Citation: CWC Immigration Solutions Inc. (Re)
2020 BCEST 74

An appeal

- by -

CWC Immigration Solutions Inc.
("CWC")

- 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.: 2020/038

DATE OF DECISION: June 24, 2020

DECISION

SUBMISSIONS

Amandeep Khaira — on behalf of CWC Immigration Solutions Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), CWC Immigration Solutions Inc. ("CWC") has filed an appeal of a determination (the "Determination") issued by Tara MacCarron, a delegate (the "Delegate") of the Director of Employment Standards (the "Director"), on January 20, 2020. In the Determination, the Delegate found that CWC contravened sections 18, 27, 58, and 63 of the *ESA* and section 46 of the *Employment Standards Regulation* (the "*Regulation*"). In the result, she ordered CWC to cease contravening the *ESA* and to pay $12,008.56 to Kanika Sharma (the "Complainant") and to pay $2,500.00 in administrative penalties.

2. CWC appeals the Determination on the grounds that: (1) the Delegate erred in law; and (2) the Delegate failed to observe the principles of natural justice in making the Determination. CWC did not expressly appeal the Determination on the ground that new evidence has become available, but on appeal, CWC submitted three affidavits as new evidence.

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 Employment Standards Tribunal (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 CWC in its Appeal Form, the sub-section 112(5) record (the "Record"), the Determination, and the Reasons for the Determination (the "Reasons").

ISSUE

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

THE DETERMINATION

Background

7. In September 2019, the Complainant filed two complaints (the "Complaint") alleging CWC failed to provide her with her final pay cheque, three months' worth of commissions, and two weeks of wages as compensation for length of service. The Complainant worked at CWC as a Business Development Manager from July 17, 2017, to September 16, 2019.

8. CWC is a federally incorporated company, extra-provincially registered in British Columbia on July 3, 2015. In the Determination, Amandeep Khaira ("Mr. Khaira") is listed as a director. CWC is an immigration consultancy business.

Issues Before the Delegate

9. The issues before the Delegate were: (1) was the Complainant an employee as defined by section 1 of the *ESA*; and (2) if so, was the Complainant owed any regular wages, commissions, compensation for length of service, and/or vacation pay?

Evidence and Submissions During the Investigation

10. The Complainant told the Delegate that although she quit her position, she felt she was owed compensation for length of service because the reason she quit was that she was not getting any work from CWC. She said that near the end of July 2019, CWC was pressuring her to sign a new contract with several new conditions that she did not want to agree to. She said that because she did not sign the new contract, CWC told her all of her scheduled appointments were cancelled and she was no longer allowed to take walk-in clients, which meant she had no work. This situation lasted for about 10 days until September 16, 2019, during which time she was not given any new cases and she could not properly carry out her other duties because she had no appointments.

11. The Complainant claimed she made several attempts to contact Mr. Khaira, her manager, to discuss the new contract and find out why she was not being given any new work, but she was repeatedly put off or given no response. Finally, on September 16, 2019, the Complainant and Mr. Khaira met. The Complainant said Mr. Khaira blamed her for a number of unsuccessful cases and told her he was going to make deductions from her commissions to compensate for clients who did not work out. At this point, the Complainant told Mr. Khaira she was quitting. The Complainant was still awaiting her final pay cheque for September 1 – 15, 2019, and commissions for June, July, and August.

12. Regarding the nature of her work, the Complainant told the Delegate that:

    (a) CWC employees were assigned clients on a one-by-one basis and through personal references;

(b) The clients were clients of CWC and signed a contract with CWC;

(c) She was not working for any other company while with CWC;

(d) She interacted with her clients under "*Kanika Sharma with CWC*";

(e) Her personal company, KS Solutions Inc., was just a company CWC used to pay her commissions and salary;

(f) She used the "*CWCCanada.com*" e-mail address with her clients and a CWC phone;

(g) When she quit, her CWC e-mail and phone were given back to CWC, along with all her files and access to her company desktop computer and e-mails;

(h) CWC had complete control over her work and she only did what they told her to do;

(i) She was authorized to collect general information from clients and make further appointments with them, but she could not provide quotes for work or talk to them about money-related matters. CWC's licensed Immigration Consultant did this;

(j) She discussed the clients' payment plans with Mr. Khaira and CWC's Accounts Department was required to clear the payment plans;

(k) Her duties were to meet with clients, assess their files to determine what services they needed, schedule appointments with new and on-going clients, collect paperwork from clients, make appointments for the clients with the Accounting Department and consult on how to proceed with their case;

(l) CWC's Case Processing Department are the ones who actively worked on the file and they instructed her about what information and paperwork they needed from the client to make filings with government on their behalf;

(m) She was paid twice a month by cheque and did not receive wage statements;

(n) She was never paid vacation pay; and

(o) She received a fixed amount of about each month with a varying amount in commissions per month on top of this, the latter of which was approximately $1,800.00.

13. The Complainant asked for unpaid commissions for cases that had been submitted to, approved by, applied to or received by, government prior to September 16, 2019. She was not looking for commissions for cases labelled as "Not Submitted". She provided the Delegate with case records for June, July, and August 2019.

14. CWC told the Delegate that the Complainant was an independent contractor and thus had no claim under the *ESA*. CWC said that:

(a) The Complainant invoiced CWC for the work she did through KS Solutions Inc.;

(b) KS Solutions Inc. charged GST on its invoices;

(c) The Complainant chose her hours and when she attended at CWC's offices;

(d) The Complainant had control over the amount of profit she made;

(e) The Complainant provided immigration services to other immigration businesses; and

(f) The Complainant was never paid benefits and CWC did not make statutory deductions on her behalf.

15. At first, CWC asserted that the Complainant was not owed wages because her work was performed incompetently or not at all and that CWC and the Complainant had agreed any losses suffered by CWC would be off-set by the worker assigned to that file. There was no documentary evidence of this agreement and during the Delegate's investigation, CWC admitted there was no specific agreement, but said the Complainant had made a mistake that caused CWC reputational and monetary loss.

16. CWC said commissions were only payable once a case was submitted to the immigration office and the Complainant had been paid for all of the cases she submitted prior to quitting.

17. CWC submitted to the Delegate: (1) Certificate of Incorporation for KS Solutions Inc; (2) the Canada Revenue Agency GST/HST account details for KS Solutions Inc.; (3) a KS Solutions Inc. invoice sheet for September 15, 2019; (4) the list of the Complainant's files for June, July, and August 2019; (5) a letter from the Complainant saying she would no longer be providing services to CWC; (6) the Complainant's contract with CWC (the "Contract"); (7) the new contract that the Complainant did not sign; and (8) CWC's Commission Policy. No payroll records were submitted.

18. The Contract said the Complainant would earn $2,700.00 a month, paid on a bi-weekly basis, with commissions being paid once a month. The Complainant was not allowed to use any of CWC's client information except on behalf of CWC. The Contract also said the Complainant had the following responsibilities:

(a) Handling client accounts;

(b) Meeting with clients and gathering information;

(c) Following up with clients;

(d) Retaining clients;

(e) Creating and maintaining the clients' profiles;

(f) Uploading information on the client's file and updating the client about the status of their file on a regular basis;

(g) Coordinating with field officers, customer service and case processors; and

(h) Meeting sales targets.

19. CWC's Commission Policy says that a Business Development Manager must report all sales as, and when, they occur to Accounts in a specific format, and commissions are paid only after a case has been submitted to the appropriate immigration office. It also says that "*No commissions will be paid or clawed back in the case of refunds or contract/declarations are not loaded in CIMS.*"

20. CWC submitted that the Complainant obtained her clients using her own referral and agent network, as well as the CWC client network. For clients referred by CWC, the Complainant operated under the name CWC, but Mr. Khaira said he did not know what her other clients were told. He said the Complainant

would set the fees after discussion with the client and CWC and then she would adjust the rates according to the work so that she could maximize her revenue in sales and increase her chance to make a profit through commissions. Commissions were only paid once the file had been "*processed and dispatched*" by CWC.

21. About working conditions, CWC said the Complainant did not have to be at the office to do her work, but she could use CWC's meeting rooms. There were no minimum expectations; the more revenue she generated, the more commissions she made. However, she did receive a minimum salary of $2,700.00 per month.

22. CWC said the Complainant's pay cheque for September 1 – 15, 2019, was pending because she owed money to CWC.

23. On December 19, 2019, the Delegate sent CWC a letter (the "Letter") with her Preliminary Finding that the Complainant was an employee of CWC.

24. In response to the Delegate's Letter, CWC re-iterated that the Complainant was an independent contractor. It highlighted the fact that CWC was working under a contract with KS Solutions Inc. and the fact that immigration consultants have to be a member of the Immigration Consultants of Canada Regulatory Council (the "ICCRC"). The Complainant was not a member of the ICCRC so she could not legally represent CWC's clients. CWC also said that the commissions claimed by the Complainant were for cases still in progress or cases where the client had backed out and therefore a refund had been issued. CWC's evidence of this was handwritten notations Mr. Khaira made on the copy of the case records submitted by the Complainant.

25. Finally, CWC said there were no changes to the nature of the Complainant's work duties and there was no pressure on her to sign a new contract.

Delegate's Findings and Analysis

Employment status

26. The first question the Delegate addressed was whether the Complainant was an employee, as defined by the *ESA*, or an independent contractor.

27. The Delegate considered the definitions 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,
>
> (c) a person being trained by an employer for the employer's business,
>
> (d) a person on leave from an employer, and
>
> (e) a person who has a right of recall;

> "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.

28. The Delegate noted that the *ESA* is remedial legislation intended to ensure that employees receive at least minimum employment standards: *ESA*, section 2. Therefore, an interpretation of the definition of "*employee*" that extends protections is preferred over one that does not.

29. The Delegate stated that the substantive nature of the relationship between the worker and the alleged employer is key in determining whether a worker is an employee for the purposes of the *ESA*. In assessing the degree of control, direction, or responsibility of CWC over the Complainant's work, relevant factors to consider include:

(a) Whether the Complainant was doing work for CWC;

(b) The degree of control exercised over the Complainant about the way in which work was done;

(c) Whether the Complainant had a chance of profit and/or risk of loss;

(d) Whether the Complainant used the tools, supplies and equipment supplied by CWC;

(e) Whether the Complainant was providing similar services to other parties or actively searching out similar work; and

(f) Whether there was an ongoing relationship between the parties.

30. The Delegate considered the above factors and the information summarized above under "Evidence and Submissions During the Investigation".

31. First, the Delegate found the Complainant was doing work for CWC because the Contract indicated the Complainant's job duties and stated that the Complainant must not use any of CWC's client information except in doing work for CWC.

32. Second, the Delegate found CWC exercised significant control and direction over the way the Complainant did her work, including when her work was considered complete. The Contract explicitly laid out the Complainant's responsibilities, including meeting "*sales targets*" and said that commissions were only paid once a case was submitted to the appropriate immigration office. The Commission Policy required workers to report all sales to Accounts in a specific format. Both CWC and the Complainant told the Delegate that CWC determined and set the rates charged to clients. The Complainant said she could not quote or discuss money-related matters with clients.

33. Third, while the Complainant had a chance of profit because of the commission system, she did not incur any risk of loss. She did not invest any of her own money in the business and there was no formal agreement that the Complainant was responsible for any losses to CWC because of her performance. Also, in terms of profit, while the Complainant could impact her commissions based on the amount of

work she did and the revenue she generated, the commission structure was fixed and set in advance by CWC. Even if the Complainant did not do any work to earn commissions in a month, she still received her monthly amount of $2,700.00.

34. Fourth, CWC provided the Complainant with tools to do her job: a phone, e-mail address, access to an office and meeting rooms, and all of her files. The Complainant had to use CWC's software, including "*CRM*" to follow-up with clients and "*CIMS*" to create and maintain client profiles. Much of the Complainant's work was done on a desktop computer located in its office and loaded with this specific software. The Complainant had to meet with scheduled clients and walk-ins at CWC's office.

35. Fifth, the Delegate found the Complainant was not providing similar services to other parties while working for CWC. All of her clients were CWC's clients and no other party was involved in the work she did for them. However the Complainant got her clients, all the clients knew that CWC was the entity providing the Complainant's services to them.

36. Sixth, the Delegate noted that the Contract had no fixed end date, which indicated there was an on-going relationship.

37. The Delegate addressed CWC's argument that the Complainant invoiced CWC through her company, KS Solutions Inc., that she charged GST on her invoices, that she was not paid benefits, that statutory deductions were not made from her wages, and that she was not a member of the ICCRC. The Delegate found these factors suggested to a limited extent that the Complainant was an independent contractor, but they were outweighed by all of the other factors described above that established she was an employee.

38. The Delegate concluded the Complainant was an employee of CWC.

Regular wages

39. The Delegate found the Complainant was owed $1,350.00 in regular wages.

40. The Complainant's Contract stated a monthly amount of $2,700.00 paid on a bi-weekly basis of $1,350.00. However, the Delegate found that the $1,350.00 payment was in fact made twice a month, not every two weeks. This means the Complainant earned a semi-monthly salary of $1,350.00.

41. The Complainant ended her employment on September 16, 2019, but did not work this day. Therefore, she was owed $1,350.00 for the pay period of September 1 – 15, 2019. CWC acknowledged it had not paid the Complainant for this period. It said it was because she owed CWC money because of a mistake she made with a file. Section 21 of the *ESA* states that an employer must not withhold, deduct, or require payment of all or part of an employee's wages for any purpose, nor should they require an employee to pay any of the employer's business costs.

Commissions

42. The Delegate found the Complainant was owed commissions for the cases shown as "*Submitted*" on the case records she provided. The Delegate used the payment amounts recorded for the June, July, and

August cases multiplied by the corresponding commission rate outlined in CWC's Commission Policy to find the Complainant was owed $4,046.00 in unpaid commissions.

43. When the Complainant's employment ended, she had a number of cases under way. Both parties agreed these files would be handed over to a co-worker, and thus, both parties agreed that the Complainant was not owed commissions for these files. However, the Complainant claimed commissions for cases that were submitted to the appropriate government office prior to her termination. The Complainant provided case records to support her claim. CWC made hand-written notations on those case records to say the cases were not in fact submitted. There was no other evidence to support CWC's position. Also, CWC did not dispute any other details or information in the case records. Therefore, the Delegate found that CWC's unsupported submission alone was not sufficient to refute the case records.

44. In any event, the CWC Commission Policy said that commissions were payable once cases were "*submitted*". Cases did not need to be concluded as argued by CWC. Thus, its notations on the case records that the cases were "*still pending*", "*not concluded*" or "*still in progress*" did not affect the Complainant's entitled to commissions. The case records did not show whether the cases were approved or completed, but they did show which cases were submitted prior to September 16, 2019.

45. The Delegate stated that the Commission Policy said no commissions would be paid or clawed back in the case of refunds or if contract/declarations were not loaded into CIMS. The Delegate took this to mean that in the case of a refund to a client, commissions would not be paid to the individual working on the file but should commissions already have been paid prior to the refund being issued, commissions would not be taken back. According to CWC's handwritten notations on the case records, the date of the first refund issued to a client was on October 1, 2019. Therefore, had the Complainant been paid all of her wages within the time required by the *ESA*, the Complainant would have already been paid those commissions and they would not have been clawed back.

46. There was no evidence to show that the Complainant had already been paid the commissions she claimed she was owed.

Compensation for length of service

47. Having determined the Complainant was an employee and how much she was owed in wages, the Delegate turned to the question of whether the Complainant was owed compensation for length of service.

48. As the Complainant was employed by CWC for just over two years, under sub-section 63(3) of the *ESA*, she was entitled to two weeks' worth of wages as compensation for length of service if she was terminated by CWC. As described below, under section 66 of the *ESA*, the Delegate found the Complainant was terminated.

49. Both parties agreed the Complainant had quit CWC. The Complainant said she quit because CWC had stopped giving her work and therefore she felt that her employment had been terminated. CWC said she quit of her own accord.

50. The Delegate explained that section 66 of the *ESA* gave the Director the authority to determine if an employee was terminated because of a substantial alteration of a condition of employment. To find a contravention of this section of the *ESA*, the Director (or Delegate) must be satisfied that the employer unilaterally made a substantial change in the nature of the employment duties or in compensation. If the employer substantially changes the employment relationship, and as a result, the employee quits, the employer's actions caused the employment relationship to end and the employee is considered terminated under section 66. The relevant factors to consider are whether: (1) there was a reduction in the wage rate; (2) there was a change in geographic location of the work; (3) the employee's authority was limited; (4) the employee was demoted; and (5) there was a change in responsibilities imposed by the employer.

51. The Delegate referred to the fact that the Complainant attended work for about 10 days prior to quitting and during this time no work was assigned to her and she had no work to do. The Delegate found this was a significant change in her responsibilities imposed by CWC. Because CWC did not give her any new cases and cancelled, without notice, all of her walk-in and scheduled client appointments, she was stripped of her job responsibilities and left with no work to do. This was a substantial, unilateral change in the nature of her employment that led her to quit. It was also a change to her employment condition regarding commissions as she could no longer earn any. While CWC submitted that the Complainant quit of her own accord, it did not provide any evidence of this such as a record of hours of work, a list of scheduled appointments and walk-in clients during this period, nor correspondence between the Complainant and CWC discussing her work or the new contract.

52. As the Delegate found the Complainant was terminated for the purposes of section 66, she was entitled to compensation for length of service under section 63 of the *ESA* equal to two weeks' worth of wages. This amount was calculated by totalling the Complainants' weekly wages and commissions during her last eight weeks of employment, dividing that total by 8, and multiplying by 2 weeks. The amount was $1,944.92.

Annual vacation pay

53. Annual vacation pay of 4% is payable on termination of employment: *ESA*, section 58. The Delegate found that the Complainant was owed vacation pay on her total gross wages paid during the course of employment in the amount of $4,667.64. This was calculated as 4% of the total following amounts:

(a) Total regular wages earned: $70,200.00;

(b) Total commissions earned: $44,546.00; and

(c) Compensation for length of service: $1,944.92.

54. There was no evidence that the parties agreed in writing that the Complainant would receive her vacation pay on scheduled pay days. Therefore, under section 58 of the *ESA*, CWC had to pay vacation pay at least seven days before the beginning of the Complainant's annual vacation for her first year of work. Section 57 of the *ESA* requires an employer to ensure an employee takes an annual vacation within 12 months of completing the year of employment entitling the employee to the vacation. The Complainant's first day of employment was July 17, 2017. Section 80 of the *ESA* allows recovery of all wages payable in the 12

months prior to the date of termination, so annual vacation pay for July 2017-2018 was included in the recovery period.

55. Based on sections 57 and 58, vacation pay for the Complainant's first year of employment had to be paid no later than July 16, 2019. Sections 18, 57, and 58 of the *ESA* required CWC to pay the Complainant annual vacation pay for her second year of employment and for the period from mid-July 2017 to her termination within 48 hours of her termination.

56. In summary, the Complainant was entitled to 4% vacation pay on all of her wages from July 17, 2017, to September 16, 2019.

57. Because the employer did not submit payroll records, which would have confirmed how much the Complainant earned during the July 17, 2017, to September 16, 2019 period, the Delegate had to determine how much in regular wages and commissions and compensation for length of service the Complainant earned using the best evidence available. Using the monthly amount of $2,700.00 paid twice a month, the Delegate found there were 52 pay periods, totalling $70,200.00 in regular wages for the period. The Complainant estimated she earned about $1,800.00 in commissions each month and CWC did not dispute this. The Delegate thus used this amount to calculate commissions for July 17, 2017, to June 1, 2019, which was $40,500.00. For the June, July, and August 2019 commissions, the Delegate used the amount of $4,046.00 she had previously found were owed to the Complainant. The total commissions earned for the period was $44,546.00. Adding the total of regular wages, commissions and two weeks' wages in compensation for length of service ($1,944.92) the Complainant was owed $4,667.64 in annual vacation pay.

Penalties

58. Section 18 of the *ESA* requires employers to pay all wages, including annual vacation pay and compensation for length of service, owing to an employee within 48 hours after termination. CWC did not pay these amounts to the Complainant within 48 hours of September 16, 2019, and its contravention of section 18 was subject to a mandatory $500.00 administrative penalty.

59. CWC's contravention of section 58 of the *ESA* for failing to pay annual vacation pay was subject to a mandatory $500.00 administrative penalty.

60. CWC's contravention of section 63 of the *ESA* for failing to pay compensation for length of service was subject to a mandatory $500.00 administrative penalty.

61. Section 27 of the *ESA* requires an employer to give each employee a written wage statement for each pay period containing the employee's wage rate, however it is paid, the hours worked, and the gross and net wages. Because CWC did not provide the Complainant with any wage statements during her employment, the Delegate imposed a mandatory $500.00 administrative penalty.

62. Section 46 of the *Regulation* says a person who is required under sub-section 85(1)(f) of the *ESA* to produce or deliver records to the director must do so as and when required. CWC did not produce all demanded records before November 15, 2019, as required in the Demand for Employer Records sent to it on October 31, 2019. Thus, the Delegate imposed a $500.00 administrative penalty.

Accrued interest

63. The Complainant was entitled to interest of $162.44, pursuant to section 88 of the *ESA*.

ARGUMENT

64. CWC submits that the Delegate made her Determination before contacting CWC about the Complainant's allegations. On behalf of CWC, Mr. Khaira says the Delegate made him uncomfortable during her first conversation with him because she was "*very persistent and aggressive*" even though Mr. Khaira said he was driving, and it was not a good time to speak.

65. CWC also submits the Delegate erred in concluding that the Complainant was an employee and not an independent contractor. CWC says the Complainant was an independent contractor because:

(a) she invoiced CWC monthly for services (through KS Solutions Inc.);

(b) she made her own appointments and scheduled meetings for her clients at CWC's office;

(c) she used the CWC brand for marketing reasons only; and

(d) CWC did not give her work.

66. In support of the proposition that the Complainant was not an employee, CWC submitted three affidavits on appeal.

ANALYSIS

67. 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.

68. Below, I first consider CWC's new evidence. Then, I address the two grounds raised by CWC in its Appeal Form.

New evidence

69. In its Appeal Form, CWC attempted to submit three affidavits. The first two affidavits were affirmed on February 26, 2020 (the "February 2020 Affidavits") and are not admissible in this appeal as new evidence. The third affidavit was affirmed on June 11, 2020 (the "June 2020 Affidavit") and is not admissible in this appeal as it is not relevant to a material issue arising from the Complaint.

70. An appeal is decided on the record before the Delegate. The only exception to this is if there is new evidence available that was not available at the time the Determination was being decided: *ESA*, sub-section 112(1)(c).

71. The Tribunal in *Bruce Davies et al.*, BC EST # D171/03 at p.3, provided guidance on how the Tribunal applies sub-section 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:

72. CWC's affidavits do not meet the Tribunal's test for admitting fresh evidence. With an exercise of due diligence, CWC could have provided the February 2020 Affidavits to the Delegate prior to the Determination being made. The June 2020 Affidavit alleges retaliatory conduct by the Complainant against one of the February 2020 affiants. These allegations are not relevant to a material issue in the Complaint or the appeal. The material issues are whether the Complainant was an employee of CWC and whether the Delegate was biased against CWC.

Breach of natural justice

73. 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 its case heard by an impartial decision-maker: see *AZ Plumbing and Gas Inc.*, BC EST # D014/14 at para. 27.

74. There is nothing in the Appeal Form, Record, Determination, or Reasons that indicates there was a breach of natural justice. CWC knew the complaint against it, had an opportunity to reply to this complaint, and had their case heard by an impartial decision-maker.

75. While CWC alleges the Delegate was biased against it and made her Determination before speaking to CWC during the investigation, I have no basis on which I could conclude that was the case. CWC's only basis for asserting bias is its assertion that the Delegate was inappropriately persistent and aggressive

during her first phone call with Mr. Khaira. This, CWC says, shows she had already made her decision about the Complaint. I do not find this bare allegation amounts to an indication of bias or even a reasonable apprehension of bias. My conclusion is based on the description of the phone call provided by CWC and by the lengthy Reasons in which the Delegate outlines all of her attempts to get CWC's information and evidence before making her Determination.

Error of law

76. In *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, 1998 CanLII 6466 (BC CA), 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.

77. The Tribunal has adopted this definition: see e.g. *Re: C. Keay Investments Ltd. (Re)*, 2018 BCEST 5 at para. 36.

78. 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.

79. For the reasons that follow, I find that the Delegate did not err in law in determining that the Complainant was an employee of CWC.

80. The Delegate considered the applicable provisions in the *ESA* that are used to determine if someone is an "*employee*" under the *ESA*. She correctly noted that assessment of a person's employment status is grounded in an application of these provisions of the *ESA* and that the *ESA* must be given a liberal interpretation as it aims to encourage employers to comply with minimum requirements of the legislation and to extend protection to as many employees as possible: *Regent Christian Academy Society*, BC EST # D011/14 at para. 41, citing *Machtinger v HOJ Industries Ltd.*, [1992] 1 SCR 986 at p. 1003.

81. Next, the Delegate appropriately looked to the common law to determine whether the Complainant was an employee under the *ESA*. Although the *ESA* casts a wider net as to who is an "*employee*" than the common law, 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.

82. Also, 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

(l) Whether the work is for a specific task or turn.

83. The Delegate considered many of these factors and found that:

(a) The Complainant did work for CWC;

(b) CWC exercised significant control and direction over how the Complainant did her work;

(c) The Complainant had a chance of profit because of the commission system, but she did not have any risk of loss and while the Complainant's commissions changed based on the amount of work she did and the revenue she generated, the commission structure was fixed and set in advance by CWC;

(d) Even if the Complainant did not do any work to earn commissions, she still received her monthly amount of $2,700.00;

(e) CWC provided the Complainant with the tools to do her job: a phone, e-mail address, specific software on a desktop computer at CWC's office, access to an office and meeting rooms, and all of her files;

(f) Even if the Complaint was not officially required to be at CWC's office to do her work, she had to use its software on the desktop computer at its office to process her files and she had to meet with scheduled clients and walk-ins at CWC's office;

(g) The Complainant was not providing similar services to other parties while working for CWC; and

(h) The Complainant's Contract had no fixed end date, which indicated an on-going relationship.

84. The Delegate expressly addressed CWC's argument that the Complainant invoiced CWC through her company, KS Solutions Inc., that she charged GST on her invoices, that she was not paid benefits, that statutory deductions were not made from her wages, and that she was not a member of the ICCRC. The Delegate's Determination that these factors were outweighed by all of the other evidence, which established she was an employee, was reasonable.

85. On a reasonable reading of the Determination, it is apparent that the Delegate identified and considered the important factors from the *ESA*, as well as a number of the factors from common law tests that the Tribunal has identified as potentially relevant. The Delegate thus approached the issue in the manner required by the *ESA* and endorsed by the Tribunal.

86. In summary, the Delegate's Determination was reasonable: she applied the appropriate legal tests to her findings of fact and these facts were grounded on the evidence before her.

Summary

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

ORDER

88. Pursuant to sub-section 115(1) of the *ESA*, I order the Determination, dated January 20, 2020, confirmed in the amount of $14,671.00, together with any interest that has accrued under section 88 of the *ESA*.

Maia Tsurumi
Member
Employment Standards Tribunal