Employment Standards TRIBUNAL

Citation: 0788720 B.C. Ltd. (Re)
2018 BCEST 89

An appeal

- by -

0788720 B.C. Ltd. carrying on business as Bauhaus Restaurant
("Bauhaus" or the "Employer")

- 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: Carol L. Roberts

FILE NO.: 2018A/70

DATE OF DECISION: August 29, 2018

DECISION

SUBMISSIONS

Natalie Boll	on behalf of 0788720 B.C. Ltd. carrying on business as Bauhaus Restaurant

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*") 0788720 B.C. Ltd. carrying on business as Bauhaus Restaurant ("Bauhaus" or the "Employer") has filed an appeal of a Determination issued by Tiara Stiglich, a delegate ("Delegate Stiglich") of the Director of Employment Standards (the "Director"), on May 18, 2018.

2. Delegate Stiglich concluded that Bauhaus had contravened the *ESA* in failing to pay Stefan Hartmann wages and accrued interest in the total amount of $6,707.01. The Director imposed an administrative penalty on Bauhaus for a contravention of section 21 the *ESA* in the amount of $500, for a total amount payable of $7,207.01.

3. Bauhaus appeals the Determination on the basis that evidence has become available that was not available at the time the Determination was being made. Bauhaus filed its appeal on June 22, 2018, and sought an extension of time until July 23, 2018, to provide additional documentation it had requested from a third party; specifically, an audit by the Integrity Services Branch regarding Mr. Hartmann and his Labour Market Impact Assessment ("LMIA") legal costs. The Tribunal's Registrar gave Bauhaus until July 23, 2018, to submit written reasons and documents in support of its appeal.

4. On July 23, 2018, Bauhaus indicated that although it had not received the requested documentation, it had, during the intervening period, obtained other new information that was not available at the time of the original hearing. Bauhaus stated that it was prepared to proceed with the appeal on the basis of this new information.

5. This decision is based on Bauhaus' written submissions, the Reasons for the Determination, and the section 112(5) "record" that was before the Director at the time the decision was made (the "Record").

FACTS AND ARGUMENT

6. Bauhaus is a company registered in British Columbia that operates a restaurant. Mr. Hartmann was employed as Bauhaus' head chef from December 29, 2014, until April 22, 2017.

7. On August 9, 2017, Mr. Hartmann filed a complaint alleging that Bauhaus had contravened the *ESA* by requiring him to pay the Employer's business costs. Delegate Stiglich conducted a hearing into Mr. Hartman's complaint on November 27, 2017.

8. The facts relevant to the appeal are as follows.

9. Mr. Hartmann was living in Germany when he responded to the Employer's advertisement for a head chef. He flew to Vancouver for an interview in the spring of 2014, and was ultimately offered the position.

10. In order for Mr. Hartmann to work in Canada, Bauhaus was required to obtain a positive LMIA Report as well as a Temporary Foreign Worker (TFW) Permit.

11. Mr. Hartmann moved to Vancouver on December 28, 2014. Although the restaurant was initially scheduled to open in February 2015, it did not ultimately open until May 2015. During that period, the Employer gave $40,000 either directly to Mr. Hartmann or paid for items on his behalf. These funds were used, among other things, to secure Mr. Hartmann an apartment, to enable him to purchase furniture and for his moving and travel costs, all of which were paid either before the commencement of Mr. Hartmann's employment or during the 2015 year.

12. Bauhaus and Mr. Hartmann entered into a written assignment of wages in which Mr. Hartmann agreed that Bauhaus could deduct a prescribed amount of money from each of his paycheques to repay those funds. Although the amounts and repayment schedule were well documented, the schedule did not clearly delineate which deductions were used to repay each of the items. This issue was important given the six-month recovery period provided for in section 80 of the *ESA*.

13. Mr. Hartmann did not dispute that he entered into the assignment agreement voluntarily as he believed it was a necessary precondition to his employment. He later became aware that the Employer could not recover the LMIA costs from him and believed that the assignment covered other items that were properly characterized as the Employer's business costs.

14. At issue before Delegate Stiglich was whether the assignment was valid, in whole or in part, under section 22 of the *ESA*.

15. Delegate Stiglich determined that the assignment was valid, and considered each of the items covered by the assignment, including rent, travel costs and furniture costs, individually. Ultimately, Delegate Stiglich determined that most of the items were properly characterized as a loan and covered by the assignment.

16. However, with respect to the costs associated with the LMIA and the work permit, which are the subject of the appeal, Delegate Stiglich determined that these were employer business costs that could not be subject to an assignment under section 21 of the *ESA*.

LMIA

17. Delegate Stiglich determined, based on the evidence of Bauhaus' accountant, that a $4,000 charge paid by Bauhaus on December 7, 2015, for the LMIA was deducted from Mr. Hartmann's wages. Delegate Stiglich noted that the declaration page of the LMIA clearly stated that no costs, directly or indirectly, associated with the LMIA could be passed on to the worker. Delegate Stiglich also determined that because Bauhaus had to obtain an LMIA in order to hire and bring Mr. Hartmann to Canada to work, this was a business cost and could not be passed on to Mr. Hartmann. Delegate Stiglich concluded that Mr. Hartmann was entitled to recover $4,000.

Work Permit

18. Bauhaus was also required to obtain a work permit to enable Mr. Hartmann to work in Canada. When Mr. Hartmann accepted the offer of employment, his wife also intended to come to Canada to work at Bauhaus. Although Bauhaus took steps to facilitate her work permit, Mr. Hartmann and his wife ultimately separated and she decided not to move to Canada.

19. Bauhaus included the amount of $9,687.10, designated as costs of obtaining a Work Permit, to be repaid through the assignment of wages. Bauhaus contended that all of those costs were related to the costs of obtaining Mr. Hartmann's wife's permit, which Mr. Hartmann agreed to pay. Bauhaus did, however, concede that some of the indirect costs for the work permit were related to Mr. Hartmann rather than his spouse.

20. In support of its position, Bauhaus submitted a November 19, 2015, email from its lawyer's office indicating that Bauhaus paid a $7,000 retainer to a law firm for the cost of obtaining Mr. Hartmann's wife's work permit. The law firm only charged Bauhaus $5,086.16 and returned the balance of the retainer.

21. Delegate Stiglich determined that the fees charged by the law firm were not related to Mr. Hartmann's employment but rather to his wife's work permit and that they were properly characterized as Mr. Hartmann's cost rather than the employer's business cost. Delegate Stiglich determined that Mr. Hartmann was entitled to recover $4,600.94, being the difference between the $9,687.10 charged to Mr. Hartmann, and the returned funds and Bauhaus' business costs related to Mr. Hartmann's work permit.

22. On appeal, Bauhaus contends that it had not attempted to recover the costs of the LMIA and the work permit from Mr. Hartman. It argues that legal fees in the amount of $2,187.10 were direct costs. It argues that it did not have full information from the law firm involved because Mr. Hartmann was the client, not Bauhaus, and the information was not directly available to Bauhaus.

23. The Employer says that Mr. Hartmann and his wife independently agreed to retain counsel for their work permits, although Bauhaus paid the fees on their behalf on the understanding that they would be paid back. The Employer says that the fees were extremely high due to Mr. Hartmann's particular circumstances and cannot be characterized as Bauhaus' business costs. The Employer contends that it has been unable to access the lawyer's files because Bauhaus is not the client and the law firm would not provide them without the Hartmanns' consent, which has not been provided.

24. Finally, the Employer asks that the loan repayment be reviewed, contending that, of the $42,111.74 lent to Mr. Hartmann, only $32,625 had been repaid when Mr. Hartmann's employment ended. It asks that the difference between those amounts be considered on appeal.

ANALYSIS

25. 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.

26. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision of the Director. I conclude that Bauhaus has not met that burden and dismiss the appeal.

27. Section 114 of the *ESA* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the 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.

New evidence

28. 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 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.

29. Bauhaus had full opportunity to submit documents in support of its position at the hearing before Delegate Stiglich. The Record indicates that Delegate Stiglich issued a Demand for Employer Records on October 24, 2017, approximately 30 days before the hearing date.

30. The material submitted on appeal is not new. The documents included with the appeal were, with the exception of two emails, all before Delegate Stiglich at the hearing. The two emails consist of correspondence between the law firm and Bauhaus regarding the recovery of the file material related to

the firm's work on the LMIA. I find that all relevant information could have, with the exercise of due diligence, been presented at the hearing. I appreciate there was an issue regarding the disclosure of the law firm's accounts to Bauhaus given that the client was Mr. Hartmann not Bauhaus despite Bauhaus' payment of the retainer. However, that issue ought to have been resolved by the time of the hearing and presented to Delegate Stiglich.

31. Delegate Stiglich made her determination on the allocation of the fees outlined in the law firm's account based on the best evidence; that is, the invoices, the Fee Estimates and the evidence of Bauhaus' accountant. I am not persuaded that the "new" evidence would have led her to a different conclusion on the issue of whether the firm's fees represented Bauhaus' business costs.

32. The appeal is, in essence, a request to review Delegate Stiglich's calculations and determination respecting amounts allocated to the cost of obtaining the LMIA and the work permit. An appeal is not an opportunity to re-argue a case that has been fully presented to the Director. Bauhaus must persuade me, on clear and convincing evidence, that Delegate Stiglich erred in law in assessing the evidence and arriving at her conclusions.

33. 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] 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.

34. Bauhaus has not persuaded me that Delegate Stiglich misapplied the *ESA* or a general principle of law, acted without any evidence, or acted on a view of the facts which could not reasonably be entertained.

35. I find that Delegate Stiglich made her determination based on the best evidence available and I find no error of in law in her conclusion.

36. I also deny Bauhaus' request to consider what it alleges is Mr. Hartmann's outstanding debt in the context of this appeal. It does not appear this issue was ever raised before the Director, and it is not a matter to be dealt with for the first time on appeal.

ORDER

37. Pursuant to section 115 of the *ESA*, I order that the Determination, dated May 18, 2018, be confirmed in the amount of $7,207.01 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