Employment Standards TRIBUNAL

Citation: Armand Norman (Re)
2019 BCEST 92

An appeal

- by -

Armand Norman

(the "Appellant")

- 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: Carol L. Roberts

FILE NO.: 2019/72

DATE OF DECISION: August 28, 2019

DECISION

SUBMISSIONS

Armand Norman — on her own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Armand Norman (the "Appellant") has filed an appeal of a determination (the "Determination") issued by a delegate of the Director of Employment Standards (the "Director") June 12, 2019.

2. The Appellant filed 12 complaints under the *ESA* between December 3, 2018, and May 29, 2019. Among the allegations were that the Greater Victoria Volunteer Society carrying on business as Volunteer Victoria ("Volunteer Victoria") contravened the *ESA* by failing to pay her wages. The Appellant also alleged that Volunteer Victoria was operating as an unlicensed employment agency and unlicensed talent agency. The delegate concluded that the *ESA* did not apply to the complaints and that the Appellant was not an employee under the provisions of the *ESA*.

3. The Appellant appeals the Determination on the basis that the Director erred in law and failed to observe the principles of natural justice in making the Determination. The Appellant also contended that evidence had become available that was not available at the time the Determination was being made. The Appellant filed her appeal submission on June 16, 2019 (the "Appeal Submission"). In support of her Appeal Submission, the Appellant also submitted 269 emails attaching approximately 707 attachments containing 8872 pages prior to the appeal deadline of 4:30 pm on July 22, 2019 (the "Subsequent Submissions"). I will address these Subsequent Submissions below under the "New evidence" heading.

4. This decision is based on the Appeal Submission, the Subsequent Submissions, and the section 112(5) "record" that was before the Director at the time the decision was made (the "Record"). The parties were advised that no further submissions were sought or would be considered if filed with the Tribunal after the appeal deadline. The Appellant submitted a further 102 emails after the appeal deadline and before August 26, 2019, and I have not considered those submissions.

FACTS AND ARGUMENT

5. The Appellant filed 12 complaints against Volunteer Victoria. In her initial complaint, the Appellant alleged that she began working at Volunteer Victoria on January 1, 1980, and that her employment continued. She alleged that she was employed 24 hours per day, 7 days per week at a number of jobs including cook, janitor, receptionist, and cashier. She contended she was entitled to wages, overtime pay, annual vacation pay, and statutory holiday pay.

6. The delegate sought Volunteer Victoria's response to the complaint on January 25, 2019. Volunteer Victoria informed the delegate that it was a registered charity operating a volunteer centre and that it did not recruit employees for other employers or operate as an employment or talent agency.

7. Volunteer Victoria is a registered charity as well as a provincially registered society. Its stated purposes are to encourage voluntary citizen participation within the charitable and government administered/assisted social welfare community and provide a central resource for the registration of volunteers and the recruitment by charitable and government administer/assisted social welfare community groups of these volunteers.

8. Volunteer Victoria contended that the Appellant was never an employee, contractor, or registered volunteer with its society. Volunteer Victoria confirmed that the Appellant was a registered client in the Volunteer Access Program, a program that supported individuals "on a mental health or addictions journey", between February 3 and August 18, 2016. Volunteer Victoria noted that participation in this program was completely voluntary and none of the positions constituted paid employment. Volunteer Victoria did not retain information on the volunteer once they had been connected to a volunteer position with another organization.

9. Volunteer Victoria indicated that it had been contracted by Vancouver Island Health Authority ("VIHA") to provide accounting services to four distinct programs operated by Mental Health and Substance Use Services, one being a program called 'Souperclean', another called 'Souper Meals'. The programs were managed and coordinated exclusively by VIHA. Between January 1, 2018 and January 31, 2019, VIHA faxed requisitions for 29 cheques to be issued to the Appellant from the Souperclean fund account in the total amount of $2,080. The Appellant did not receive any funds from Volunteer Victoria.

10. In an April 8, 2019, letter to the Appellant, the delegate noted that the Appellant alleged non- payment of wages for working in Souper Meals in 2016 and Souperclean in July 2018. The delegate determined, on the evidence provided to date, that the Appellant was not an employee of Volunteer Victoria. The delegate also noted that the *ESA* would not apply to any wages earned in 2016. The delegate concluded by asking that if the Appellant disagreed with her findings, she should inform the delegate her no later than April 24, 2019, following which the delegate would issue a formal Determination. The delegate also provided the Appellant with a copy of Volunteer Victoria's response to the Appellant's complaint.

11. The Appellant replied to the delegate on April 20, disputing Volunteer Victoria's response to the complaint. The delegate issued the Determination on June 12, 2019.

ANALYSIS

12. 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.

13. Acknowledging that the majority of appellants do not have any formal legal training and, in essence, act as their own counsel, the Tribunal has taken a liberal view of the grounds of appeal. As the Tribunal held in *Triple S Transmission*, (BC EST # D141/03), while

> most lawyers generally understand the fundamental principles underlying the "rules of natural justice" or what sort of error amounts to an "error of law", these latter terms are often an opaque mystery to someone who is untrained in the law. In my view, the Tribunal must not mechanically adjudicate an appeal based solely on the particular "box" that an appellant has--often without a full, or even any, understanding--simply checked off.
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> The purposes of the *Act* remain untouched, including the establishment of fair and efficient dispute resolution procedures and, more generally, to ensure that all parties receive "fair treatment" [see subsections 2(b) and (d)]. When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, *prima facie,* invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant's explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

14. Where there is any doubt about the grounds of an appeal, the doubt should be resolved in favour of the appellant. I have therefore considered whether or not the Appellant has demonstrated any basis for the Tribunal to interfere with the Determination. I conclude that the Appellant has not met that burden.

15. 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.

Error of Law

16. 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.

17. The Appellant has not identified any errors of law which the delegate may have committed. Upon a review of the record, I find that the delegate's conclusions were rationally based on the evidence before her, and that the delegate properly applied the relevant sections of the *ESA*. The evidence before the delegate led her to conclude that the Appellant did not meet the definition of employee (Section 1 of the *ESA*). Although I appreciate the Appellant disagrees with this conclusion, I find no error in the delegate's analysis.

Failure to observe the principles of natural justice

18. Natural justice is a procedural right that includes the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker. There is nothing in the appeal submission that establishes that the Appellant was denied natural justice.

19. After investigating the complaints, the delegate informed the Appellant of her preliminary conclusions. The delegate included the correspondence she received from Volunteer Vancouver and invited the Appellant to respond to the delegate's preliminary conclusions. The Appellant did so, disputing effectively all of Volunteer Victoria's responses.

20. I find that the Appellant had every opportunity to advance her case as well as to respond to Volunteer Victoria's submissions. There are no allegations, nor is there any evidence, that the delegate was biased.

21. I therefore find no basis for this ground of appeal.

New evidence

22. 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.

23. I have reviewed the material the Appellant submitted in support of her appeal. That material includes psychological reports, a 2003 Canadian Human Rights Tribunal decision, appeals relating to matters while the Appellant attended Camosun College, complaints the Appellant made to the Police Commissioner and the Public Guardian, family photos, Workers Compensation and Criminal Injury Claim applications, and complaints related to strata and residential tenancy disputes, among others. After reviewing all of the

material, I conclude that none of this information is relevant to the issue under appeal; that is, whether or not the Appellant was an employee of Volunteer Victoria, and if she was an employee, whether she was entitled to wages.

24. In my view, this information, even if were properly new evidence according to the test set out above, would not have led the delegate to a different conclusion on the material issue before her. None of the material submitted on appeal demonstrates that the Appellant was an employee.

25. Therefore, I conclude that there is no reasonable prospect that the appeal will succeed and dismiss the application.

ORDER

26. Pursuant to section 115 of the *ESA*, I order that the Determination, dated June 12, 2019, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal