

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Terra Nova Transcription Inc
("Terra Nova")

- 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: David B. Stevenson

FILE No.: 2020/060

DATE OF DECISION: July 22, 2020

DECISION

SUBMISSIONS

J. Vernon French, Q.C.

on behalf of Terra Nova Transcription Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Terra Nova Transcription Inc. (“Terra Nova”) has filed an appeal of a determination issued by Shannon Corregan, a delegate of the Director of Employment Standards (the “Director”), on March 6, 2020 (the “Determination”).
2. The Determination found Terra Nova had contravened Part 3, sections 16 and 28, Part 4, section 40, Part 5, sections 45 and 46, Part 7, section 58, and Part 8, section 63 of the *ESA* in respect of the employment of Dawn Lucavs (“Ms. Lucavs”) and ordered Terra Nova to pay Ms. Lucavs wages in the amount of \$10,809.75, an amount that included interest under section 88 of the *ESA*, and to pay an administrative penalties in the amount of \$3,500.00. The total amount of the Determination is \$14,309.75.
3. In this appeal, Terra Nova says the Director erred in law in finding the complaint fell within the jurisdiction of the *ESA* and in finding Ms. Lucavs was an employee of Terra Nova rather than an independent contractor. Terra Nova seeks to have the Determination cancelled.
4. Terra Nova also seeks a suspension of the effect of the Determination under section 113 of the *ESA*.
5. In correspondence dated April 20, 2020, the Tribunal acknowledged having received an appeal. Among other things, the correspondence requested the section 112(5) record (the “record”) from the Director, notified the parties that no submissions were being sought from any other party pending a review of the appeal by the Tribunal, and notified the parties that, following such review, all or part of the appeal might be dismissed.
6. The record has been provided to the Tribunal by the Director. A copy has been delivered to Terra Nova and Ms. Lucavs. Both have been given an opportunity to object to its completeness. Terra Nova has filed submissions inquiring about a document that was mentioned in the Determination but not submitted to the Director during the complaint process and about whether there is a transcript of the complaint hearing. I shall comment on each of these references.
7. A document that is not *before* the Director at the time the Determination is made is not included in the record. It might be considered by the Tribunal as “new evidence” if it is sought to be included in an appeal, but that ground of appeal is not raised by Terra Nova. There was no request to the Director from Terra Nova that the document be produced, and none has been made to the Tribunal. The inquiry made by Terra Nova does not bear on the completeness of the record.
8. As a matter of practice, complaint hearings are not recorded; there is nothing in the *ESA* that requires it. The Director may allow formal recording of a complaint hearing if such is requested and circumstances

justify the Director allowing it. I can find no indication in the record of a request for the complaint hearing to be recorded and transcribed.

9. As there has been no specific objection to the completeness of the record, I am satisfied it is complete.
10. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal, and my review of the material that was before the Director when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:
- 114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any appeal if the tribunal determines that any of the following apply:*
- (a) the appeal is not within the jurisdiction of the tribunal;*
 - (b) the appeal was not filed within the applicable time period;*
 - (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 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.*
11. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and Ms. Lucavs will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal will succeed.

ISSUE

12. The issue here is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE FACTS

13. There is no significant disagreement on the facts relating to the matters raised in this appeal; the disagreement is with the conclusions reached by the Director on the facts as found. Terra Nova has sought to correct one factual statement made in the Determination, but by even allowing the correction, it would not change or impact the Determination in any way.

14. Terra Nova operates a medical transcription business in St. John's, Newfoundland. Ms. Lucavs worked as a medical transcriptionist from September 16, 2016, to October 8, 2018. Ms. Lucavs worked from her home in Victoria, British Columbia. She initially worked Tuesday to Saturday, but later worked Wednesday to Sunday.
15. Ms. Lucavs worked on two types of files, which she was assigned to transcribe by Terra Nova; she was paid \$0.08 a line for one type and \$0.05 a line for the other.
16. During the complaint process, and at the complaint hearing, Terra Nova took the position that Ms. Lucavs was not an employee but an independent contractor.
17. The Director conducted a complaint hearing. Ms. Lucavs provided evidence on her own behalf. Maria French, a director of Terra Nova, provided evidence on its behalf.
18. The Director considered whether Ms. Lucavs' complaint fell within the jurisdiction of the *ESA*, finding there was a "sufficient connection" between her employment obligations for Terra Nova and British Columbia for the *ESA* to apply to her complaint.
19. Having found there was jurisdiction over the complaint, the Director considered the evidence presented by the parties and found Ms. Lucavs was an employee of Terra Nova for the purposes of the *ESA* and, as such, was owed wages in the amount set out in the Determination.

THE APPEAL

20. Terra Nova submits the Director committed an error of law by acting on a view of the facts that could not reasonably be entertained.

ANALYSIS

21. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:
- 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of 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.*
22. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.
23. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

24. The grounds of appeal listed above do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. 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.
25. The test for establishing findings of fact constitute an error of law is stringent. They are only reviewable by the Tribunal as errors of law in situations where it is objectively shown that a delegate has committed a palpable and overriding error on the facts.
26. To expand the above point, in order to establish the Director committed an error of law on the facts, Terra Nova is required to show the findings of fact and the conclusions and inferences reached by the Director on the facts were inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or inexplicable: see *3 Sees Holdings Ltd. Carrying on business as Jonathan's Restaurant*, BC EST # D041/13, at paras. 26 – 29.
27. Terra Nova says the Director acted on a view of the facts that could not reasonably be entertained. I disagree.
28. On the question of whether the complaint filed by Ms. Lucavs fell within the *ESA*, the Director has correctly observed the answer to that question is determined by whether there is a "sufficient connection" between her employment obligations, assuming employment, and the province.
29. Decisions of the Tribunal demonstrate that question is decided by examining a number of factors, the most relevant being a requirement for a "real presence" performing employment obligations in the province, which includes consideration of the location where the work is performed, the residence of the employee, the usual place of employment of the employee, and where the employee was hired. Other factors include the place of business of the employer, the amount, or scope, of the work performed in the province and, correspondingly, the extent to which the employee has a presence in the province and whether, and the extent to which, other jurisdictions may legitimately claim jurisdiction over the person's employment.
30. In the context of that last point, I note Ms. Lucavs performed absolutely no work in Newfoundland and the work she performed was done solely for a client of Terra Nova in Ontario.
31. While Terra Nova contends the Director did not "acknowledge" certain factors in her reasoning, the Determination clearly acknowledges evidence was presented and argument was made on all of those

“factors” during the complaint process and hearing. Because the Director did not acknowledge those factors does not mean she did not consider them. It is not an error of law, and Terra Nova does not suggest otherwise, if the reasons for Determination do not address every point raised by either party if it is apparent from the context of the decision that those points have not been accepted by the Director as being determinative. The Director did identify the essential factors.

32. Terra Nova relies heavily on the fact of the company being situate in Newfoundland, with no legal or physical presence in the province, and that the work performed by Ms. Lucavs was done for a third party in Ontario. I do not find this argument particularly compelling in the circumstances, for at least two reasons.
33. First, neither fact derogates from the reasonableness of the conclusion that there was *sufficient connection* between Ms. Lucavs’ employment obligations and the province, based on her residence in the province, that her work for Terra Nova was performed exclusively in the province, that she entered into her contract with Terra Nova while residing in the province; that she received her compensation for the work she performed in the province and that she received direction on matters relating to her work in the province.
34. Second, there is nothing in the argument made by Terra Nova that establishes either Newfoundland or Ontario could legitimately claim jurisdiction over her employment. The references in their appeal submission to guidelines issued by Canada Revenue Agency are irrelevant to an interpretation and application of employment standards legislation in this province. Those pieces of legislation speak to entirely different statutory regimes, purposes, and objectives. Ultimately, the failure of Terra Nova to show another forum where Ms. Lucavs could advance her claim is a factor supporting the conclusion made by the Director.
35. I find the Director made no reviewable error on this matter and dismiss the argument of Terra Nova on this issue.
36. On the question of whether Ms. Lucavs was an employee or an independent contractor, I refer to, and adopt, the extensive analysis of the legislative provisions, legal principles, and policy considerations that direct the approach to deciding this question set out in *Beach Place Venture Ltd. and Black Top Cabs Ltd.*, 2019 BCEST 23 (Reconsideration denied 2019 BCEST 61) from paragraphs 82 to 100.
37. The Director acknowledged the task of deciding if a worker is an employee or an independent contractor involves a weighing of factors “on both sides of the equation”. The Director applied the correct legal principles to the task – Terra Nova does not argue otherwise; the Director made findings on the relevant factors and weighed those findings against the legal principles.
38. The task of the Director, once the findings of fact are made, is a balancing and weighing of relevant factors.
39. The weight of evidence is a matter for the Director and is a question of fact, not law. Findings of fact made by the Director require deference. Asking the Tribunal to reassess the evidence and alter findings of fact, as this appeal does, is inconsistent with the usual deferential approach to review of findings of fact.

40. The Director was alert to all of the facts that might bear on the question of Ms. Lucavs' status under the *ESA*. The argument made here neither adds to nor detracts from the facts presented to and analyzed by the Director in the Determination; it seeks only to have them weighed differently.
41. In my view, the findings of fact made by the Director were consistent with and reasonably grounded in the evidence provided by the parties, and I so find. Terra Nova has not shown the conclusion of the Director, based on a weighing of the relevant factors established by those facts, is an error of law. I dismiss the argument of Terra Nova on this issue.
42. In sum, no error of law on the facts has been shown.
43. I am not persuaded this appeal has merit.
44. Based on all of the above, I find this appeal has no reasonable prospect of succeeding. The purposes and objects of the *ESA* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1) (f) of the *ESA*. The appeal is dismissed and consideration of the application for a suspension of the effect of the Determination is unnecessary.

ORDER

45. Pursuant to section 115 of the *ESA*, I order the Determination dated March 6, 2020, be confirmed in the amount of \$14,309.75, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal