAL

Citation: The Owners, Strata Plan [KAS1695] (Re)
2018 BCEST 111

An appeal

- by -

The Owners, Strata Plan [KAS1695]
("KAS1695")

- 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)

PANEL: David B. Stevenson

FILE NO.: 2018A/108

DATE OF DECISION: November 28, 2018

DECISION

SUBMISSIONS

Cathy Jackson — on behalf of The Owners, Strata Plan [KAS1695]

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the *"ESA"*) by The Owners, Strata Plan [KAS1695] ("KAS1695") of a Determination (the "Determination") issued by Carrie H. Manarin, a delegate (Delegate Manarin) of the Director of Employment Standards (the "Director"), on September 7, 2018.

2. The Determination found KAS1695 had contravened Part 3, sections 17, 18, and 27 of the *ESA* in respect of the employment of John Kolody ("Mr. Kolody") and ordered KAS1695 to pay Mr. Kolody wages in the amount of $1,144.84, an amount that included regular wages, statutory holiday pay, annual vacation pay, and interest under section 88 of the *ESA*. The Director imposed administrative penalties for the three contraventions of the *ESA* in the amount of $1,500.00. The total amount of the Determination is $2,644.84.

3. KAS1695 has appealed the Determination on the ground that evidence has come available that was not available when the Determination was being made. KAS1695 seeks to have the matter referred back to the Director.

4. The appeal was delivered to the Tribunal on October 19, 2018, four days after the time period for filing an appeal of the Determination had expired. KAS1695 has applied under section 109(1) (b) of the *ESA* for an extension of the appeal time period.

5. In correspondence dated October 24, 2018, the Tribunal, among other things, acknowledged having received the appeal, requested the section 112(5) record (the "record") from the Director, and notified the other parties that submissions on the merits of the appeal were not being sought from any other party at that time.

6. The record has been provided to the Tribunal by the Director and a copy has been delivered to KAS1695 and Mr. Kolody. Both have been provided with the opportunity to object to its completeness. No objection to the completeness of the record has been received and, accordingly, the Tribunal accepts it as being complete.

7. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal, my review of the material that was before the Director when the Determination was being made, and any material that is accepted as new, or additional, evidence.

8. Under section 114(1) of the *ESA*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

> *114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any appeal if the tribunal determines that any of the following apply:*
>
> *(a) the appeal is not within the jurisdiction of the tribunal;*
>
> *(b) the appeal was not filed within the applicable time limit;*
>
> *(c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;*
>
> *(d) the appeal was made in bad faith or filed for an improper purpose or motive;*
>
> *(e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
>
> *(f) there is no reasonable prospect that the appeal will succeed;*
>
> *(g) the substance of the appeal has been appropriately dealt with in another proceeding;*
>
> *(h) one or more of the requirements of section 112(2) have not been met.*

9. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), the Director and Mr. Kolody will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether KAS1695 should be granted an extension of the statutory time period for filing an appeal, or if the appeal should be dismissed as untimely, and whether there is any reasonable prospect the appeal can succeed.

ISSUE

10. The issue is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE FACTS

11. KAS1695 is a strata corporation operating a townhouse complex in Vernon, BC. Mr. Kolody was engaged by KAS1695 as a handyman from November 16, 2016, to November 15, 2017, at a rate of $20.00 an hour.

12. Mr. Kolody filed a complaint alleging he had not been paid all wages owed to him. KAS1695 responded that no wages were owed as Mr. Kolody was not an employee under the *ESA*, but was an independent contractor and therefore not covered by any provisions of the *ESA*.

13. Delegate Manarin conducted a complaint hearing, receiving evidence from KAS1695 through several witnesses and from Mr. Kolody.

14. Delegate Manarin considered the definition of "employee" in the *ESA* and, applying that definition to the facts as found from the evidence provided, determined Mr. Kolody was an employee of KAS1695 for the purposes of the *ESA* and was owed wages. Delegate Manarin also considered whether Mr. Kolody fell within the definition of "resident caretaker" in the *Employment Standards Regulation* (the "*Regulation*") and found he did not.

15. The statutory time period for an appeal under the *ESA* expired on October 15, 2018.

ARGUMENT

16. KAS1695 has provided four reasons to support the appeal:

1. Mr. Kolody was never given a hiring package by KAS1695, indicating there was never any intention on their part to engage him as an employee. He was engaged as an independent contractor.
2. A complaint by Mr. Kolody to Work Safe BC alleging KAS1695 had taken discriminatory action against him after he raised health and safety concerns was dismissed. An appeal by Mr. Kolody of a decision by Canada Revenue Agency on March 9, 2018, finding Mr. Kolody's employment with KAS1695 was not pensionable or insurable because the requirements of a contract of service for the purposes of the *Canada Pension Plan* and the *Employment Insurance Act* were not met, was also dismissed.
3. Mr. Kolody falsely claimed KAS1695 had provided him with a list of contractor's contact information.
4. Mr. Kolody decided what hours he would work and what time he would take off, except, for budgetary reasons, he was limited to 50 hours of work a month.

17. A copy of the Work Safe BC decision and the Canada Revenue Agency appeal decision are included with the appeal. The former is dated September 26, 2018, and the latter October 15, 2018, although an initial Canada Revenue Agency decision to the same effect had been made on March 9, 2018, was delivered to KAS1695 and is included in the record.

18. KAS1695 says the delay in filing the appeal was caused by confusion between two separate offices of strata council members, with the strata council assuming the deadline for filing the appeal was October 19, 2018.

ANALYSIS

19. The *ESA* imposes an appeal deadline on appeals to ensure they are dealt with promptly: see section 2(d) of the *ESA*. The *ESA* allows an appeal period to be extended on application to the Tribunal. In *Metty M. Tang*, BC EST # D211/96, the Tribunal expressed the approach it has consistently followed in considering requests to extend the time limit for filing an appeal:

> Section 109(1)(b) of the *Act* provides the Tribunal with the discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.

20. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re Niemisto*, BC EST # D099/96. The following criteria must be satisfied to grant an extension:

1. There is a reasonable and credible explanation for failing to request an appeal within the statutory time limit;
2. There has been a genuine and ongoing *bona fide* intention to appeal the Determination;
3. The responding party and the Director have been made aware of the intention;
4. The respondent party will not be unduly prejudiced by the granting of an extension; and
5. There is a strong *prima facie* case in favour of the appellant.

21. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can be considered. The burden of demonstrating the existence of such criteria is on the party requesting an extension of time. No additional criteria have been advanced in this appeal. The Tribunal has required "compelling reasons" for granting of an extension of time: *Re Wright*, BC EST # D132/97.

22. In this case, the length of delay is not excessive and the explanation for the delay is not entirely unreasonable. I note, however, that the Determination was made and issued on September 7, 2018, meaning KAS1695 had the Determination for close to five weeks and only advanced this appeal at the last minute. In the circumstances, this criterion is at best neutral.

23. There is no indication during the appeal period that KAS1695 had formed any intention to appeal the Determination.

24. There is nothing in the material that suggests Mr. Kolody would be prejudiced by the requested extension of the appeal period.

25. When considering the *prima facie* strength of the case presented by KAS1695 in this appeal the Tribunal is not required to reach a conclusion that the appeal will fail or succeed, but to make an assessment of the relative merits of the grounds of appeal chosen against established principles that operate in the context of those grounds.

26. My conclusion on this criterion militates strongly against an extension of the appeal period, as I find the appeal lacks the merit necessary to warrant extending the statutory appeal period.

27. This appeal is grounded solely in evidence coming available that was not available when the Determination was being made. This ground is commonly referred to as the "new, or additional, evidence" ground of appeal and is intended to address evidence that may bear on the merits of an appeal but which was not presented to the Director during the complaint process, was not considered by the Director, and is not included in the record.

28. The Tribunal has discretion to accept or refuse new, or additional, evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether

the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. New evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality, and efficiency: see section 2(b) and (d) of the *ESA*.

29. The proposed "evidence" included with the appeal does not meet the necessary considerations for admission under section 112(1) (c) in three respects. First, little of the factual foundation on which the appeal is grounded is "new". KAS1695 provided evidence during the complaint hearing that it "intended" to hire Mr. Kolody as a contractor and that Mr. Kolody could set his own hours of work. In context, KAS1695 does nothing more in restating and raising these facts in support of its appeal than seek to have this panel change findings made by the Director in the Determination, which the Tribunal may not do unless the Director's findings amount to an error of law, which is neither asserted nor demonstrated in this appeal.

30. Second, the assertion that Mr. Kolody "falsely claimed" he had been given a list of contractor's contact information, in addition to being another matter about which the Director heard evidence and made a finding, is not "evidence" at all in this appeal; it is simply an assertion disputing an aspect of the evidence provided to the Director that is unsupported by any objective material.

31. Third, while the decisions from Work Safe BC and Canada Revenue Agency might be considered "new", I do not find that material relevant to any issue raised in Mr. Kolody's complaint, most particularly the question of his status as an employee under the *ESA*.

32. The Work Safe BC decision accepted Mr. Kolody was a "worker" for the purposes of the complaint filed by him under sections 150 – 153 of the *Workers Compensation Act*.

33. The appeal decision by Canada Revenue Agency found Mr. Kolody was not engaged with KAS1695 in pensionable or insurable employment because the requirements of a contract of service for the purposes of the *Canada Pension Plan* and the *Employment Insurance Act* were not met.

34. The Tribunal has consistently said that decisions made by other tribunals, which in this case would include Work Safe BC and Canada Revenue Agency, while having some value, are not determinative of an individual's status under the *ESA*, as they interpret different statutes for different legislative purposes.

35. The statutory definitions and purposes in the *ESA* are quite different from either the *Workers Compensation Act* or the federal legislation under which Canada Revenue Agency functions. It is the application of the definitions and purposes of the *ESA* which determines an individual's status for the purposes of a complaint under the *ESA*. A decision by Work Safe BC or Canada Revenue Agency of a worker's status may be a factor to be considered, but those decisions are not binding: see *Profile Marble*

& Bath Ltd., BC EST # D055/97, and *B.J. Heatsavers Glass & Sunrooms Inc.*, BC EST # D137/97. I note the following comment from the Tribunal's decision in *Profile Marble & Bath Ltd.*, *supra*:

> Morrice says that the Revenue Canada ruling also establishes his status as an employee, but I disagree. First, the Revenue Canada ruling makes a determination for income tax purposes and this has nothing to do with the employee's status under this legislation. Second, the evidence upon which these conclusions were based is not set out in the letter. Consequently, I give that document no weight.

36. Based on the foregoing, I find nothing in the appeal that demonstrates KAS1695 has a strong *prima facie* case.

37. An extension of the appeal period is denied.

38. As well, the appeal for the reasons given above has no reasonable prospect of succeeding and, even if the appeal period was extended, would be dismissed on that basis. The purposes and objects of the *ESA* are not served by requiring the other parties to respond to it.

39. In sum, the appeal is dismissed under section 114(1) (b) and (f) of the *ESA*.

ORDER

40. Pursuant to section 115 of the *ESA*, I order the Determination dated September 7, 2018, be confirmed in the amount of $2,644.84, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal