



Citation: Hassan Torfisaedi (Re)
2019 BCEST 99

An appeal

- by -

Hassan Torfisaedi

- 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.: 2019/78

DATE OF DECISION: September 16, 2019

DECISION

SUBMISSIONS

Hassan Torfisaeydi	on his own behalf
Shannon Corregan	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Hassan Torfisaeydi has filed an appeal of a Determination issued by a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”) on May 23, 2019.
2. Mr. Torfisaeydi filed a complaint alleging that Nancy Market Ltd. (“Nancy”) failed to pay him wages earned. Following a hearing on February 26, 2019, the Delegate concluded that Mr. Torfisaeydi was not an employee under the *ESA* and was thus not entitled to wages.
3. Mr. Torfisaeydi appeals the Determination on the basis that the Director failed to observe the principles of natural justice in making the Determination. After reviewing the appeal submissions, I sought a response from the Director on this issue.
4. This decision is based on the written submissions of the parties and the section 112(5) record (the “Record”) that was before the Director at the time the decision was made.

FACTS AND ARGUMENT

Evidence

5. Nancy operates a grocery store in North Vancouver. Nancy’s sole director is Navid Ghayour. Mr. Ghayour is also one of Nancy’s two corporate officers. Mr. Ghayour and his counsel appeared at the hearing on Nancy’s behalf.
6. There appeared to be no dispute before the Delegate that in July 2017, Mr. Ghayour and Mr. Torfisaeydi agreed that Mr. Torfisaeydi would become a partner in Nancy and that Mr. Torfisaeydi agreed to pay Mr. Ghayour \$150,000. However, the evidence suggests that the parties did not enter into any written contract, loan, partnership or employment agreements until February 2018. The parties are currently in a dispute before the Supreme Court of British Columbia regarding various aspects of that agreement. Mr. Torfisaeydi worked at the grocery store from July 19, 2017 until December 15, 2017. Neither party recorded Mr. Torfisaeydi’s hours of work or schedule.
7. In almost all other respects, the evidence of the parties differed. Mr. Torfisaeydi said that the \$150,000 payment to Mr. Ghayour was a loan while Mr. Ghayour contended it was an investment in the business. Mr. Ghayour asserted that Mr. Torfisaeydi was a business partner while Mr. Torfisaeydi contended he was an employee; thus the claim for wages.

8. Mr. Torfisaeydi's evidence was that in July 2017 he asked Mr. Ghayour for a job, and that the parties agreed Mr. Torfisaeydi would become a partner in Nancy once the amount of wages owing to him equaled one half the value of the business. However, the parties did not discuss the value of the business nor what Mr. Torfisaeydi's wage rate would be. Mr. Torfisaeydi began working at Nancy on July 19, 2018, and on that day, paid Mr. Ghayour \$5,000. This represented the first installment of the \$150,000 loan/investment which was to be paid over a period of time.
9. According to Mr. Torfisaeydi, Mr. Ghayour was to pay 2% interest on the loan, but there was no evidence the parties discussed when the loan was to be repaid.
10. Mr. Torfisaeydi said that he was the store manager although his duties were not clearly defined, and that he was told to record his hours. He said that he worked from store opening until closing, or from 0700 until 2200. He contended that he worked 14.5 hours per day, seven days a week, opening and closing the store, cleaning, purchasing supplies and receiving deliveries. He was given a Costco card to make purchases.
11. Nancy had four other employees. Mr. Torfisaeydi had no authority to hire or fire employees, make decisions about the company, never dealt with the landlord or suppliers or make any changes or repairs to the building.
12. Mr. Torfisaeydi contended that the \$5,000 loan was not sufficient evidence to establish that the parties were business partners.
13. The parties submitted a record, created by Mr. Torfisaeydi, documenting payments Mr. Torfisaeydi made to Nancy, or on Nancy's behalf, since July 18, 2017. The payments amounted to \$152,795.85, including payments amounting to several hundred dollars to two other employees.
14. The Delegate heard the evidence of two employees, one who worked in the store as a cashier, another who worked in the bakery. Both testified that they observed Mr. Torfisaeydi working long hours in the store as if he were the manager. One of the employees said she was paid by Mr. Ghayour, the other said he was paid by Mr. Torfisaeydi.
15. Mr. Ghayour's evidence was that although there was an agreement that Mr. Torfisaeydi would pay him \$150,000 in instalments, the money was an investment, and there was never any conversation about Mr. Torfisaeydi receiving wages or recording his hours of work. Mr. Ghayour's evidence was that he and Mr. Torfisaeydi were equally in charge of the store's operations, with both having the authority to make decisions about the business including making repairs and hiring and scheduling employees.
16. The Delegate issued two Demand for Records, the first being for employee records, the second for the security camera video recordings, daily cash register logs and invoices. No records were produced in response to either Demand. Mr. Ghayour stated that the cash register did not produce records, or only retained records for three days. He also said that video recordings had not been retained from the period of time requested.

17. A limited range of bank records and invoices were provided to the Delegate. The bank records from June 30 to July 31, 2017, demonstrated that four deposits of \$5,000 each had been made in July 2017 and a \$3,500 deposit had been made on July 31, 2017.

Delegate's Findings

18. The Delegate found that the parties had agreed that Mr. Torfisaeydi would become a partner in Nancy, although the evidence about when that would occur conflicted, with Mr. Torfisaeydi contending that it was to happen at an unspecified future date, while Mr. Ghayour contended it was July 17, 2017, when Mr. Torfisaeydi first invested in the business.
19. The Delegate did not accept Mr. Torfisaeydi's contention that he sought employment which was separate from a partnership agreement:

I do not believe that a reasonable person seeking employment would chose to accept a position from an employer that stated it could not pay wages, would work for that employer in the absence of any agreement regarding the payment of wages, and would not seek payment of wages until the breakdown of the employment relationship almost six months later, all while putting money into the business. The fact that Mr. Ghayour stated that Nancy Market could not pay wages and the fact that no wage rate was discussed are the most significant factors in this analysis. I also reject Mr. Torfisaeydi's argument that he was not a partner until his wages owing amounted to half the value of Nancy Market.

20. The Delegate noted that while there were many factors to consider in determining the existence of an employment relationship, the parties disagreed on the degree of control Mr. Torfisaeydi had over the store and whether he had authority to hire and fire employees and make purchases. She found the evidence of both parties on the issue of direction and control of the business to lack credibility, stating that she found Mr. Torfisaeydi's contention that he did not care whether or not the store was successful as he was "just working" there to be unbelievable in the face of his ongoing investments into the business. She also found the evidence of both parties lacking in detail.
21. The Delegate considered the *ESA* definition of employee to include "a person entitled to receive wages for work performed for another," noting that where an individual is in business on their own behalf, they are not an employee. She determined that Mr. Torfisaeydi's decision to make payments in the amount of \$152,795.85 to or on behalf of Nancy to be more indicative of a partnership agreement than an employment relationship.
22. The Delegate further noted that while many of the details of the partnership arrangement were undefined, Mr. Torfisaeydi's loan of \$150,000, paid in a series of installments, his long hours, Mr. Ghayour's lack of control over his hours of work or responsibilities, were more indicative of a joint venture than an unpaid employee.

ARGUMENT

23. Mr. Torfisaeydi advanced a number of arguments on appeal, arguing that the Delegate:
- failed to call a number of his witnesses leading her to an incorrect conclusion;

- failed to give proper consideration to the evidence of one of his witnesses that Mr. Ghayour had a history of taking advantage of his employees;
- failed to investigate Nancy to get more information about Mr. Ghayour’s “history of frauds”;
- communicated with Nancy without informing him;
- failed to properly consider evidence, including Mr. Ghayour’s false assertion that Mr. Torfisaeydi was a business partner and not an employee;
- relied on false information;
- failed to give proper consideration to a loan agreement and distinguish it from his claim for wages; and
- erred in concluding that he was not an employee.

ANALYSIS

24. 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.

25. Although Mr. Torfisaeydi advanced only one ground of appeal, given that he is self-represented, I have taken a liberal view of the grounds of appeal (see *Triple S Transmission Inc.* (BC EST # D141/03).

26. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision of the Director. After considering the submissions of the parties, I conclude that Mr. Torfisaeydi has not met that burden and dismiss the appeal.

Failure to observe the principles of natural justice

27. 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. There is nothing in the appeal submission that establishes that Mr. Torfisaeydi was denied natural justice.

28. Mr. Torfisaeydi appeared at an oral hearing regarding his complaint. There is no evidence he was denied an opportunity to present any documentary evidence or to ask Mr. Ghayour questions on his evidence.

29. Mr. Torfisaeydi says that he provided a list of 13 witnesses that was shortened to six, but that during the hearing, the Delegate only contacted two of those witnesses, after which she stated that it would not be necessary to hear from the remainder.

30. The Delegate says that of the 13 witnesses Mr. Torfisaeydi originally identified, eight were store customers, three were former employees and two were suppliers. She says that during the pre-hearing teleconference, Mr. Torfisaeydi confirmed that none of the witnesses could speak to the issue of whether

or not he was an employee, only to the issue of the number of hours he worked. When the Delegate asked Mr. Torfisaeydi to identify those witnesses who could provide the best or most relevant evidence, he identified six of those individuals, two of whom had the most relevant evidence.

31. During the hearing, the Delegate states that she believes she further clarified with Mr. Torfisaeydi that none of the witnesses could give evidence on the issue of whether or not he was an employee; that they could only give evidence on the number of hours he worked. The Delegate stated however, that she was unable to confirm that she did so. Nevertheless, the Delegate submits that she heard the evidence of two witnesses regarding the hours Mr. Torfisaeydi worked, she concluded that the evidence of the additional four witnesses was not necessary. The Delegate also says that, to the best of her recollection, she did not tell Mr. Torfisaeydi that he could not call the rest of the witnesses, only that she did not think it was necessary to do so, a suggestion he did not object to.
32. I accept that the Delegate did not call all of the witnesses identified by Mr. Torfisaeydi. However, even if she had done so, I am not persuaded that any of them had evidence relevant to the key issue in this appeal, that is, whether or not Mr. Torfisaeydi was an employee of Nancy. The two parties to the loan/partnership agreement were Mr. Torfisaeydi and Mr. Ghayour, both of whom gave evidence. There is no information before me to suggest that any of the additional potential witnesses could have testified to the business relationship between Mr. Torfisaeydi and Mr. Ghayour. Therefore, I conclude that the Delegate did not deny Mr. Torfisaeydi the opportunity to be heard.
33. I also do not accept that the Delegate was any under duty to independently investigate Mr. Ghayour's "history of fraud." The Delegate was obliged to make a determination based on the evidence presented to her on the issue of whether or not Mr. Torfisaeydi was an employee. Even if it were established that Mr. Ghayour had such a history, I am not persuaded that it would have had a bearing on the Delegate's conclusion on this issue.
34. Mr. Torfisaeydi further asserts that the Delegate communicated with and accepted submissions from Nancy without informing him until he followed up with the Delegate. The record demonstrates that the Delegate indeed initially failed to provide Mr. Torfisaeydi with a copy of an email Nancy sent to the branch. However, there is no evidence that was a deliberate attempt to deprive Mr. Torfisaeydi of a fair hearing. Rather, it was an oversight, and the document was ultimately forwarded to Mr. Torfisaeydi for his response.
35. I find no basis for this ground of appeal.

Error of Law

36. 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.

37. An appellant must demonstrate that the Delegate's analysis constitutes an error of law. There is nothing in the appeal submissions that persuade me that the Delegate erred in her analysis of the evidence.
38. Both parties presented their version of the nature of the arrangement between them. Although Mr. Torfisaeydi contends that the Delegate relied on "false information", failed to properly consider the loan/investment agreement and erred in concluding that he was an employee, I find no error in her analysis.
39. Neither party presented any evidence of either an employment agreement or a loan agreement during the hearing. Although Mr. Torfisaeydi submitted a document described as a 'Loan Agreement' with his appeal submission, that agreement is dated February 6, 2018, which is several months after Mr. Torfisaeydi left his work at the store. I do not consider this new evidence to be relevant to the Delegate's determination about the existence of any written agreement between the parties as of July 2017.
40. In the absence of any definitive evidence from either party, either in the form of wage payments, employment or business agreements, the Delegate was left to consider what, in the circumstances, made sense. I agree that it would make no sense for an employee to work long hours for a business without any pay for six months, while at the same time advancing that business in excess of \$100,000. Those facts, which are not in dispute, in my view, support the Delegate's conclusion that the parties did not have an employment relationship. I find the Delegate's conclusion was one she could reasonably arrive at on the facts before her.
41. In my view, the appeal is nothing more than an attempt to have the Tribunal revisit the Delegate's determination. Not only is that not the purpose of an appeal, there is nothing in the appeal submission to persuade me the Delegate erred in law in her conclusion.

ORDER

42. Pursuant to section 115 of the *ESA*, I order that the Determination that the *ESA* does not apply to the complaint, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal