

Citation: Elite Limousine Service (2003) Ltd. (Re)
2020 BCEST 147

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Elite Limousine Service (2003) Ltd.
("Elite Limousine")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2020/138

DATE OF DECISION: December 17, 2020

DECISION

SUBMISSIONS

Rajinder Nagi

on behalf of Elite Limousine Service (2003) Ltd.

OVERVIEW

1. On August 19, 2020, Mitch Dermer, a delegate of the Director of Employment Standards (the “delegate”), issued a Determination against the present appellant, Elite Limousine Service (2003) Ltd. (“Elite Limousine”), pursuant to section 79 of the *Employment Standards Act* (the “ESA”). By way of the Determination, Elite Limousine was ordered to pay a former employee (the “complainant”) the total sum of \$1,361.79 on account of unpaid wages (including \$720.00 in unauthorized wage deductions) and section 88 interest.
2. Further, and also by way of the Determination, the delegate levied five separate \$500.00 monetary penalties against Elite Limousine (see section 98) based on its contraventions of sections 17 (failure to pay earned wages at least semimonthly), 18 (failure to pay earned wages following termination of employment), 21 (unauthorized wage deductions), 28 (failure to keep payroll records), and 58 (failure to pay vacation pay) of the *ESA*. Accordingly, the total amount payable under the Determination is \$3,861.79.
3. Elite Limousine appeals the Determination on the grounds that the delegate erred in law and failed to observe the principles of natural justice in making the Determination (see sections 112(1)(a) and (b) of the *ESA*).
4. In my view, this appeal has no reasonable prospect of succeeding and, on that basis, must be dismissed under section 114(1)(f) of the *ESA*. My reasons now follow.

THE DETERMINATION

5. The Determination was issued following an investigation into the complainant’s unpaid wage complaint. The delegate issued his “Reasons for the Determination” (the “delegate’s reasons”) concurrently with the Determination. As detailed in the delegate’s reasons, Elite Limousine operates a limousine service in Delta, and the complainant worked for Elite Limousine as a part-time driver.
6. The delegate, rejecting Elite Limousine’s position that the complainant was an independent contractor, determined that the complainant was an “employee” under the *ESA*. The delegate awarded the complainant \$43.20 for a gratuity that “[t]he parties agree...the Complainant is owed...[but was not paid] due to a clerical error by the Employer” (delegate’s reasons, page R9). The delegate also awarded the complainant \$120.00 for so-called “Meet and Greet” fees payable under his employment contract, \$297.50 for minimum daily pay under section 34 of the *ESA*, and \$52.50 for time spent exchanging vehicles (for example, switching from a sedan to an SUV) while on the job. Finally, the delegate awarded the complainant \$720.00 for unauthorized wage deductions and 4% vacation pay on all unpaid wages (\$62.90), and \$65.69 in interest.

ELITE LIMOUSINE'S APPEAL

7. As noted above, Elite Limousine says that the delegate erred in law and failed to observe the principles of natural justice. With respect to this latter ground, the only allegation that could reasonably be characterized as a natural justice breach is Elite Limousine's assertion "that this determination has taken way too long and was not done in a timely manner and for this reason we may not be able to produce some of the evidence needed as we had thought this matter was settled."
8. As for the error of law ground, Elite Limousine contests many of the delegate's findings of fact and, more fundamentally, his finding that the complainant was an employee rather than an independent contractor. Elite Limousine also challenges the delegate's interpretation and application of section 34 of the *ESA*.

FINDINGS AND ANALYSIS

Alleged Natural Justice Breaches

9. The complainant worked for Elite Limousine from February 16, 2019 to March 16, 2019. He filed his complaint on March 19, 2019. The Determination was not issued until August 19, 2020. Clearly, there was a lengthy delay in adjudicating this complaint, but in light of the Supreme Court of Canada's decision in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, I am unable to conclude that the administrative delay involved here resulted in the Employment Standards Branch losing jurisdiction to adjudicate the complaint (see also *Brill-Edwards*, 2019 BCEST 56, *Jensen*, 2019 BCEST 100, and *Garrick Automotive Ltd.*, 2020 BCEST 85, for recent Tribunal decisions to like effect).
10. Further, Elite Limousine has not identified *any* credible and cogent evidence that they were unable to produce as a direct result of any delay. I note that the complainant – through the now abandoned "self-help kit" – first made Elite Limousine aware of his unpaid wage claim in March 2019. If Elite Limousine had relevant evidence regarding the complainant's claim it was incumbent on it to take steps to preserve it so that it could be produced to the delegate. In this latter regard, I also note that the section 112(5) record shows the Employment Standards Branch apprised Elite Limousine about this complaint by no later than early June 2019. While there was delay in adjudicating this complaint, there was little, if any, delay regarding Elite Limousine being notified about the complaint. Finally, Elite Limousine has not appealed the Determination on the basis that it has new and relevant evidence (section 112(1)(c) of the *ESA*), nor has it submitted any new evidence, or otherwise particularized what evidence it is now unable to produce.
11. Although Elite Limousine says "[it] thought this matter was settled", there is no evidence whatsoever that this matter was the subject of a binding settlement agreement. Elite Limousine, as part of its appeal documents, has not provided any formal document evidencing the alleged terms of settlement.

Alleged errors of law

12. As noted above, Elite Limousine's principal challenge to the Determination concerns the delegate's finding that the complainant was an employee, not an independent contractor. The delegate's findings on this issue are set out at pages R7 – R8 of his reasons. In my view, the delegate correctly determined that the parties were in an employment relationship. It is clear that the complainant was a driver working as part of Elite Limousine's business. He was not a freelance driver using his own tools and equipment to operate

a taxi service that provided transportation services to his own clientele. The complainant was an integral part of Elite Limousine's business. He was subject to significant control by Elite Limousine as set out in its "Drivers Manual – Company Policies & Procedures" [sic]. Indeed, the complainant was so obviously an employee that I consider Elite Limousine's appeal on this point to be bordering on frivolous. Although Elite Limousine says that it "strongly argue[s] that [the complainant] was in fact a contractor", it has not presented any rational argument, or any cogent evidence, to support its position. Elite Limousine's appeal on this issue amounts to nothing more than a bald unsupported assertion of error on the delegate's part.

13. The balance of Elite Limousine's challenge to the Determination largely, if not exclusively, is predicated on its assertion that the delegate's findings of fact should be set aside. Findings of fact may be characterized as errors of law, but only where there was no proper evidentiary foundation for the impugned findings. That is not the case here. I am not satisfied that any of the delegate's factual findings are tainted by "palpable and overriding error" (see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235). As for Elite Limousine's challenge to the delegate's interpretation and application of section 34 (pages R9 – R10), I am of the view that the delegate's analysis of this issue was correct.
14. As for the monetary penalties, in light of the delegate's factual findings (none of which was unsupported or otherwise unreasonable), there was a proper evidentiary foundation for each of the five penalties imposed. In this case, the monetary penalties are almost double the size of the unpaid wage award. Elite Limousine notes that the Determination "greatly impacts [them] during this already tough financial time led by covid". However, the Tribunal has no authority to reduce monetary penalties (penalty amounts are fixed by regulation), or to cancel penalties, based on economic hardship considerations.
15. The fundamental problem here is that Elite Limousine treated the complainant as an independent contractor, when he clearly met the definition of "employee" under the *ESA*. This case is yet another cautionary tale for employers who, inadvertently or otherwise, misclassify their workers.

ORDER

16. Pursuant to section 114(1)(f) of the *ESA*, this appeal is dismissed. Pursuant to section 115(1)(a) of the *ESA*, the Determination is confirmed as issued in the total amount of \$3,861.79, together with whatever additional interest that has accrued under section 88 since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal