Employment Standards TRIBUNAL

Citation: Commonwealth Physiotherapy Clinic Physical Therapist Corp. (Re)
2019 BCEST 17

An appeal

- by -

Commonwealth Physiotherapy Clinic Physical Therapist Corp. carrying on business as Shelbourne Physiotherapy
("Shelbourne")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Robert E. Groves

FILE NO.: 2018A/121

DATE OF DECISION: February 19, 2019

DECISION

SUBMISSIONS

Jeff Fitzgibbon	on behalf of Commonwealth Physiotherapy Clinic Physical Therapist Corp. carrying on business as Shelbourne Physiotherapy

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Commonwealth Physiotherapy Clinic Physical Therapist Corp. carrying on business as Shelbourne Physiotherapy, Pilates and Massage ("Shelbourne") appeals a determination (the "Determination") issued by a delegate (the "Delegate") of the Director of Employment Standards (the "Director") dated October 18, 2018.

2. The Determination resulted from a complaint filed by Jacqueline Sloan (the "Complainant") pursuant to section 74 of the *ESA* alleging that Shelbourne had unlawfully failed to pay her wages. The Determination followed a hearing conducted by the Delegate. That hearing occurred on June 26, 2018.

3. The Delegate found that Shelbourne had contravened the *ESA*. He ordered Shelbourne to pay $8,421.64 in regular wages, overtime, statutory holiday pay, minimum daily pay, annual vacation pay, and accrued interest. He also imposed $2,500.00 in administrative penalties.

4. Shelbourne argues that the Delegate erred in law, that he failed to observe the principles of natural justice in making the Determination, and that evidence has become available that was not available at the time the Determination was being made. It asks that the Determination be cancelled.

5. I have before me the Determination, the Delegate's Reasons in support of it, Shelbourne's Appeal Form material, its submission in support of its appeal, and the record the Director was required to provide to the Tribunal pursuant to subsection 112(5) of the *ESA*. Copies of the material in the record were delivered to the parties, and no one has objected that the record is incomplete.

6. Subsection 114(1) of the *ESA* stipulates that the Tribunal may dismiss all or part of an appeal, at any time after an appeal is filed and without a hearing, if any of a listed number of criteria is satisfied. In this instance, I am persuaded that it is appropriate to consider the criterion established in subsection 114(1)(f). That subsection permits the Tribunal to dismiss an appeal if it determines there is no reasonable prospect that the appeal will succeed.

ISSUE

7. Should the appeal be permitted to proceed or should the Tribunal exercise its discretion pursuant to subsection 114(1)(f) and dismiss the appeal because there is no reasonable prospect that it will succeed?

THE FACTS

8. Shelbourne operates a physical therapy clinic. It offers physiotherapy, kinesiology, acupuncture, Pilates, yoga, and massage therapy services to its clients.

9. Shelbourne and the Complainant entered into what the Delegate termed "a working relationship" in September 2009. The Complainant was hired as a Pilates instructor. However, the Delegate found that Shelbourne also successfully petitioned the relevant professional physiotherapy authorities to recognize the Complainant's skills and experience so as to allow her to work as a Physiotherapy Assistant ("PTA") under the direction of Shelbourne's physiotherapists, notwithstanding that the Complainant had no formal training for this type of work.

10. Thereafter, a principal of Shelbourne provided the Complainant with training, supervised her activities relating to the important elements of her duties to ensure that they were in accord with the established standards, and looked after the billings issued by Shelbourne for the Complainant's PTA work.

11. Most of the clients the Complainant worked with were referrals from other areas of Shelbourne's clinic. That said, the Delegate found that other clients had followed the Complainant from her previous place of work. These latter clients then became clients of Shelbourne.

12. The Complainant invoiced Shelbourne for her work twice monthly. Those invoices included charges for GST. The Complainant invoiced her work based on a stipulated rate for each hour worked. Initially, it was agreed that the Complainant would be paid at a rate of $35.00 per hour. In 2014, the parties negotiated an increase to $40.00 per hour.

13. The arrangement between Shelbourne and the Complainant contemplated that the Complainant would advise Shelbourne when she was available for work. It seems that her hours fluctuated, but the Delegate also noted that as the years passed the Complainant's hours became more regular, and she rose to become one of Shelbourne's senior instructors. During this later period, at least, the Delegate found that the Complainant worked almost exclusively for Shelbourne, although she did, on occasion, fill in for friends at other Pilates studios.

14. It was Shelbourne that advertised the Complainant's services, worked to fill her Pilates sessions, and collected fees from registrants. It provided her with a vest, and business cards with its name on them. It supplied her with the equipment she used in her Pilates sessions.

15. Commencing in 2010, the Complainant participated in an extended health insurance plan offered by a third-party carrier through Shelbourne. It seems that Shelbourne paid the premiums, but that the Complainant was to contribute to the cost by deducting an agreed upon amount from her invoices submitted to Shelbourne. The evidence before the Delegate revealed that some of the Complainant's invoices did not include a deduction for the premium.

16. Before the Delegate, Shelbourne argued that the Complainant's complaint should be dismissed because she had worked for Shelbourne as an independent contractor, rather than as an employee.

17. Alternatively, it asserted that it had stopped payment on the Complainant's final cheque because the Complainant's neglecting to deduct her insurance premium payments from some of her invoices, and her submitting invoices that Shelbourne paid, but which it later determined were "inflated", meant that she had, in fact, been overpaid for her work. In addition, Shelbourne objected to what it considered to be the Complainant's failure to give proper notice of her departure, her alleged misappropriation of client information, and her alleged post-relationship attempts to solicit Shelbourne's clients at her new place of work.

18. The Delegate rejected Shelbourne's submissions and determined that the Complainant was an employee.

ANALYSIS

19. Subsection 115(1) of the *ESA* should also be noted. It says this:

> 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
>
> (a) confirm, vary or cancel the determination under appeal, or
>
> (b) refer the matter back to the director.

20. Shelbourne challenges the Determination on each of the three grounds noted in subsection 112(1). In support of its position, Shelbourne makes several arguments. None of them are characterized in such a way as to connect them directly to a specific ground set out in subsection 112(1). Nevertheless, I believe they can be separated having regard to the ground they appear to engage, and I will address them in that way, as follows.

Error of Law

21. A formula the Tribunal has established for determining what constitutes an error of law for the purposes of subsection 112(1)(a) was set out in *Britco Structures Ltd.*, BC EST # D260/03. There, the Tribunal identified that a determination would reveal an error of law if a delegate:

- misinterpreted or misapplied a section of the *ESA;*
- misapplied an applicable principle of general law;
- acted without any evidence;
- acted on a view of the facts which could not reasonably be entertained; and
- adopted a method of assessment which was wrong in principle.

22. Here, the principal point of contention the Delegate was asked to resolve was whether the Complainant had worked for Shelbourne as an employee, or as an independent contractor. Shelbourne argues that, in essence, the Delegate came to the wrong legal conclusion when he determined that the Complainant was an employee.

23. A focus of Shelbourne's challenge is that the Delegate seemed disinterested in how the Complainant herself characterized her working relationship with Shelbourne. In particular, Shelbourne notes that the Delegate never asked the Complainant whether she thought she was an employee.

24. Shelbourne also observes that in her communications with Shelbourne, its clients, and its staff, the Complainant always identified herself as a principal of a separate business entity from Shelbourne, which suggested that she believed she was acting in business for herself. Other evidence offered in support of this argument consisted of Shelbourne's assertion that the Complainant had a long history of self-employment before and after her time working for Shelbourne, that her invoicing for her remuneration and her charging GST constituted an acknowledgement that the Complainant was a contractor, and that when the Complainant terminated her working relationship with Shelbourne she sent unsolicited emails to many of Shelbourne's clients asking them to join her exercise classes at her new place of work.

25. Finally, Shelbourne states that when it placed a stop payment order on the Complainant's last cheque, the Complainant retained legal counsel, whose demand letter to Shelbourne characterized the Complainant's claim as being one for "services rendered" and declared that if Shelbourne failed to pay the entirety of the outstanding amount, the Complainant had given instructions to commence a small claims action.

26. Shelbourne alleges that most, if not all, of these indicia suggesting the Complainant was a contractor were ignored by the Delegate.

27. I disagree.

28. The Delegate expressly declined to give weight to the fact that the Complainant submitted invoices based on her hours of work, which included a calculation for GST. His reason for doing this is seen in his statement to the effect that if he were to rely on the Complainant's billing practice in support of a conclusion that she was a contractor, it would elevate the form of the parties' relationship over its substance. For the Delegate, the key to determining the Complainant's status did not depend on the manner in which they may have communicated to one another, and therefore, by implication, on their individual intentions, but rather on the way the relationship between the Complainant and Shelbourne actually operated.

29. The Delegate was correct when he decided to interpret the parties' relationship in this way. It is trite law to say, and several Tribunal decisions have held, that a characterization of a working relationship by the parties is not determinative, and it is the objective nature of the relationship that governs a finding concerning a person's status at work (see, for example: *Re Hantula (c.o.b. Cambie Country Garden)*, BC EST # D277/97; *Re Vitality Products Inc.*, BC EST # D322/98; *Re GBC Banking Software Corp.*, BC EST # D066/07). For this reason, too, it is largely irrelevant what the Complainant's employment status was in her working relationships with others either before or after the period of time she spent working for Shelbourne.

30. In the case of *671122 Ontario Ltd. v. Sagaz industries Canada Inc. [2001] 2 SCR 983*, a case involving an issue of vicarious liability, the Supreme Court of Canada stated that there is no single conclusive test that can be universally applied to determine if a person is an employee or an independent contractor. Instead, there are several factors which need to be considered including:

- the level of control over the worker's activities that is exercised by the employer;
- whether the worker supplies tools;
- the degree of financial risk undertaken by the worker;
- the degree of responsibility for investment and management resting in the hands of the worker; and
- the worker's opportunity for profit or loss arising from the work.

31. The relative weight of these factors, and any others that may be relevant to the inquiry, will depend on the particular facts and circumstances of the case at hand.

32. It is also trite to say that the *ESA* casts a wider net for employment than does the common law (see *North Delta Real Hot Yoga*, BC EST # D026/12, and the cases referred to therein). Part of the reason for this is to be found in the policy objectives of the statute. As stated in *Machtinger v. HOJ Industries Ltd. [1992] SCJ No. 41*, concerning the employment standards legislation in Ontario, but in terms equally applicable to the *ESA*:

> ...an interpretation of the Act which encourages employers to comply with its minimum requirements, and so extends the Act's protection to as many employees as possible, is to be favoured over one that does not.

33. Another reason for the subordination of the common law tests is the expansive language used to describe what the terms "employee" and "employer" are defined to mean in the *ESA*. In section 1, "employee" is defined to include, among other things, a person "receiving or entitled to wages for work performed for another" and a person "an employer allows, directly or indirectly, to perform work normally performed by an employee". An "employer" is defined as including a person "who has or had control or direction of an employee", or "who is or was responsible, directly or indirectly, for the employment of an employee".

34. In this case, I do not discern that the Delegate considered irrelevant matters, or misapplied the relevant legal tests when deciding that the Complainant was an employee of Shelbourne.

35. While the Delegate acknowledged that the Complainant's advising Shelbourne of the hours she was available for work constituted evidence that she was a contractor, he determined that other factors, taken together, overwhelmed this consideration and weighed in favour of a conclusion that she was not acting in business for herself in her dealings with Shelbourne. These other factors identified by the Delegate were all relevant, having regard to the legal tests to which I have referred. They included the following:

- Shelbourne exercised significant control over the Complainant's work. It advertised the Complainant's Pilates classes, collected fees from registrants, and referred participants to her from other areas in the clinic. It took charge of the steps that were taken to see that the Complainant's experience was recognized by the relevant professional physiotherapy authority so that the Complainant could work as a PTA. Shelbourne trained her to perform her PTA duties and her work in that capacity was closely supervised.
- The Complainant performed duties that would normally be performed by employees of Shelbourne.

- Shelbourne provided the Complainant with business cards with her name on them, as well as a vest. It used her image in its advertising for the clinic. These actions indicated that the Complainant was Shelbourne's representative, and supported an inference that she performed an integral role in its business.
- Shelbourne expected the Complainant to perform her duties personally. A characteristic of contractor status is that the contractor may sub-contract the work. The Delegate's Reasons for the Determination indicate that the Complainant substituted for friends by covering their classes in other Pilates studios, but otherwise she worked almost exclusively for Shelbourne. No mention was made of an instance where the Complainant sub-contracted her work at Shelbourne to another individual.
- The working relationship between Shelbourne and the Complainant was a long-standing one. It was also of an indefinite nature, unlike the more usual arrangement where contractors are retained for a specific, time-limited, purpose or task.

36. Given that the Delegate found the Complainant to be an employee, it was also right for him to determine that section 21 of the *ESA* prohibited Shelbourne from unilaterally withholding any of the Complainant's wages for any reason except as permitted by law, and since the Complainant had not authorized Shelbourne to withhold her wages, there was no lawful basis for Shelbourne's decision to place a stop payment on the Complainant's final cheque. As the Delegate noted, if Shelbourne's assertion that the Complainant owed it money was correct, it needed to take other steps, in a different forum, in order to collect the sums owed.

Natural Justice

37. A challenge to a determination on the basis that there was a failure to observe the principles of natural justice raises a concern that the procedure followed by the Delegate was somehow unfair. Two principal components of fairness are that a party must be informed of the case it is required to meet and offered an opportunity to be heard in reply. A third component is that the decision-maker be impartial.

38. The requirement for fairness is also mandated in section 77 of the *ESA*, which reads:

> 77 If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

39. Shelbourne's submission regarding this issue focuses on several alleged failures on the part of the Delegate.

40. Shelbourne first alleges that the Delegate ignored evidence it tendered for the purpose of establishing that the Complainant had delivered invoices for payment that were in error. It also asserts that it was prejudicial for the Delegate to request further documents and information from the Complainant after the hearing was concluded, but before the Determination was issued.

41. It is clear from the record delivered by the Director that the Delegate was alive to the dispute between the parties regarding the amount of wages owed to the Complainant. Indeed, the inference to be drawn from what transpired is that it was for the purpose of ensuring that Shelbourne's concerns relating to this

issue were fully canvassed that the Delegate requested further financial documents and information from both parties relating to the Complainant's billings, and her hours of work, after the June 26, 2018, hearing was concluded. The Complainant provided the documents and information the Delegate requested from her, but Shelbourne did not.

42. The Delegate forwarded to Shelbourne copies of the material the Complainant provided, and the correspondence the Delegate sent to her requesting clarification. The Delegate also requested submissions from Shelbourne. In response, Shelbourne stated that it disputed the Complainant's material, but it declined to provide any particulars. Instead, it asserted that the Delegate's requesting, and receiving, further materials from the Complainant after the hearing had concluded made a mockery of the dispute process.

43. Shelbourne's failure to provide the documents and information the Delegate had requested of it, together with its failure to deliver any substantive objections to the materials supplied by the Complainant, led the Delegate to conclude that the Complainant's evidence was the best evidence of the hours she had worked and the wages she had earned during her time working at Shelbourne.

44. In my view, these facts disclose no failure on the part of the Delegate to observe the principles of natural justice.

45. Fair and efficient procedures for resolving disputes are identified as a purpose of the *ESA* in subsection 2(d). It is consistent with the realization of this purpose that the Delegate possessed considerable latitude when deciding what steps would be taken in the investigation of the complaint, how the hearing would be conducted, and the evidence he would rely upon when he made the Determination. A decision relating to these matters, including a decision to request further evidence after the hearing had concluded, involved an exercise of a discretion, with which the Tribunal will be loath to interfere unless it can be said that the Delegate misdirected himself in some way, or if the decision was so clearly wrong that it amounted to an injustice.

46. I see no misdirection, or injustice, in the way the Delegate conducted this aspect of the process. Shelbourne raised concerns about the amounts owed to the Complainant at the hearing. The Delegate observed that the evidence presented was insufficient to resolve the question. Further evidence was requested, and later received, from the Complainant. Shelbourne did not deliver the evidence the Delegate requested of it. Shelbourne was provided with an opportunity to respond to the evidentiary material supplied by the Complainant, but declined to do so in any substantive manner.

47. In these circumstances, I cannot conclude that the Delegate acted unfairly.

48. Shelbourne also alleges that it was unaware that the Complainant's status as an employee or a contractor would be an issue at the hearing.

49. I cannot accept this submission.

50. The Director's record includes a written communication regarding the complaint, dated May 28, 2018, from the principal of Shelbourne in which it is clearly asserted that the Complainant was not an employee. The Delegate's Reasons reveal that Shelbourne's submission at the hearing included the same assertion.

I think it improbable, therefore, that Shelbourne did not know that the Complainant's working status would be an issue the Delegate would have to resolve in order for her complaint to succeed.

51. Shelbourne argues, in addition, that the Delegate ignored evidence of the Complainant's work arrangements, and communication practices, that Shelbourne suggested were evidence that she was a contractor. Again, I disagree. There is no evidence the Delegate ignored these facts. At the same time, it was unnecessary for the Delegate to refer to them in his Reasons, because they were largely irrelevant. Evidence of the nature of the Complainant's working relationships with other entities was of limited, if any, value in determining the substance of the relationship that the Complainant had with Shelbourne. Furthermore, as I have stated earlier, the law is that even if it could be established that the Complainant perceived herself to be a contractor, that fact alone would not be determinative of the status question the Delegate needed to decide.

52. Finally, Shelbourne implies that it was unfair for the Delegate to take a complaint over a stop payment on the Complainant's final cheque and then issue a Determination that incorporated a direction not only to make good that payment of wages, but also orders that Shelbourne must pay overtime wages, statutory holiday pay, minimum daily pay, annual vacation pay, accrued interest, and administrative penalties.

53. Shelbourne's challenge on this basis is misconceived.

54. No doubt, the Complainant's desire for a remedy was inspired by Shelbourne's decision to place a stop payment order on the Complainant's final paycheque. However, her complaint form was cast in broader terms, as it included the assertion that relief should be provided to her having regard to the fact that she was an employee for the purposes of the *ESA*.

55. In my view, once the Complainant sought unpaid wages under the statute, the Delegate was entitled to investigate the amount of all the wages that might be owed. Indeed, the Delegate was obliged to do this in order to act in a manner consistent with a further purpose of the *ESA*, which is that employees receive at least the basic standards of compensation mandated by it.

56. All of the sums the Delegate ordered Shelbourne to pay constitutes "wages" under the *ESA*. The Notice of Complaint Hearing forwarded to Shelbourne advised what might occur if a determination found that "wages and penalties" were owed.

57. For all these reasons, it would have been unreasonable for Shelbourne to have believed that the Delegate's focus when deciding the complaint would be limited to the issue of the stop payment on the Complainant's final cheque.

New Evidence

58. The Tribunal's power to allow an appeal based on new evidence under subsection 112(1)(c) incorporates an obligation to exercise a discretion. The discretion must be exercised with caution. A rationale for this approach is embedded in subsection 2(d) of the *ESA*, referred to earlier, which stipulates that it is a purpose of the legislation to provide fair and efficient procedures for resolving disputes over its application and interpretation. It would hinder the achievement of that purpose if an appellant were to be permitted, as a matter of routine, to seek out new evidence to bolster a case which failed to persuade

at first instance. Conversely, proceedings under the *ESA* are likely to be more fair and efficient if parties are encouraged to take care to seek out all relevant information during the investigation phase, and present it to a delegate before a determination is issued.

59. One of the criteria that the Tribunal will apply in determining whether an appeal should be allowed on this basis is to ask whether the evidence could not, with the exercise of due diligence, have been presented to a delegate during the investigation or adjudication of a complaint and prior to a determination being made. In other words, was the evidence really unavailable to the party seeking to present it? At the same time, even if the evidence was not unavailable in this sense, the Tribunal may nevertheless consider it if an appellant can demonstrate that the evidence is important, there is good reason why the evidence was not presented at first instance, and no serious prejudice will be visited upon the respondent if it is admitted (see *Re Specialty Motor Cars*, BC EST # D570/98).

60. In this case, there are two reasons why I cannot accept Shelbourne's submission that new evidence should be admitted on appeal.

61. The issue of the Complainant's working status during her time at Shelbourne was before the Delegate throughout the proceedings that led to the issuance of the Determination. Shelbourne was aware this was an important issue. It made submissions regarding the issue at the hearing conducted by the Delegate, and in correspondence that preceded it. Now, on appeal, Shelbourne seeks to offer what it calls "additional" evidence to support its position that the Complainant was a contractor.

62. Shelbourne's submission constitutes an attempt to make use of the appeal process to re-investigate the complaint in the hope that the Tribunal will come to a conclusion different from the one that was reached by the Delegate. That is not the purpose of an appeal under the *ESA*. The appeal process is designed to identify and correct errors, having regard to the Tribunal's jurisdiction set out in section 112. It is for an appellant to establish that errors of the type referred to in section 112 have occurred. None of the evidence offered by Shelbourne establishes those types of errors.

63. Secondly, there is nothing in the submissions of Shelbourne which indicates that the additional evidence it seeks to present was unavailable to it prior to the issuance of the Determination, with the result that it would have been impossible for Shelbourne to communicate it to the Delegate had it chosen to do so. Put simply, the evidence is not "new".

64. Accordingly, I have decided that Shelbourne's submission regarding new evidence must be rejected.

ORDER

65. Pursuant to section 114(1)(f) of the *ESA*, I order that the appeal be and is hereby dismissed, as there is no reasonable prospect that it will succeed.

Robert E. Groves
Member
Employment Standards Tribunal