Employment Standards TRIBUNAL

Citation: Kingsman Security and Investigation Corporation (Re)
2019 BCEST 134

An appeal

- by -

Kingsman Security and Investigation Corporation

- 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: Richard Grounds

FILE NO.: 2019/137

DATE OF DECISION: December 12, 2019

DECISION

SUBMISSIONS

Martin Crowder	on behalf of Kingsman Security and Investigation Corporation
Jennifer L. Sencar	delegate of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Kingsman Security and Investigation Corporation (the "Appellant") has filed an appeal of a determination (the "Determination") issued on May 7, 2019, by Jennifer L. Sencar, a delegate of the Director of Employment Standards (the "Delegate").

2. The Appellant operates a security company in Vancouver, British Columbia and its sole director is Martin Crowder who is also the sole Officer (President). The Appellant hired Khalil Gilani (the "Complainant") as a security guard on April 21, 2018, and again for the period of May 10 to 30, 2018, for a security project in Osoyoos, British Columbia. The Complainant filed a complaint under section 74 of the *ESA* for failing to pay wages. The Appellant took the position that the Complainant was an independent contractor and not an employee.

3. The complaint proceeded to a hearing in front of the Delegate on January 29, 2019. The Delegate determined that the Complainant was an employee of the Appellant and was owed wages including regular wages, overtime and vacation pay. The Determination was issued on May 7, 2019, and the appeal period was up to June 14, 2019.

4. On July 12, 2019, the Appellant appealed the Determination on the basis that the Director erred in law and failed to observe the principles of natural justice in making the Determination. In addition, the Appellant appealed the Determination on the basis that evidence has become available that was not available at the time the Determination was being made.

5. The Appellant failed to file the appeal within the statutory time limit which expired on June 14, 2019. The Appellant requested an extension of time to the statutory appeal period.

6. Submissions were requested from the Delegate related to the delivery address of the Determination. The Delegate confirmed that the Registered Office for the Appellant was an address on Terminal Avenue in Vancouver, British Columbia and that the Determination was sent to the Appellant at its Registered Office address and also to the address of its Director, Mr. Crowder[1]. The Determination sent to the Registered Office for the Appellant was returned but the Determination sent to Mr. Crowder was not. The Delegate

[1] Mr. Crowder is listed as the sole Director and Officer (President) of the Appellant and the Determination was sent to the mailing address for Mr. Crowder in his capacity as the Officer of the Appellant.

confirmed that the Terminal Avenue address continued to be the Registered Office for the Appellant as of the date of the submission on October 29, 2019.

7. The Delegate advised that the Determination was also sent to the Appellant by email on May 7, 2019, and that the Appellant responded to the email advising of its intention to dispute the hours in the Determination. The Delegate further advised that on May 11, 2019, the Appellant emailed to request the "link" for the Tribunal and that this was provided by email on May 13, 2019. These emails are contained in the Director's Record at pages 331-334. The Delegate submitted that they received an updated address for the Appellant on June 27, 2019.

8. Submissions on the merits of the appeal were not requested from the parties.

9. For the reasons that follow, the Appellant's request for an extension of time to file the appeal is denied.

ISSUE

10. The issue is whether or not to grant an extension of time to the statutory time limit for the Appellant to appeal the Determination.

ARGUMENT

11. The Appellant submitted on appeal that the Complainant was a an independent contractor who hired his own staff (for the project in Osoyoos), made profit off of the staff he hired, was unsupervised, worked an 18 hour shift with no direction from the Appellant and was aware that he had to cover his hotel and food costs on his own. The Appellant submitted that the Determination was sent to the wrong address and when the Determination was sent, he was in a location with no computer and no way to fight the Determination which was unfair.

12. Submissions were not requested from the Appellant, but unsolicited submissions were received from the Appellant. The Appellant submitted a copy of the Notice of Articles confirming that the Registered Office of the Appellant was the Terminal Avenue address. The Appellant submitted the following in separate emails to the Tribunal on November 14, 2019:

    4:41 pm: "Received not correct address at all."

    4:43 pm: "Address was changed in 2018 to [Terminal Avenue] Vancouver BC."

    5:10 pm: "I informed verbally my new address was [in New Westminster, BC] and Revenue Canada has in record since August 2018."

    5:13 pm: "Address change was May 27, 2019."

13. The Appellant also submitted a Security Business Licence issued on May 27, 2019, showing the New Westminster address.

THE FACTS AND ANALYSIS

FACTS

14. The Appellant operates a security company in Vancouver, British Columbia and its sole Director is Martin Crowder who is the President of the Appellant. The Appellant hired Khalil Gilani (the "Complainant") as a security guard on April 21, 2018, and again for the period of May 10 to 30, 2018, for a security project in Osoyoos, British Columbia to guard a flooded condo building. The Appellant did not pay the Complainant anything for working in Osoyoos except for a $445 advance for food.

15. On August 3, 2018, the Complainant filed a complaint under section 74 of the *ESA* for failing to pay wages including regular wages, overtime, vacation pay and a referral fee for finding additional security guards to work in Osoyoos. The Appellant took the position that the Complainant was an independent contractor. The complaint proceeded to a hearing in front of the Delegate on January 29, 2019. The Complainant and another witness who was the Appellant's on-site manager for the Osoyoos project testified on behalf of the Complainant and Mr. Crowder testified on behalf of the Appellant.

16. The Complainant disputed that he was hired as an independent contractor and testified that the Appellant supervised him and told him what to do and where to go, he did not control the shifts that he worked, he was warned that he could be fired after falling asleep at work, he had to fill out security forms each shift provided by the Appellant, he was told what to wear including a vest provided by the Appellant and he was provided with a car to drive for mobile security work. The Complainant testified that the Appellant agreed to pay him an additional $20 per shift for each additional security guard he was able to recruit to work in Osoyoos. The Complainant testified that he incurred $65 in cell phone charges to recruit the additional security guards.

17. The Appellant's on-site manager in Osoyoos testified on behalf of the Complainant. She testified that she directed the Complainant where to go and shuttled the security guards around. She testified that the Appellant had difficulty finding security guards and agreed to pay the Complainant an additional $20 per shift for each additional security guard he could recruit to work in Osoyoos. These additional security guards would get paid $180 per shift instead of $200 per shift. She testified that the Appellant provided the security guards with vests, a vehicle to patrol the work sites and that the Appellant provided the schedule and set the shifts.

18. Mr. Crowder testified on behalf of the Appellant. Mr. Crowder testified that all of the security guards hired by the Appellant are contractors. Mr. Crowder testified that the Complainant signed an employment contract with various conditions relating to conduct including a dress code, to have no contact with the Appellant's clients, not to leave the site without authorization and that a violation of the rules could result in immediate dismissal. Mr. Crowder testified that the clients belonged to the Appellant, he would tell the Complainant what site to go to and that he or the on-site manager would provide relief for breaks.

19. Mr. Crowder testified that he would let the security guards work out the hours or shifts they would work and then they would tell him what they actually worked. He provided the Complainant with a vest and coat to wear and he also provided a vehicle to use while working. He testified that the wage rate was $180 for a 12-hour shift and that the Appellant paid for the Complainant's hotel but he was responsible for his own food. Mr. Crowder testified that he had a one-time referral fee of $20 for each additional

security guard that the Complainant could recruit to work for the Appellant. The Complainant was able to recruit three additional security guards. Mr. Crowder did not dispute that the Complainant used his cell phone to recruit the security guards. Mr. Crowder did not dispute the hours or shifts worked claimed by the Complainant but never paid him because the Complainant never gave him an invoice.

The Determination

20. On May 7, 2019, the Delegate completed the Determination and concluded that the Complainant was an employee of the Appellant and, thus, was entitled to wages including regular wages, overtime, vacation pay and payment for the cell phone usage to recruit the additional security guards. In reaching this conclusion, the Delegate considered the definitions in the *ESA* and the common-law tests for determining whether someone is an employee or is self-employed, as provided for in *671122 Ontario Ltd.* v. *Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983. The Delegate concluded that the Appellant had control and direction over the Complainant, the Complainant did not have a chance of profit or loss, the Complainant's position as a security guard was integral to the Appellant's business, the Complainant did not have a financial interest in the business, the Complainant did not supply any tools or materials and the clients belonged to the Appellant.

21. The Delegate found that the Complainant's rate of pay was $200 per 12-hour shift and that the Appellant had agreed to pay the Complainant an additional $20 per shift for each additional security guard he was able to recruit to work for the Appellant. The Delegate calculated the amount of wages owed by the Appellant to the Complainant including regular wages, overtime, vacation pay and reimbursement for cell phone usage.

Appeal of the Determination

22. The Determination was mailed to the Registered Office for the Appellant as well as to the mailing address for Mr. Crowder as the sole Officer of the Appellant. In addition, the Determination was sent by email to the Appellant on May 7, 2019. The Determination sent to the Appellant's Registered Office was returned because the Appellant's business office, which was also its Registered and Records Office, had moved. The Determination sent to Mr. Crowder's address was not returned. Mr. Crowder responded to the email providing the Appellant with a copy of the Determination and indicated that he disputed some hours in the Determination and that they were changed by the Complainant from 4 am to 4 pm to 8 am to 8 pm.

23. That same day the Appellant was advised by the Employment Standards Branch that if he wished to dispute the Determination, he would have to file an appeal with the Tribunal. On May 11, 2019, the Appellant requested the website address (link) for the Tribunal and was provided with this on May 13, 2019.

24. The statutory deadline to appeal the Determination was June 14, 2019. The Appellant filed its appeal on July 12, 2019.

ANALYSIS

25. The Determination was issued on May 7, 2019. The Appellant filed its appeal outside the statutory deadline to appeal the Determination and has requested an extension of time to the appeal period. The

Determination stated that an appeal must be delivered to the Employment Standards Tribunal by 4:30 pm on June 14, 2019. This date complies with section 112(3)(a) of the *ESA* which provides that the appeal period is "30 days after the date of service of the determination, if the person was served by registered mail".

26. The Appellant was served by Registered Mail to the Registered Office of the company and also to the mailing address of its sole Officer, Mr. Crowder. The Determination sent to the Registered Office of the Appellant was returned but was sent to the correct address because, although the Appellant had moved offices, it failed to update its address with BC Registry Services. The Appellant was also provided with the Determination by email on May 7, 2019, but the *ESA* does not address electronic service. This is, however, confirmation that the Appellant was aware of the Determination on May 7, 2019, and that the Appellant indicated an intention to dispute the Determination.

27. The Appellant has submitted additional documents including the Notice of Articles showing the address being on Terminal Avenue in Vancouver where the Determination was sent and returned, and a Security Business Licence issued on May 27, 2019, with a different address in New Westminster. The Appellant submitted that the address was changed verbally on May 27, 2019. Aside from the fact that this is well after the date of May 7, 2019 when the Determination was sent out and received at Mr. Crowder's address and received by the Appellant by email, the Delegate submitted that no new address was received from the Appellant until June 27, 2019, after the appeal period had already expired.

28. There is no automatic right to an extension of the time limit to appeal. In *Niemisto* (BC EST #D099/96) the Tribunal identified the following non-exhaustive criteria to consider when deciding whether to extend an appeal period:

1. there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
2. there has been a genuine, and on-going *bona fide* intention to appeal the Determination;
3. the respondent party, as well as the Director, has been made aware of this 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.

29. These criteria were applied by the court in *Gorenshtein* v. *British Columbia (Employment Standards Tribunal)*, 2013 BCSC 1499 when reviewing a decision by the Tribunal not to extend an appeal period where the Appellant was unable to file an appeal due to having surgery. Each of these criteria will be considered below.

Reasonable and credible explanation for the failure to request an appeal within the statutory time limit

30. The Appellant submitted that it was delayed in requesting an appeal because the Determination was sent to the wrong address and, when the Determination was sent, Mr. Crowder was in a location with no computer and no way to dispute the Determination. The failure by the Employment Standards Branch to send a Determination to the correct address could be a relevant factor when assessing this criterion but in this case the Determination was sent to the current Registered Office of the Appellant and was also sent to Mr. Crowder's mailing address. Mr. Crowder also received the Determination by email on May 7,

2019. Given the evidence, I am satisfied that the Appellant was properly served with the Determination to trigger the appeal period.

31. The Appellant's submission that it could not dispute the Determination is inconsistent with Mr. Crowder's immediate response to receiving the Determination by email. The circumstances are much different from those in *Gorenshtein* where the Appellant was unable to file the appeal due to surgery. I am not satisfied that the Appellant has provided a reasonable and credible explanation for the failure to request an appeal within the statutory appeal period.

There has been a genuine, and on-going bona fide intention to appeal the Determination

32. The Appellant indicated on May 7, 2019, that he disputed some hours in the Determination and on May 11, 2019, requested the website address (link) for the Tribunal, which was provided to him on May 13, 2019. There is no other evidence that the Appellant intended to appeal the Determination. Accordingly, I am not satisfied that the Appellant exhibited a genuine and on-going *bona fide* intention to appeal the Determination.

The respondent party, as well as the Director, has been made aware of this intention

33. There is no evidence that the respondent party was aware of the Appellant's intention to appeal but the Appellant did inform the Employment Standards Branch on May 7, 2019, that it disputed some of the hours in the Determination and asked for the website address (link) for the Tribunal on May 11, 2019. Given this, I am satisfied that the Director was aware of the Appellant's intention to appeal the Determination.

The respondent party will not be unduly prejudiced by the granting of an extension

34. The issue relating to the request for an extension of time is not substantively related to the merits of the Determination, i.e. whether or not the Complainant was an employer or independent contractor for the Appellant. Accordingly, I am satisfied that the respondent party would not be unduly prejudiced by the granting of an extension.

There is a strong prima facie case in favour of the appellant

35. The determinative issue relates to whether or not the Complainant was an employee or independent contractor for the Appellant. This was the focus of the Determination and also the focus of the original appeal submissions. The Appellant has not identified any particular error of law on the part of the Delegate or breach of procedural fairness in making the Determination. In addition, the Appellant has not provided any new evidence with his appeal submissions, except for perhaps the Security Business License which does not address the fact that the Appellant did not change his address with BC Registry Services, or with the Employment Standards Branch until after the appeal period expired.

36. The Delegate considered the evidence from the parties and from a witness who also worked for the Appellant during the relevant time when the Complainant worked for the Appellant in Osoyoos. The Delegate considered the definitions in the *ESA* and the common-law tests for determining whether

someone is an employee or is self-employed, as provided for in *671122 Ontario Ltd.* v. *Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983. In that case, the Supreme Court of Canada stated at para. 46:

> In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in *Stevenson Jordan, supra*, that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming observed that "no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations ..." (p. 416). Further, I agree with MacGuigan J.A. in *Wiebe Door*, at p. 563, citing *Atiyah*, supra, at p. 38, that what must always occur is a search for the total relationship of the parties:
>
> > [I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose.... The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones.

37. The Supreme Court went on in *Sagaz*, at paras. 47 – 48, to describe the appropriate approach at common law to distinguishing an employment relationship from other kinds of relationships:

> Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations*, *supra*. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

38. The Delegate concluded that the Appellant had control and direction over the Complainant, the Complainant did not have a chance of profit or loss, the Complainant's position as a security guard was integral to the Appellant's business, the Complainant did not have a financial interest in the business, the Complainant did not supply any tools or materials and the clients belonged to the Appellant. The evidence from the Complainant and the Appellant's on-site manager in Osoyoos who testified on behalf of the Complainant support the Delegate's conclusions.

39. The Tribunal has adopted the following definition of an error in law set out in *Gemex Developments Corp*. v. *British Columbia (Assessor of Area #12 - Coquitlam)*, [1998] B.C.J. 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.

40. Given the evidence, there is no reasonable basis to find that the Delegate erred in law in concluding that the Complainant was an employee and not an independent contractor.

41. The principles of natural justice relate to the fairness of the process and ensure that the parties know the case against them, are given the opportunity to respond to the case against them and have the right to have their case heard by an impartial decision maker. The principles of natural justice include protection from proceedings or decision makers that are biased or where there is a reasonable apprehension of bias.

42. Given the evidence, there is no reasonable basis to find that the Delegate failed to observe the principles of natural justice in making the Determination.

43. The Appellant has not identified any new evidence which was not available at the time the Determination was made. Accordingly, it is not necessary to consider the test for the admission of fresh evidence on appeal.

44. Given the evidence and the factors noted, I am not satisfied that there is a strong *prima facie* case in favour of the Appellant.

45. I have considered the above relevant factors to determine whether or not an extension to the statutory time limit for the Appellant to appeal the Determination should be granted. Given the factors discussed above, I am not satisfied that an extension should be granted.

ORDER

46. The Appellant's request to extend the time period for requesting an appeal is denied. Pursuant to section 115 of the ESA, I order the Determination dated May 7, 2019, be confirmed.

Richard Grounds
Member
Employment Standards Tribunal