Employment Standards TRIBUNAL

Citation: North Shore Home Services Ltd. (Re)
2018 BCEST 14

An appeal

- by -

North Shore Home Services Ltd.
("NSHS")

- 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: Kenneth Wm. Thornicroft

FILE NO.: 2017A/144

DATE OF DECISION: February 7, 2018

DECISION

SUBMISSIONS

Troy Thompson — on behalf of North Shore Home Services Ltd.

INTRODUCTION

1. This is an appeal filed by North Shore Home Services Ltd. (NSHS) pursuant to subsections 112(1)(a), (b) and (c) of the *Employment Standards Act* (the "*ESA*"). NSHS appeals a Determination that was issued by Guy Massey, a delegate of the Director of Employment Standards (the "delegate"), on November 7, 2017. By way of the Determination, the delegate ordered NSHS to pay a former employee (the "complainant") the total sum of $3,807.04 on account of unpaid wages and section 88 interest.

2. In addition, and also by way of the Determination, the delegate levied three separate $500 monetary penalties against NSHS and thus the total amount payable by NSHS under the Determination is $5,307.04.

3. At this juncture, I am considering whether this appeal should be summarily dismissed as having no reasonable prospect of succeeding (see subsection 114(1)(f) of the *ESA*).

THE APPEAL

4. Although NSHS, in its Appeal Form, checked the boxes relating to all three statutory grounds of appeal – "error of law"; "natural justice" and "new evidence" – it is clear from its written reasons for appeal that its fundamental concern is that the delegate erred in law in finding that the complainant was an employee rather than an independent contractor. However, NSHS also appears to raise a natural justice issue:

> It is our opinion that whoever accepted this claim in the first place with the Employments [*sic*] Standards Office should not have. It is also this Company's opinion that [the delegate] has not conducted even a cursory investigation of the facts, even with only one sides [*sic*] evidence. It doesn't appear that any investigative questions were asked of [the complainant], and a simple probing of the facts presented by her.

5. NSHS does not contest, in any fashion, the delegate's calculations regarding the complainant's unpaid wage entitlement; rather, its principal position is that she was not an "employee" and, therefore, was not entitled to avail herself of the wage protection provisions of the *ESA*.

6. With respect to this latter argument, it must be noted that the original unpaid wage complaint was the subject of an oral complaint hearing rather than an investigation. NSHS did not attend the hearing and it was not incumbent on the delegate to cross-examine or question the complainant in order to explore possible defences that might have been raised by NSHS had it chosen to attend the hearing. Indeed, it would have been a breach of the rules of natural justice for the delegate to have, in effect, taken on the role of "advocate" for NSHS at the complaint hearing. If NSHS wished to question the complainant and otherwise challenge her evidence, it should have appeared at the hearing where it would have been given a fair opportunity to do so.

7. Although given notice of the hearing, and contacted on the day of the hearing, NSHS refused to attend the hearing. When contacted immediately before the hearing was to commence, one of its staff members (its bookkeeper) stated that the complainant "was never an employee and that North Shore Home had absolutely no interest in participating in the hearing" (delegate's "Reasons for the Determination" – the "delegate's reasons" – at page R5). However, prior to the hearing NSHS did provide some information in support of its position that there was no employment relationship between it and the complainant. The delegate did turn his mind to those (rather cursory) arguments.

8. NSHS, demonstrating a triumph of chutzpah over cogent legal analysis, seeks the following remedies: "We would like to see this claim rejected, ad [*sic*] an apology by the delegate, and an internal investigation as to why this case from an individual acting as a company was allowed to abuse the process and mandate of the Employment Standards Branch".

9. It should be noted that the Tribunal does not have any statutory authority to order apologies or to order the Employment Standards Branch to conduct some sort of internal review. However, and quite apart from those observations, in my view this appeal is wholly without merit and, accordingly, must be summarily dismissed.

10. My reasons for reaching that conclusion now follow.

FINDINGS AND ANALYSIS

11. In *Tri-West Tractor Ltd.*, BC EST # D268/96, the Tribunal observed (at page 3):

> This Tribunal will not allow appellants to "sit in the weeds", failing or refusing to cooperate with the delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it. An appeal under Section 112 of the *Act* is not a complete re-examination of the complaint. It is an appeal of a decision already made for the purpose of determining whether that decision was correct in the context of the facts and the statutory provisions and policies. The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process.
>
> (see also *Kaiser Stables Ltd.*, BC EST # D058/97)

12. Although *Tri-West Tractor* was decided in the context of an investigation rather than an oral complaint hearing, this principle has also been repeatedly applied in the latter context (see, for some recent examples, *Co-Par Investments Ltd.*, BC EST # D120/17; *Zeal Contracting Inc.*, BC EST # D031/17; and *Adams Lake Towing Ltd.*, BC EST # D163/16).

13. In the instant case, NSHS has, from the outset, resolutely failed to participate in the complaint resolution and adjudication process. First, NSHS – taking the position that the complainant was not an employee – refused to participate in a scheduled mediation. Second, and as noted above, NSHS refused to attend the oral complaint hearing. Third, NSHS refused to comply with a demand for employment records. While NSHS was entirely free to refuse to participate in the scheduled mediation (since mediation is an entirely voluntary process), its separate refusals to attend the complaint hearing and to provide employment records have serious

legal consequences – a monetary penalty regarding the latter and the application of the *Tri-West Tractor/Kaiser Stables* principle regarding the former.

14. Accordingly, and solely on the basis of the *Tri-West Tractor/Kaiser Stables* principle, this appeal must be dismissed. However, and notwithstanding my view on that latter point, I find the appeal to be wholly lacking any substantive merit. I shall thus briefly turn to the asserted grounds of appeal.

15. Although not specifically advanced as an "error of law", NSHS's ground of appeal in this regard appears to be that the delegate erred in law in finding that the complainant was an employee. NSHS now wishes to argue on appeal that the complainant was "hired as a sub contractor of [NSHS]…not as an employee". NSHS says that the complaint is "fraudulent" since the complainant "ran an independent company, and was not hired as an employee". NSHS says that although it initially intended to hire the complainant as an ordinary employee, at her insistence, it agreed to engage her as an independent contractor. Further, it says that considering the nature of the parties' entire relationship, she did not meet the statutory definition of "employee" set out in section 1 of the *ESA*.

16. A finding that an individual is an employee rather than an independent contractor amounts to a finding of mixed fact and law. Such a finding can only be overturned if the decision-maker applied the wrong legal test or otherwise made a palpable and overriding error in applying the proper legal test to the facts at hand (see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235).

17. In this case, the delegate applied the proper legal test regarding whether an individual is an employee or an independent contractor. As for the application of that legal standard in the instant case, I cannot say that the delegate erred in finding an employment relationship. Indeed, I am of the view that the delegate correctly decided the matter. The complainant worked for NSHS as an "Inside Sales Representative and Customer Service Representative" and was paid an hourly wage plus commissions (delegate's reasons, page R2). The nature of the complainant's full-time duties, as detailed in the delegate's reasons, clearly demonstrates that the parties were in an employment relationship. Further, when initially hired, NSHS indicated in its offer letter that it was offering her "employment" based on an 8-hour day/5-day workweek schedule. The offer letter also included information about her vacation and company benefits entitlements. She was subject to a 90-day probation period – which she completed (her period of employment spanned approximately 19 months). The "Inside Sales Rep Privacy Agreement" (prepared by NSHS) unequivocally sets out the terms of an employment agreement. NSHS exercise considerable control over the complainant's work activities.

18. While there may have been some features of the relationship between the parties that were akin to those that might be found in an independent contractor relationship, on balance, I cannot conclude that the delegate erred in finding an employment relationship given the evidence before her. To the extent that NSHS did not present sufficient evidence to support its position that the complainant was an independent contractor, it is solely to blame for that state of affairs.

19. With respect to NSHS's "natural justice" argument, this appears to relate to the delegate's "failure" to, in effect, conduct a cross-examination of the complainant. As noted above, the Determination was not issued as a result of an investigation; rather, the delegate's role at the complaint hearing was to preside as a neutral decision-maker and not to advocate or otherwise act for NSHS in its capacity as the respondent party (and

who voluntarily chose not to attend the hearing). Of course, had NSHS attended the hearing, it could have fully cross-examined the complainant and presented its own evidence to support its position that the complainant was not an employee. However, it cannot now complain about its ill-advised decision to boycott the complaint hearing.

20. Finally, with respect to the "new evidence" ground of appeal, although NSHS appended several documents to its Appeal Form that do not appear to have been provided to the delegate, each and every one of those documents could have been submitted at the complaint hearing (indeed, in advance of the hearing) had NSHS bothered to attend the hearing or meaningfully participate in the dispute resolution process. None of the documents meets the test for the admission of new evidence set out in *Davies et al.*, BC EST # D171/03. Since all of the documents fail meet the test for admissibility, none can be considered in this appeal.

ORDER

21. Pursuant to subsection 114(1)(f) of the *ESA*, this appeal is dismissed. In accordance with the provisions of subsection 115(1)(a) of the *ESA*, the Determination is confirmed as issued in the total amount of $5,307.04 together with whatever further interest that has accrued under section 88 of the *ESA* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal