

Citation: Urban Concierge Services Inc. (Re)
2020 BCEST 3

An appeal

- by -

Urban Concierge Services Inc.

- 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: Maia Tsurumi

FILE NO.: 2019/176

DATE OF DECISION: January 7, 2020

DECISION

SUBMISSIONS

Christopher Gunn

on behalf of Urban Concierge Services Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA” or “Act”), Urban Concierge Services Inc. (“Urban Concierge”) has filed an appeal of a determination (the “Determination”) issued by Rachel Smith, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”), on September 5, 2019. In the Determination, the Delegate found that Urban Concierge contravened sections 17, 18, and 58 of the *ESA* and section 46 of the *Employment Standards Regulation* (“Regulation”).
2. Urban Concierge 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 and because evidence has become available that was not available at the time the Determination was made.
3. I have decided that this appeal is appropriate for consideration under sub-section 114(1) of the *ESA*. Under sub-section 114(1), the Tribunal has the discretion to dismiss all or part of an appeal, without a hearing, for any of the following reasons:
 - 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.
4. Pursuant to sub-section 114(1)(f), I dismiss the appeal and confirm the Delegate’s Determination.
5. This decision is based on the submissions made by Urban Concierge, the sub-section 112(5) record (the “Record”), the Determination, and the Reasons for the Determination (the “Reasons”).

ISSUE

6. The issue before the Employment Standards Tribunal is whether this appeal should be allowed to proceed or be dismissed under sub-section 114(1) of the *ESA*.

ARGUMENT

7. Urban Concierge appeals the Determination because it says Ellen Smith (the “Complainant”) was a contractor and not an employee. Specifically, Urban Concierge appeals on the following basis:
 - a. the Complainant had clear control regarding accepting or declining tasks in her schedule;
 - b. the Complainant was billing or invoicing Urban Concierge as a contractor;
 - c. the Complainant had control over her own schedule and activities and the freedom to choose which days and times she worked; and
 - d. the Complainant had an opportunity to make extra profit by working efficiently, charging more per hour, and/or changing to a fixed fee contract.
8. Urban Concierge wants the Tribunal to review the Determination and find the Complainant was a contractor.

THE FACTS AND ANALYSIS

Background

9. Urban Concierge Services Inc. is a company incorporated in British Columbia since March 15, 2018. Christopher Gunn (“Mr. Gunn”) is listed with BC Registry Services as its sole director and officer. Urban Concierge manages short-term property rentals in Victoria, British Columbia.
10. The Complainant worked for Urban Concierge as an office manager from May 7 to July 30, 2018, at a wage of \$19 per hour. On November 22, 2018, she filed a complaint (the “Complaint”) with the Employment Standards Branch alleging that Urban Concierge failed to pay her wages and vacation pay.

Issues Before the Delegate

11. The issues before the Delegate were whether (1) the Complainant was an employee of Urban Concierge; and (2) whether any wages were owing to the Complainant.

Evidence and Submissions at the Hearing

12. The Delegate conducted a hearing on June 10, 2019.
13. The Complainant told the Delegate that she was hired by Urban Concierge in April 2018 after being interviewed by Mr. Gunn and another individual, who Urban Concierge identified as Joshua Schmidt (“Mr. Schmidt”), a consultant who helped Urban Concierge with hiring the Complainant. The Complainant’s hourly rate was discussed, and Mr. Gunn told her she would be working as an independent contractor. The Complainant agreed to these terms. There was no formal written agreement between the parties.
14. The Complainant and Urban Concierge both said the Complainant received some initial training from Urban Concierge for a couple of days, which included how to update the company’s calendar and how to

invoice clients. Urban Concierge told the Delegate further training was offered to the Complainant when she started to struggle with the work and make mistakes.

15. According to the Complainant, she did not have a regular work schedule, but would provide her availability to Mr. Gunn and he would tell her when her services were required. She said she considered herself to be on-call during her available hours. Her average work week was between 20 to 30 hours per week, but she occasionally worked more than 30 hours per week. She used her own laptop for work and spent part of her work hours at Urban Concierge's office and part of those hours working remotely. If she wanted time off, she would have to ask Mr. Gunn. Urban Concierge disagreed with this latter submission. Mr. Gunn said the Complainant would tell him when she would not be working.
16. The Complainant said she had a variety of duties such as invoicing clients; organizing the company calendar for check-ins and check-outs; arranging for cleaners; meeting with other service providers; cleaning various properties herself; and other miscellaneous errands required for the day-to-day running of Urban Concierge. She kept a record of her hours worked and submitted invoices to Urban Concierge. She also said that Urban Concierge paid for work-related costs, which Mr. Gunn confirmed.
17. The Complainant stated that she did not run her own business while working for Urban Concierge, although she was employed as a barista at a local hotel.
18. On July 30, 2018, Urban Concierge terminated the Complainant. Although she submitted an invoice for the hours she worked in July 2018, she did not receive any payment for that work. The Complainant provided the Delegate with a record of the hours and dates she worked in July 2018, as well as a copy of the invoice she sent to Urban Concierge.
19. Urban Concierge did not dispute the amount of wages claimed by the Complainant, but it did dispute that any wages were owing to her as it took the position that she was not an employee as defined by the *ESA*.
20. Urban Concierge said it hired the Complainant as a contractor. It referenced a letter from Mr. Schmidt who was present at the Complainant's interview. The letter says that Urban Concierge hires individuals to work as independent contractors rather than as employees. Mr. Gunn explained that only after successfully completing a 90-day probation period might the Complainant have had the opportunity to become an employee. One reason for this was that Urban Concierge was a start-up and not in a position to pay payroll remittances.
21. Urban Concierge stated the Complainant was paid as an independent contractor and there were no source deductions on her pay cheques. Further, the Complainant never asked for any deductions to be made.
22. Mr. Gunn told the Delegate Urban Concierge was responsible for the quality of the Complainant's work because she was its representative. If she made mistakes, it was Urban Concierge that suffered the risk of loss. Urban Concierge said this was the case when the Complainant made several errors that resulted in Urban Concierge losing clients and incurring thousands of dollars in expenses and the loss of clients and cost to the company was why Urban Concierge terminated the Complainant.

Delegate's Findings and Analysis

Was the Complainant an employee?

23. After finding the Complainant and Urban Concierge agreed the Complainant was hired and paid as an independent contractor, the Delegate noted it is well-established that the parties' intentions are not the determining factor when there is a question of whether a person is an employee under the *ESA*.
24. The Delegate stated that the test for determining whether a person is an employee for the purposes of the *ESA* is based on the definitions and objectives of the *ESA*. This test takes into consideration the fact that the *ESA* is intended to be benefits-conferring in establishing minimum standards for employees, which cannot be waived by an employer or employee. The *ESA* is interpreted broadly in order to meet these objectives.
25. Next, the Delegate reviewed the definition of "employee", "employer", and "work" in section 1 of the *ESA*:
- "employee" includes
- (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
 - (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
- ...
- "employer" includes a person
- (a) who has or had control or direction of an employee, or
 - (b) who is or was responsible, directly or indirectly, for the employment of an employee;
- "work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.
26. The Delegate said the *ESA*'s definition of employer showed that control and direction are important factors in determining if there is an employment relationship or not. She considered these and other factors, including the question of "whose business was it?" and found the Complainant was an employee of Urban Concierge. The basis for her determination was as follows:
- a. while the Complainant was able to complete some of her work off-site and may have had some authority over when she took time off of work, she was expected to come into work and complete tasks when and as required by Urban Concierge;
 - b. the Complainant's quality of work was subject to inspection by Urban Concierge, which was ultimately responsible for the work she performed and which suffered the financial consequences of any mistakes she made;
 - c. the Complainant was not in business for herself when she was hired by Urban Concierge as an office manager;

- d. Urban Concierge acquired all the clients and all of the Complainant's work was in furtherance of Urban Concierge's business; and
- e. the Complainant worked for an hourly wage without the ability to profit from particularly efficient work.

Wages owing

- 27. Based on the records provided by the Complainant, which Urban Concierge agreed were accurate, the Delegate found the Complainant was owed wages for 115.75 hours at her regular wage of \$19 per hour for a total of \$2,199.25.
- 28. The Delegate also found, based on the Record, that pursuant to section 40 of the *ESA* the Complainant was owed 7.75 hours of daily overtime at 1.5 times her regular wage (\$28.50 per hour) for a total of \$220.88.
- 29. The Delegate further found the Complainant was owed \$140.77 for out-of-pocket expenses.
- 30. The total of the above was \$2,560.90 and the Complainant was also entitled to annual vacation pay at the rate of 4% on this amount under section 58 of the *ESA* and to interest in the amount of \$111.68 pursuant to section 88.

Penalties

- 31. The Delegate imposed three penalties of \$500 for a total of \$1,500 for Urban Concierge's violation of sections 17 and 18 of the *ESA* and section 46 of the *Regulation*. Sub-section 98(1) of the *ESA* requires a mandatory administrative penalty for each contravention of the *ESA* or *Regulation*. The penalty amounts are set out in sub-section 29(1) of the *Regulation*.
- 32. Section 17 of the *ESA* requires wages earned during a pay period to be paid at least semi-monthly and within 8 days after the end of a pay period. Based on the Record, the Delegate found the Complainant earned, but was not paid for, wages during the pay period ending July 15, 2018. Thus, Urban Concierge contravened section 17 on July 24, 2019, when it failed to pay wages earned by the Complainant.
- 33. Section 18 of the *ESA* requires an employer pay all wages owing to an employee within 48 hours of terminating employment. The Delegate found Urban Concierge violated section 18 by failing to pay the Complainant's wages on August 1, 2018, after terminating her on July 30, 2018.
- 34. Finally, section 46 of the *Regulation* provides that a person who has to produce or deliver records to the Director under sub-section 85(1)(f) of the *ESA* must do so as, and when, required. Urban Concierge was served with a Demand for Records that required records be produced on or before April 29, 2019, but no records were produced.

Analysis

35. Urban Concierge submits the Delegate erred in law and failed to observe principles of natural justice because:
- a. the Complainant had clear control regarding accepting or declining tasks in her schedule;
 - b. the Complainant was billing or invoicing Urban Concierge as a contractor;
 - c. the Complainant had control over her own schedule and activities and the freedom to choose which days and times she worked; and
 - d. the Complainant had an opportunity to make extra profit by working efficiently, charging more per hour, and/or changing to a fixed fee contract.
36. Urban Concierge is asking me to review the same evidence that was before the Delegate, as well as some additional evidence, and come to the opposite conclusion as her – that the Complainant was not an employee. I note that an appeal is not a re-hearing of the matter and is not another opportunity to give one’s version of the facts. Sub-section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:
- a. the director erred in law;
 - b. the director failed to observe the principles of natural justice in making the determination;
 - c. evidence has become available that was not available at the time the determination was being made.

Error of law

37. In *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, B.C.J. No. 2275 (B.C.C.A.), the British Columbia Court of Appeal defined a question of law in the context of an appeal of a tribunal’s determination. In this context, an error of law occurs in the following situations:
- a. a misinterpretation or misapplication by the decision-maker of a section of its governing legislation;
 - b. a misapplication by the decision-maker of an applicable principle of general law;
 - c. where a decision-maker acts without any evidence;
 - d. where a decision-maker acts on a view of the facts that could not reasonably be entertained; and/or
 - e. where the decision-maker is wrong in principle.
38. The Tribunal has adopted this definition: see e.g., *Re: C. Keay Investments Ltd. (Re)*, 2018 BCEST 5 at para. 36.
39. The *ESA* does not allow appeals based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors of factual findings unless such findings raise an error of law: *Britco Structures Ltd.*, BC EST # D260/03. The test for establishing an error of law because of factual error is stringent, requiring the appellant to show that the findings are perverse and inexplicable in the sense that

they were made without any evidence, that they were inconsistent with, and contradictory to, the evidence or they were without any rational foundation: *Britco Structures Ltd.*, BC EST # D260/03 at p. 17.

40. As I explain below, I find the Delegate did not err in law in determining the Complainant was an employee of Urban Concierge.
41. The Delegate first considered the applicable provisions in the *ESA* that are used to determine if someone is an “employee”. She correctly noted that assessment of a person’s employment status is grounded in an application of these provisions of the *ESA*. She explained that the *ESA* must be given a liberal interpretation: *Regent Christian Academy Society*, BC EST #D011/14 at para. 41, citing *Machtiger v HOJ Industries Ltd.*, [1992] 1 SCR 986 at p. 1003.
42. Although the *ESA* casts a wider net as to who is an “employee” than the common law, the Delegate appeared alive to the fact that common law tests of employment status can assist in determining status: see e.g. *Regent Christian Academy Society*, BC EST # D011/14 at paras. 43 – 44; *Zip Cartage*, BC EST # D109/14, reconsideration refused BC EST # RD005/15. While there is no single, conclusive test, the Supreme Court of Canada has identified the following factors as potentially relevant:
- a. the level of control over the worker’s activities exercised by the employer;
 - b. whether the worker or the employer supplies the tools;
 - c. the worker’s degree of financial risk;
 - d. the worker’s degree of responsibility for investment and management; and
 - e. the worker’s opportunity for profit or loss arising from the work:
- 671122 Ontario Ltd v Sagaz Industries Canada Inc.*, [2001] 2 SCR 983 at para. 47.
43. In *Cove Yachts (1979) Ltd.*, BC EST # D421/99 at p. 5, the Tribunal listed a number of factors as being potentially relevant to determining whether a person is an employee or an independent contractor:
- a. the actual language of the employment contract;
 - b. control by the employer over the “what and how” of the work;
 - c. ownership of the means of performing the work (e.g. tools);
 - d. chance of profit/risk of loss;
 - e. remuneration of staff;
 - f. right to delegate;
 - g. discipline/dismissal/hiring;
 - h. right to work for more than one “employer”;
 - i. perception of the relationship;
 - j. integration into the business;
 - k. intention of the parties; and

I. whether the work is for a specific task or term.

44. The Delegate noted both the Complainant and Urban Concierge agreed the Complainant would work as an independent contractor. However, she correctly stated that the requirements of the *ESA* cannot be waived or circumvented by agreement: see section 4 of the *ESA*. The fact that a business and/or employee may intend the employee to be an independent contractor (as the parties did here) does not require a finding that the person was not an employee.
45. Thus, Urban Concierge's assertions on appeal that the Complainant's invoices indicate she was an independent contractor do not establish that the Delegate erred. The Delegate considered the parties' intention as one of the facts before her, but it was just one factor to consider and in light of her other factual findings, the Delegate concluded that the Complainant was an employee.
46. Importantly, the Delegate found the work done by the Complainant was largely controlled and directed by Urban Concierge. As stated by the Delegate, the definition of "employer" in the *ESA* indicates that the degree of control and direction exerted by the alleged employer over the alleged employee are important factors in determining whether there is an employment relationship. The evidence before the Delegate indicated that Urban Concierge decided the Complainant's wage rate and hours of work. It decided what work the Complainant would do and for which clients she would do it for.
47. The Delegate also found the Complainant did not have a chance of profit or a risk of loss from her work for Urban Concierge. Urban Concierge acquired all the clients. Urban Concierge was the entity that risked losing money from its business, including because of any mistakes made by the Complainant. When work was done poorly by the Complainant, Urban Concierge took care of correcting the work and it suffered the loss. The Complainant was paid the same hourly rate for all her hours worked regardless of how she performed.
48. Regarding integration into the business, the Delegate found that all of the Complainant's work was in furtherance of Urban Concierge's business and not any business of her own. Additionally, other than the fact that the parties agreed the Complainant would work as an independent contractor and that she billed her services in that manner, there was no evidence that the Complainant was in business for herself.
49. On appeal, Urban Concierge argues the Delegate failed to "see the clear control" the Complainant had in relation to accepting or declining to do specific tasks like providing concierge services to Urban Concierge's clients. Urban Concierge relies on Google calendar check-in invitations and acceptances as proof of its point. I deal with these documents below under "*New evidence*". However, even if I were to accept these documents as evidence, they merely indicate the Complainant could refuse to accept certain check-in tasks, they do not show the Delegate erred in law in her Determination.
50. Urban Concierge similarly asserts that because the Complainant could choose which days and times she worked, as well as whether she worked at home or in the office, she had control and direction of her work so as to be an independent contractor.
51. I disagree. First, while there may have been some flexibility around the how and when and where of the work, the nature of the work and the work itself was controlled and directed by Urban Concierge. Second,

and more importantly, in light of the other facts found by the Delegate, which I reviewed above, there were other grounds on which the Delegate could reasonably conclude the Complainant was an employee.

52. Regarding the Complainant's use of her own equipment, the Delegate was aware of this fact, but she also found that the Complainant was paid for expenses related to her work for Urban Concierge. In terms of ownership of "tools", this factor goes in both directions.
53. Finally, on appeal, Urban Concierge says the Complainant could have worked more efficiently, charged more and/or gone to a fixed contract fee for her work and therefore she had a chance of profit from the business. No evidence is provided to support this argument. In any event, this argument appears to be based on a misunderstanding of the chance of profit / risk of loss factor. A chance of profit from the business means the alleged employee has a chance of profit or risk of loss based on how the business operates, not because a person can work more efficiently or renegotiate payment for work.
54. The Reasons indicate the Delegate correctly identified and considered the required factors from the *ESA*, as well as a number of the factors from common law tests that the Tribunal has identified as relevant in determining when a person is an employee under the *ESA*. The Determination was reasonable: the Delegate applied the appropriate legal tests to her findings of fact and her findings were based on the evidence before her.

Breach of natural justice

55. Principles of natural justice (also called procedural fairness) are, in essence, procedural rights that ensure that parties know the case made against them, are given an opportunity to reply to the case against them, and have their case heard by an impartial decision-maker: see *AZ Plumbing and Gas Inc.*, BC EST # D014/14 at para. 27.
56. There is nothing in Urban Concierge's appeal submissions, the Record, the Determination, or the Reasons that indicates there was a breach of natural justice. Urban Concierge knew the Complaint against it, had an opportunity to reply to the Complaint, and had a hearing before an impartial decision-maker.

New evidence

57. In its appeal submissions, Urban Concierge provided documents to the Tribunal that are not in the Record, including the Complainant's resume, electronic Google calendar excerpts and what appears to be an invoice from the Complainant for the pay period June 16 to 30, 2018. I cannot accept these documents as new evidence.
58. An appeal is decided on the Record before the delegate unless there is evidence that has become available after the determination that was not available at the time the determination was being made: *ESA*, subsection 112(1)(c). The Tribunal in *Bruce Davies et al.* provided guidance on how the Tribunal applies subsection 112(1)(c):

This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph

112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence...[The evidence] must meet four conditions:

- (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 culpable of belief; and
- (d) the evidence must have high potential 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

(Bruce Davies et al., BC EST # D171/03 at p. 3).

59. None of the documents submitted in Urban Concierge's appeal submissions meets the Tribunal's test for admitting fresh evidence. The documents were all available at the time of the hearing of the Complaint.

60. In summary, I find Urban Concierge's appeal has no reasonable prospect of succeeding and therefore I dismiss it under sub-section 114(1)(f) of the *ESA*.

ORDER

61. Pursuant to sub-section 114(1)(f) of the *ESA*, I order the Determination, dated September 5, 2019, confirmed in the amount of \$4,275.02, together with any interest that has accrued under section 88 of the *ESA*.

Maia Tsurumi
Member
Employment Standards Tribunal