Citation: North Shore Taxi (1996) Ltd. (Re)
2020 BCEST 92

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

North Shore Taxi (1966) Ltd.
(the "Employer")

- 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.: 2020/079

DATE OF DECISION: July 27, 2020

DECISION

SUBMISSIONS

William A. McLachlan — legal counsel for North Shore Taxi (1966) Ltd.

INTRODUCTION

1. On April 9, 2020, and following a hearing conducted by teleconference on January 14, 2020, Rodney J. Strandberg, a delegate of the Director of Employment Standards (the "delegate"), issued a Determination under section 79 of the *Employment Standards Act* (the "*ESA*"). By way of the Determination, the present appellant, North Shore Taxi (1966) Ltd. (the "Employer"), was ordered to pay its former employee, Ajinder Kainth (the "complainant"), the total sum of $27,593.18 including section 88 interest.

2. The delegate determined that the complainant, a taxi driver, had been dismissed without just cause, and was thus entitled to 8 weeks' wages as section 63 compensation for length of service. The delegate also determined that the complainant had valid claims for unpaid statutory holiday pay, vacation pay, and a section 21 entitlement to recover business costs he had been wrongfully required to pay.

3. Further, and also by way of the Determination, the delegate levied six separate $500 monetary penalties against the Employer (see section 98). Accordingly, the total amount payable under the Determination is $30,593.18.

4. In my view, this appeal is entirely without merit and, accordingly, must be dismissed under section 114(1)(f) of the *ESA* as having no reasonable prospect of success. My reasons for reaching that conclusion now follow.

ISSUE ON APPEAL

5. The *only* issue raised by the Employer in this appeal is whether the Determination should be cancelled and this matter returned to the Director of Employment Standards for rehearing. The Employer says that the Tribunal should issue such an order because the delegate failed to observe the principles of natural justice in making the Determination (see section 112(1)(b) of the *ESA*). As will be seen, the Employer's "natural justice" argument references the fact that the delegate held the complainant to be an "employee" for purposes of the *ESA* – an issue raised by the Employer at the complaint hearing. However, the Employer does *not* assert that the delegate erred in law in finding that the complainant was an employee rather than an independent contractor.

6. The delegate issued "Reasons for the Determination" (the "delegate's reasons") concurrently with the Determination. The delegate's reasons are included in the Employer's 25-page appeal submission (at pages 13 to 25). The delegate, at pages 17 – 19, set out his analysis and findings regarding the "employee versus independent contractor" issue. As noted above, the Employer does not challenge the delegate's finding that the complainant was an employee. Simply for the sake of completeness, I will observe that I find the delegate's determination of this issue to be entirely correct, consistent as it is with many other

Tribunal decisions (see, for example, *Beach Place Ventures Ltd. and Black Top Cabs Ltd.*, 2019 BCEST 23 and the Tribunal decisions cited therein at para. 96).

7. The Employer's natural justice argument flows from the delegate's refusal to grant its application to adjourn the complaint hearing, the matter to which I now turn.

THE EMPLOYER'S NATURAL JUSTICE ARGUMENT AND THE RELEVANT FACTUAL BACKGROUND

8. The section 112(5) record shows that prior to the complaint hearing, the Employer was represented by William A. McLachlan, the latter being the same lawyer who now represents the Employer in this appeal. Mr. McLachlan did not appear on behalf of the Employer at the complaint hearing, although he represented the Employer at a mediation teleconference conducted on December 3, 2019.

9. Viji Maini ("Maini"), the Employer's General Manager, appeared on the Employer's behalf at the complaint hearing, and the complainant appeared on his own behalf. Prior to the hearing, the Employer identified Mr. Maini and another individual, Balwinder Manhas, as the only two witnesses who would testify on its behalf. However, this latter individual did not testify at the hearing.

10. The record also includes an Employment Standards Branch 3-page factsheet entitled "Complaint Hearings" that was sent to both parties prior to the hearing. This factsheet includes a section headed "Adjournments" that states:

> A request for an adjournment must be made in writing, include reasons, alternate available dates and whether the other party consents, and be delivered to the Branch seven days before the scheduled hearing date. Requests for an adjournment will be granted or refused on a case-by-case basis.
>
> Parties should remain prepared to attend the hearing on the originally scheduled date unless advised in writing that the adjournment has been granted.

11. In addition, by letter dated December 13, 2019, the Employment Standards Branch sent out a "Notice of Complaint Hearing" to the parties that included this notice – the final paragraph of the 3-page document – regarding adjournments:

> **Adjournments**
> A request for an adjournment must be made in writing and be delivered to the Branch at least seven days before the scheduled hearing date. It must advise whether the other party consents and include reasons, alternate available dates and supporting documentation if applicable.
>
> Parties should remain prepared to attend the hearing on the originally scheduled date until advised in writing that the adjournment has been granted. If a party does not appear, the hearing may proceed in their absence.

The Adjournment Application

12. The delegate's reasons (at pages 14 – 15 of the Employer's appeal submission) record the details of the Employer's adjournment application that was made at the outset of the complaint hearing (i.e., not in accordance with the 7-day notice requirement of which it had been expressly advised):

> …Prior to the hearing commencing, [Mr. Maini] applied to adjourn it. Neither the Complainant, who had taken a day off work, or the Director had no notice of the adjournment application. [*sic*]
>
> Mr. Maini said [the Employer] retained a lawyer, William A. McLachlan ("Mr. McLachlan"), to represent it at the hearing. Mr. McLachlan supplied [the Employer's] documents in response to the Director's Demand for Employer Records, and witness list on December 20, 2019. Mr. Maini said that he learned, a few days before the hearing date, that the Vancouver Taxi Association had a lawyer, Peter Gall, under retainer. He said that [the Employer] wanted Mr. Gall to represent it at the hearing. Mr. Maini had not discussed having Mr. Gall do so and had no idea of Mr. Gall's availability if I adjourned the hearing.
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> [The Employer's] application to adjourn the hearing came on the day of the hearing, without notice to either the Director or the Complainant who, by taking a day off work, suffered financial prejudice. A party, such as [the Employer], may choose to be represented by a lawyer, but it has an obligation to both the Director and the Complainant to ensure that any lawyer it chooses to represent it is available on the hearing date. [The Employer] retained a lawyer who prepared its case for it and who appeared ready to attend the hearing. [The Employer's] last-minute decision to change lawyers, with no idea of the new lawyer's availability, would have led to an adjournment of the complaint hearing of an indeterminate length. After considering these factors, and the Act's purposes in section 2, I exercised my discretion to deny [the Employer's] application to adjourn the hearing.
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> Mr. Maini also said that he was stuck in his residence due to adverse road conditions resulting from a snowfall in Vancouver. After determining that he had access to all the material exchanged by the parties in preparation for this hearing, which the Director sent to the parties by Canada Post and by email, Mr. Maini confirmed that he was able and prepared for the hearing.
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> Accordingly, the hearing went ahead and concluded on the scheduled date.

13. The Employer indicated in its appeal submission that Mr. Gall is no longer on retainer to the Vancouver Taxi Association.

The Employer's Natural Justice Argument

14. The Employer's appeal submission includes the following assertions:

- "[The Employer] is a member the [*sic*] Vancouver Taxi Association (VTA). Mr. Peter Gall, QC, is a senior Vancouver lawyer specializing in taxi and employment related issues, and he is on retainer to the VTA. [The Employer] determined that Mr. Gall's retainer agreement would include his representation of [the Employer] on the [complainant's] matter."
- "Mr. Maini asked for an adjournment on two grounds: first, he did not have access to all of the relevant file material, given that he was unable to travel to his office because of the heavy snowfall that day; and second, Mr. Maini was not represented by legal counsel."
- "Mr. Maini's file material was mostly at the North Shore Taxi office and not at his home."
- "…Mr. Maini had some of the file material in his possession. However, he did not have the ability to access his full file from home."

- "The legal issues before the Director were technical, and all of the factual issues were in dispute."
- "Mr. Maini, who has no legal training whatsoever, had no understanding of the [*ESA*], and had no knowledge of the issues identified in the [*ESA*] that needed to be addressed."
- "…the Complaint Hearing should have recessed for a few minutes to allow Mr. Maini to speak with Mr. Gall and provide [the delegate] with some future Hearing dates."

FINDINGS AND ANALYSIS

15. The Employer submits "that the [delegate] failed to observe the principles of natural justice in making a determination without allowing [the Employer] to have legal counsel present for the Complaint Hearing". In my view, that assertion misstates what actually transpired in this case. The delegate did not deny the Employer the right to have legal representation. Rather, the delegate simply held that if the Employer wished to change lawyers, it had an onus to act promptly in that regard so as not to derail the scheduled complaint hearing (a hearing that was originally scheduled one month earlier).

16. The Employer was represented by legal counsel in the pre-hearing period (the same legal counsel that now represents the Employer in this appeal). For whatever reason, the Employer determined, as was its right, that it would not have legal representation at the complaint hearing – or, at the very least, it would not be represented by the counsel who had been acting on its behalf prior to the hearing. As recorded in the delegate's reasons (page 14 of the appeal submission), "Mr. Maini said that he learned, *a few days before the hearing date*, that the Vancouver Taxi Association had a lawyer, Peter Gall, under retainer" (my *italic*s). That being the case, there was ample time *prior to the hearing* for the Employer to contact Mr. Gall's office and determine his willingness and availability to act.

17. The Employer maintains that the adjournment application was predicated on two grounds – lack of "relevant file material" and the absence of legal counsel. The delegate's reasons make no mention of the first ground. Indeed, the delegate's reasons record that Mr. Maini "confirmed that he was able and prepared for the hearing". The Employer's submission that a lack of documentation was advanced as a justification for the adjournment is pure hearsay, and stands in marked contrast to the delegate's reasons. There is nothing in the material before me from Mr. Maini asserting that he, in fact, told the delegate that he was not ready to proceed due to a lack of documentation.

18. The Employer asserts that the issues before the delegate were "technical", and that Mr. Maini, not having any legal training, was perhaps not adequately prepared to address the legal issues that arise in an "employee versus contractor" dispute. However, that could equally be said (possibly even more so) about the complainant (who appeared on his own behalf). Mr. Maini appeared on the Employer's behalf, along with Mr. McLachlan, at the December 3, 2019 mediation conference, and thus he must have had some idea about the issues that would be addressed at the complaint hearing. Nevertheless, the Employer seemingly never took any affirmative steps, prior to the hearing, to ensure that it would have counsel on the day and time set for the hearing. In my view, in this instance, the Employer's adjournment application, made at the outset of the hearing, was an application that might be characterized as "a day late" (perhaps several days) "and a dollar short".

19. Further, the relevant facts were not in dispute. Both parties were given a full and fair opportunity to present their case. Mr. Maini apparently had no personal knowledge about some matters. But the Employer was not denied the opportunity to call any other relevant witness(es). In fact, the one witness the Employer had previously indicated it intended to call, was not called on to testify at the hearing. The unpaid wage order issued in favour of the complainant was principally based on the records that the *Employer* supplied in accordance with a section 85 demand. The Employer does not challenge any of the delegate's findings of fact relating to the "employee versus contractor issue"; nor does it contest any of the delegate's unpaid wage calculations.

20. Section 2 states, among other things, that the *ESA* is intended to "provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act". In my view, the delegate did not breach the principles of natural justice when he refused to adjourn the hearing based on what I consider to have been a very tenuous, bordering on specious, argument. The delegate turned his mind to the appropriate considerations, and I find that his decision to refuse the Employer's adjournment application was, in the circumstances, entirely reasonable.

ORDER

21. 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 $30,593.18, together with whatever additional interest that has accrued under section 88 since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal