

An appeal

- by -

Selena Elrod carrying on business as Kinetic K9 Supplies
("Kinetic")

- 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.: 2018A/11

DATE OF DECISION: April 18, 2018

DECISION

SUBMISSIONS

W. Eric Pedersen	counsel for Selena Elrod carrying on business as Kinetic K9 Supplies
The Law Centre	counsel for Celina Vermaat
Chantal Webb	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Selena Elrod carrying on business as Kinetic K9 Supplies (“Kinetic”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on December 12, 2017. In that Determination, the Director found that Kinetic had contravened sections 17, 18, 40 and 45 of the *ESA* in failing to pay Celina Vermaat \$3,586.07, representing regular and overtime wages, annual vacation pay, statutory holiday pay and interest. The Director also imposed four administrative penalties in the total amount of \$2,000 for the contraventions, for a total amount owing of \$5,586.07.
2. Kinetic appeals the Determination contending that, in determining Ms. Vermaat to be an employee, the delegate failed to comply with the principles of natural justice, specifically, ignoring relevant evidence and refusing to hear Ms. Elrod’s evidence. Kinetic’s counsel contends that Ms. Vermaat was a student rather than an employee.
3. This decision is based on the submissions of the parties, the section 112(5) “record” that was before the delegate at the time the decision was made, and the Reasons for the Determination.

FACTS AND ARGUMENT

4. Ms. Elrod operates Kinetic, a pet care facility, as a sole proprietor. Ms. Vermaat filed a complaint alleging that Ms. Elrod contravened the *ESA* by failing to pay her wages.
5. The delegate held a hearing on September 26, 2017. Ms. Elrod appeared on her own behalf, and Ms. Vermaat was represented by Mr. Montes, an articling student with The Law Centre Clinical Law Program.
6. The parties agreed that Ms. Vermaat had been employed by Kinetic as a Dog Day Care Supervisor from January 2, 2017, until February 22, 2017, after which date Ms. Vermaat reduced her full time hours to one day per week in order to train with Ms. Elrod as a certified dog groomer. Ms. Vermaat was paid for all hours worked as a Dog Day Care Supervisor with the exception of overtime hours worked on three days for which she was paid regular wages. Between February 22, 2017, and June 13, 2017, Ms. Vermaat was at Kinetic’s premises training to be a dog groomer for a minimum of five hours per day Monday to Friday with the exception of statutory holidays and from May 12 to 20, which she took as vacation.

7. At issue before the delegate was whether Ms. Vermaat was entitled to wages for work performed, either while training to be a dog groomer or at any other time.
8. Ms. Elrod contended that Ms. Vermaat was not entitled to wages on the basis that she was a student who received training grooming canines, rather than an employee.
9. Ms. Vermaat's evidence was that she believed that Ms. Elrod was certified and accredited to teach dog grooming and would provide a certificate that would be industry recognized. Ms. Elrod accepted Ms. Vermaat into her program and told her that she would hire her as a dog groomer upon successful completion of the program. She did not charge Ms. Vermaat the normal \$4,000 - \$5,000 fee for the four courses, each of which would take one month to complete. Although Ms. Vermaat was not required to read or study any materials, she was required to pass a quiz at the end of each of the four courses in order to receive her certification. Each course took between four and six weeks to complete, and there were no practical tests. After successfully completing two of the four quizzes, Ms. Vermaat asked Ms. Elrod when she could take her third quiz, as she understood she would receive her certificate at the end of June 2017 and wanted to be paid for her work. Ms. Elrod informed Ms. Vermaat that she was not yet ready to take the third course exam but did not explain to Ms. Vermaat why she was not ready or provide any timeline for course completion. Ms. Vermaat then quit the program on June 13, 2017, believing that Ms. Elrod was using her for free labour.
10. Ms. Vermaat was under 19 years of age at the time of the training and neither she nor her parents were aware of any educational contracts. Ms. Elrod did not provide Ms. Vermaat with any certificates of completion, offering them to her only after Ms. Vermaat filed her complaint.
11. Ms. Vermaat's tasks involved "roughing-in" dogs, including clipping nails, undercarriage and around the paw pads and then bathing, drying and combing the dog before processing payment for the services and returning it to its owner. Ms. Vermaat typically had three appointments per day. Between appointments, she would do laundry, clean the floor, answer the telephone and provide customer service. Ms. Elrod directed Ms. Vermaat's daily tasks and told her when she was to start and end work.
12. Ms. Elrod said that she provided training to Ms. Vermaat as a gift, and that while education was a big part of her business, she did not consider Kinetic primarily as an educational institution. Ms. Elrod did not provide Ms. Vermaat with any books to study, although she did make some book recommendations. Ms. Elrod also did not provide any course outline describing the practical components of the work, stating that the course consisted entirely of practical work with a written test at the end to ensure an understanding of the content.
13. Ms. Elrod stated that before she hired a dog groomer, the individual would have to meet the quality of work and education she provided. She said that Ms. Vermaat could easily have found work with the skills she had acquired.
14. Ms. Elrod identified Ms. Vermaat's responsibilities as including studying, doing tests, studying terminology, working alongside Ms. Elrod so she could observe her skills, booking appointments and processing payment, answering the telephone, preparing dogs for grooming, brushing and cleaning the dogs, and keeping the shop clean.

15. Ms. Elrod charged customers for Ms. Vermaat's services. As a Dog Day Care Supervisor, Ms. Vermaat's duties included walking dogs, cleaning the shop, checking dogs in and out, feeding dogs, keeping track of their leashes, booking appointments, taking payments and closing the shop.
16. After Ms. Vermaat inquired into the completion date for her courses, Ms. Elrod stated that she was not persuaded that Ms. Vermaat had demonstrated sufficient skills to take the third course. Although Ms. Elrod was prepared to discuss the matters with Ms. Vermaat, Ms. Vermaat quit before that occurred.
17. Ms. Elrod stated that she did not benefit financially from Ms. Vermaat's work because she had to supervise Ms. Vermaat rather than do her own work. She said that she lost revenue because she had not charged Ms. Vermaat any fees for the courses.
18. Ms. Elrod noted that because pet grooming was an unregulated industry, anyone could purchase scissors and call themselves a groomer. She also said that she had inquired with the Private Career Training Institutions Agency ("PCTIA") and was informed that she was not required to be registered as a school and did not need to be a member to deliver courses.
19. Ms. Elrod does not have any licences or certifications that are recognized by a professional body, trade school or post-secondary school.
20. The Determination states that although Ms. Elrod planned on calling five witnesses, only one was available at the time of the hearing. Ms. Elrod informed the delegate that the witnesses were going to testify about the quality of Kinetics' courses as well as Ms. Vermaat's hours and the tasks she performed. The delegate noted that since the parties had agreed on those matters, there was no need for the witness to testify. During her final submissions, Ms. Elrod expressed concern that her available witness was not permitted to testify. She said that although that witness would not have provided any new evidence, that evidence would corroborate Ms. Elrod's evidence.
21. The delegate noted that only secondary school students who were in a work or occupational study class at the school in which they were enrolled were excluded from the provisions of the *ESA*. The delegate's conclusion on this point is not disputed.
22. The delegate considered the definitions of employee, employer and work contained in section 1 of the *ESA*, noting that the definition of employee included a person being trained by an employer, and that the *ESA* was to be interpreted liberally. The delegate determined that the tasks Ms. Vermaat was performing brought her within the definition of employee under the *ESA*. The delegate noted that Ms. Elrod directed and controlled Ms. Vermaat's daily activities and that Ms. Vermaat was required to attend Kinetic's premises four days per week for 5.5 hours per day.
23. The delegate also found that all of the tasks performed by Ms. Vermaat were integral to Kinetic's business and were for Ms. Elrod's benefit. The delegate concluded that there was an employment relationship between the parties and that Ms. Vermaat was entitled to the protections of the *ESA*.
24. The delegate found that Ms. Vermaat was not paid for the tasks she performed for 5.5 hours per day, four days a week, over the period of her employment, and that Ms. Vermaat was entitled to an hourly wage rate

equivalent to what she was paid as a Dog Day Care Supervisor, or \$3,257.38. The delegate also determined that Ms. Vermaat was entitled to overtime wages for three days on which she had been paid straight time, as well as statutory holiday pay and annual vacation pay.

Argument

25. Ms. Elrod's counsel argues that the delegate failed to give appropriate weight to documentary evidence Ms. Elrod submitted at the hearing, including course outlines, educational contracts, textbooks, certificates, testing materials and a paid invoice for course work from another student.
26. Counsel for Ms. Elrod also contends that, in advance of the hearing, Ms. Elrod identified five individuals who were to be called as witnesses to give evidence relevant to the issue of Ms. Vermaat's status as an employee.
27. Although Ms. Elrod represented herself at the hearing, counsel on appeal argues that what the delegate wrote in the Determination regarding the availability of her witnesses did not accurately reflect what happened at the hearing. Counsel argues that Ms. Elrod mistakenly believed that her witnesses would be contacted by the Employment Standards Branch prior to the hearing, and that although she confirmed during a break that all of her witnesses were available, the delegate refused to hear from them. [my emphasis] Because this is a serious allegation, I requested submissions from the delegate and Ms. Vermaat on this issue.
28. In the appeal submission, counsel identified those five witnesses and included a summary of what evidence it was anticipated they would have given at the hearing - including Ms. Vermaat's activities at the premises, the level of control exerted by Ms. Elrod over Ms. Vermaat and the hours Ms. Vermaat spent at the premises.
29. Ms. Elrod's counsel argues that the delegate failed to consider certain evidence, including the assertion that Ms. Vermaat was offered the course with the expectation that she would be moving away, in her conclusion that Ms. Vermaat was an employee. Ms. Elrod further submits that, by failing to hear from her witnesses, the delegate was unable to consider the degree of control Ms. Elrod exercised over Ms. Vermaat. Counsel submits that the evidence would have demonstrated that Ms. Vermaat spent significant time on matters unrelated to the business.
30. Finally, Ms. Elrod contends that the delegate erred in attributing a wage of \$11.50 to Ms. Vermaat's activities without considering the wages a groomer would normally be paid; that is, minimum wage.
31. Counsel for Ms. Vermaat submits that many facts were uncontroversial and admitted at the hearing, including the understanding that Ms. Vermaat was taking a sequence of courses in dog grooming from Ms. Elrod, that Ms. Vermaat attended the premises during the days and hours referred to, the limited nature of course planning, materials and testing, and that Ms. Vermaat regularly performed the work of grooming dogs on the premises that was charged out to clients. Counsel submits that, in light of these undisputed facts, it was not necessary for the delegate to hear from Ms. Elrod's witnesses.
32. Ms. Vermaat's counsel relies on the Tribunal's decision in *Golden Feet Reflexology* (2018 BCEST 1) in support of the delegate's authority to decide how to conduct the hearing and to determine which witnesses are necessary to hear from. Counsel submits that the denial of an opportunity to call further witnesses will not necessarily affect the fairness of the hearing, and that fairness will depend on the circumstances of each case.

Counsel notes that the delegate set out the reasons for not calling the additional witnesses, including that their understanding of Ms. Vermaat's status was not relevant to a determination of whether or not Ms. Vermaat was an employee under the *ESA*.

33. The delegate submits that Ms. Elrod informed the delegate that only one of the witnesses was available and that her witness would not have provided any new evidence. Ms. Elrod informed the delegate that the witness would only have given credibility to Ms. Elrod's testimony. In light of those statements, the delegate submits that the decision not to hear from that witness was reasonable and appropriate, given that credibility was not at issue in the hearing.

ANALYSIS

34. 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.

35. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I conclude that Ms. Elrod has not met that burden and dismiss the appeal.

Failure to observe the principles of natural justice

36. Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker.

37. As the Tribunal has noted on many occasions, the Director has the ability to determine the manner in which a complaint under the *ESA* is resolved. Part 10 of the *ESA* sets out how complaints are investigated and decided. Section 77 provides that if an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond. As the Tribunal noted in *Golden Feet Reflexology, supra*, if potential witnesses would "cover the same material and their evidence was not necessary to establish credibility, this does not necessarily mean that a breach of natural justice occurred."

38. The record demonstrates that Ms. Vermaat's hours of work was essentially undisputed. Ms. Elrod stated that Ms. Vermaat was at the premises approximately 5 and one half hours four days a week, a contention that Ms. Vermaat agreed with. Consequently, it was unnecessary for the delegate to hear evidence from the witness evidence regarding Ms. Vermaat's hours of work.

39. Similarly, Ms. Elrod's contention that the witnesses would testify that Ms. Vermaat was receiving educational training was an issue that was not in dispute. Ms. Vermaat believed she was in an educational program. However, the finding of a student-teacher relationship does not preclude an employment relationship (see *North Delta Real Hot Yoga Ltd.* (BC EST # D026/12) and *Janice Castanelli carrying on business as Classy Canine Grooming* (BC EST # D084/15)).

40. Ms. Elrod also contends that her witnesses would have testified about Ms. Vermaat’s contribution to the business. In light of Ms. Elrod’s own evidence that only she and her accountant were aware of the financial circumstances of her business, this evidence was also not relevant to the delegate’s decision and it was not necessary for the delegate to hear from the witness on this issue.
41. In my view, the potential witnesses’ view of Ms. Vermaat’s employment status, her hours of work or her contribution to the business, financial or otherwise, was not relevant to the delegate’s determination. The issue before the delegate, that is, whether or not Ms. Vermaat was an employee, was a question of law in which the witnesses had no expertise. The delegate was able to analyze the evidence, about which there was little dispute, and arrive at conclusions based on that evidence.
42. I am not persuaded that the delegate failed to observe the principles of natural justice. Ms. Elrod was given an opportunity to fully respond to the complaint. That opportunity does not require the delegate to hear from multiple witnesses on issues that are either undisputed, irrelevant, or that provide opinions on questions of law on which they have no competence.

Error of law

43. The Tribunal has 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] BCJ No. 2275 (BCCA):
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.
44. The delegate considered Ms. Elrod’s arguments and determined that Ms. Vermaat fell within the definition of an employee in the *ESA*. I am not persuaded the delegate made any error in arriving at this conclusion.
45. In *North Delta Real Hot Yoga Ltd., supra*, the Tribunal noted that the definition of employee is to be broadly interpreted and that the common law tests used to determine whether or not an individual is an employee are subordinate to the definitions contained in the *ESA*. The Director’s delegate considered the definition of “employer” and “employee” in the *ESA* and the remedial nature of the *ESA* in arriving at his conclusion.
46. There is no dispute that Ms. Elrod allowed Ms. Vermaat to perform work normally performed by an employee, including bathing, drying and brushing canines, answering telephones, sweeping floors and doing laundry. There is no dispute that Ms. Elrod directed Ms. Vermaat’s activities and the work she performed was to Kinetic’s benefit.
47. Although Ms. Elrod contended that Ms. Vermaat was a student, she provided Ms. Vermaat with no course outlines, textbooks or educational contracts. She also provided Ms. Vermaat with no certificates of

completion of any of her course segments. Kinetic is not accredited or registered as an educational institution. Furthermore, while there may have been some indicators of a student-teacher relationship, that relationship does not exclude or prohibit a finding that there was an employment relationship. I am not persuaded that the delegate misapplied the *ESA* or misconstrued the evidence in concluding that Ms. Vermaat was an employee, or that she was entitled to the wages outlined in the Determination.

48. The appeal is dismissed.

ORDER

49. Pursuant to section 114 of the *ESA*, I deny the appeal. Pursuant to section 115 of the *ESA*, I Order that the Determination, dated December 12, 2017, be confirmed in the amount of \$5,586.07 together with whatever further interest that has accrued under section 88 of the *ESA* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal