Citation: CloudCradle Management Corp. and Newmark Investment Corp. (Re)
2022 BCEST 52

EMPLOYMENT STANDARDS TRIBUNAL

Appeals
pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

CloudCradle Management Corp. and Newmark Investment Corp.

- of a Determination issued by -

The Director of Employment Standards

PANEL: James F. Maxwell

FILE NOS.: 2022/108 and 2022/109

DATE OF DECISION: August 18, 2022

DECISION

SUBMISSIONS

Zhi-shu Yang	on behalf of CloudCradle Management Corp. and Newmark Investment Corp.

OVERVIEW

1. CloudCradle Management Corp. and Newmark Investment Corp. (the "Appellants") have filed an appeal of a determination dated April 7, 2022 (the "Determination"), issued by Michael Thompson, a delegate (the "Adjudicative Delegate") of the Director of Employment Standards (the "Director"), pursuant to the *Employment Standards Act* (the "*ESA*"). The Adjudicative Delegate held that the Appellants had breached sections 17, 27, 28, 40 and 45 of the *ESA* in their treatment of Shufeng Liu (the "Employee"). The Adjudicative Delegate held that the Appellants are liable to pay the sum of $13,558.37 to the Employee, and assessed administrative penalties in the sum of $2,500.00. The Appellants appeal the Determination.

ISSUE

2. The following issue arises in the appeal:

    a. Is there a reasonable prospect that the within appeal will succeed?

3. I have concluded that there is no reasonable prospect that the within appeal will succeed, for the reasons set out herein.

FACTS

4. The Appellants are corporations carrying on business in, *inter alia*, online property sales and rental marketing.

5. The Employee was employed by one or both of the Appellants up to December 3, 2019, at which time his employment was terminated. There is disagreement between the Employee and the Appellants as to the date that the Employee's employment began, and on the nature of that employment.

6. On January 27, 2020, the Employee filed a complaint with the Employment Standards Branch (the "Complaint"). The Complaint alleged that the Employee had not been paid all sums owing for regular wages, overtime wages, and compensation for length of service, as required pursuant to the provisions of the *ESA*, and that $41,150.00 was owing.

7. Sarah Vander Veen, a delegate (the "Investigative Delegate") of the Director, notified the Appellant of the Complaint, and commenced an investigation of the facts surrounding the Employee's allegations.

8. The Investigative Delegate interviewed the Employee, and the representative of the Appellants, Zhi-shu Yang ("Mr. Yang"), and examined records supplied by both the Employee and the Appellants.

9. On September 22, 2021, the Investigative Delegate issued a preliminary Investigation Report, providing it to both the Employee and the Appellants by email, and invited them to provide further responses.

10. On April 7, 2022, the Adjudicative Delegate issued the Determination which gives rise to the within Appeal.

THE DETERMINATION

11. In the Determination, the Adjudicative Delegate noted that the two Appellant corporations are controlled by Mr. Yang. The Adjudicative Delegate also noted that both Appellants issued Records of Employment upon the termination of the Employee's employment. The Employee reported that he had provided services to both corporations. The Appellant Newmark entered into a written Employment Agreement with the Employee dated January 1, 2019. The Adjudicative Delegate found that the Employee worked for both Appellant corporations. Pursuant to section 95 of the *ESA*, the Adjudicative Delegate held that the two Appellant corporations should be considered to be one entity for the purposes of considering the Employee's entitlements under the *ESA*, and held that the two Appellant corporations are jointly and severally liable for any unpaid sums.

12. The Adjudicative Delegate noted that the Employee reported that he had provided services to Mr. Yang and the Appellants from as early as January 2017. The Employee was reportedly not paid for these services until February 2019, as the Appellants' business was not functional before that date. The Adjudicative Delegate considered the information supplied by the Employee regarding the nature of the work that the Employee performed, and concluded that the Employee had worked for the Appellants, or either of them, from January 1, 2017 to December 3, 2019.

13. The Adjudicative Delegate held that the Employee would normally be entitled to recover wages unpaid for the period of 1 year prior to the date that his employment was terminated, in this case December 3, 2019.

14. The Adjudicative Delegate considered section 31 of the *Employment Standards Regulation* (the "*Regulation"*), which provides that persons licensed under the *Real Estate Services Act* and providing services governed by that legislation may be excluded from the provisions of the *ESA*. The Adjudicative Delegate found that the Employee became licensed under the *Real Estate Services Act*, and from August 2019 to the termination of his employment was providing services governed by that Act. The Adjudicative Delegate concluded that the Employee was excluded from the provisions of the *ESA* after July 31, 2019.

15. The Adjudicative Delegate also considered section 34 of the *Regulation*, which provides that persons working in a managerial capacity are excluded from the provisions of the *ESA* that govern hours of work, overtime, and statutory holiday pay. The Adjudicative Delegate considered the evidence as to the work performed by the Employee, and concluded that the Employee's principal duties were not managerial, and that the Employee was not a manager.

16. As a result of the foregoing, the Adjudicative Delegate concluded that the Employee was entitled to recover unpaid wages from December 4, 2018 to July 31, 2019.

17. The Adjudicative Delegate considered the Employee's evidence that the Employee had worked 10 hours per day, 24 days per month. The Adjudicative Delegate noted that the while the Employee was able to provide some documentary evidence to support these alleged hours of work, the Appellants had failed to keep a daily record of the Employee's hours, as required by the *ESA*. The Adjudicative Delegate concluded that the Employee's records as to hours worked was the best available evidence.

18. The Adjudicative Delegate calculated the number of hours worked by the Employee, in terms of both regular and overtime hours, and added the Employee's entitlement to wages for statutory holidays. The Adjudicative Delegate then calculated the Employee's hourly wage rate, based upon the monthly salary set out in the Employment Contract executed by the Appellant Newmark. The Adjudicative Delegate applied this wage rate for hours worked after January 1, 2019, and applied the minimum statutory wage rate for hours worked prior to that date, and concluded that the Employee should have been paid the sum of $27,600.35.

19. The Adjudicative Delegate considered the evidence supplied by the Employee as to amounts that he had been paid from January 2019. The Adjudicative Delegate held that since the Appellants had failed to supply wage statements showing the amount of wages paid to the Employee, the Employee's records were the most reliable evidence. The Adjudicative Delegate held that, after deducting the sums already paid, the Employee was entitled to recover wages and statutory holiday pay in the sum of $12,600.35, plus interest thereon, for a total sum owing to the Employee of $13,558.37.

20. The Adjudicative Delegate assessed penalties of $2,500.00 for breaches of sections 17, 27, 28, 40, 45 of the *ESA*.

21. The Adjudicative Delegate rejected the Employee's claim for compensation for length of service, finding that the Employee's duties changed after August 1, 2019, and the Employee was no longer covered by the provisions of the *ESA* at the time that his employment ended in December 2019.

ARGUMENT

22. The Appellants have appealed the Determination on all of the statutory grounds, namely error of law, failure to observe the principles of natural justice, and because evidence has become available that was not available at the time that the Determination was made.

23. The Appellants tendered reasons and arguments in support of their appeal, summarized as follows:

(a) the Employee has been fully paid all wages owing;

(b) the Employee was a Property Manager, and thus exempt from the provisions of the *ESA*, pursuant to s.31, 34(f) and 36 of the *Regulation*. There is no legal basis or evidence to support a conclusion that the Employee did not act in a managerial capacity;

(c) there is no evidence or legal basis for an award of overtime hours. The Appellants neither requested nor allowed the Employee to work overtime hours;

(d) the Appellants dispute that the Employee worked 10 hours per day, 5 days per week. The Appellants offer the evidence of an ex-employee to support this argument;

(e) the Employee's evidence as to hours worked is falsified and inconsistent;

(f) there is no evidence or legal basis upon which to conclude that the Employee was employed by the Appellant corporations during December 2018.

24. The Appellants accept the imposition of penalties for failing to pay wages on a biweekly basis, and for failing to issue wage statements.

ANALYSIS

25. Section 114 of the *ESA* provides that this Tribunal may dismiss all or part of an appeal if there is no reasonable prospect that the appeal will succeed:

> 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 the appeal if the tribunal determines that any of the following apply:
>
> …
>
> (f) there is no reasonable prospect that the appeal will succeed;

26. It is incumbent on me to assess whether there is a reasonable prospect that the within appeal will succeed.

27. The statutory grounds upon which an appeal of a determination may be brought under the *ESA* are set out in section 112(1):

> Appeal of director's determination
>
> 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.

28. An appeal is not simply an opportunity to argue the merits of a claim to another decision-maker. An appeal is an error correction process, and the burden is on the appellant to persuade the Tribunal that there is an error in the determination under one of the statutory grounds listed in section 112(1).

29. I turn now to examine the arguments advanced by the Appellants, to assess whether there is a reasonable prospect that the within appeal will succeed under one of the three statutory grounds of appeal.

Did the Director err in law in making the Determination?

30. This Tribunal has adopted the following definition of "error of law", as 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.):

(a) a misinterpretation or misapplication of a section of the applicable legislation;

(b) a misapplication of an applicable principle of general law;

(c) acting without any evidence;

(d) acting on a view of the facts which could not reasonably be entertained; and

(e) adopting a method of assessment which is wrong in principle.

31. As a preliminary matter, I note that the Adjudicative Delegate held that the two Appellant corporations should be considered, pursuant to section 95 of the *ESA*, to be one entity for the purposes of considering the Employee's entitlements under the *ESA*. The Appellants did not argue that this conclusion was an error of law, and I am satisfied that the Adjudicative Delegate correctly applied the evidence and the legislation in reaching this conclusion.

32. The Appellants contend the Employee has been fully paid all wages owing. The question of whether the Employee was owed any wages is one of mixed fact and law. It is not the purview of this tribunal to re-consider the facts that were before the Director at the time that the Adjudicative Delegate concluded that all wages had not been paid. I am satisfied that the Adjudicative Delegate provided a fulsome description of the evidence as to the work performed by the Employee for the Appellants, and it cannot be said that the Adjudicative Delegate acted without evidence on this issue. The Adjudicative Delegate preferred the evidence of the Employee over that of the Appellants, particularly as the Appellants had failed to fulfil their duty to keep records of the hours worked by the Employee.

33. The Adjudicative Delegate evaluated the evidence provided by the parties and, applying the relevant statutory provisions in the *ESA*, concluded that the Employee did not act principally in a managerial capacity. I am satisfied that the Adjudicative Delegate's conclusion was consistent with that legislation, supported by evidence, and reasonable.

34. The Appellants contend that the Adjudicative Delegate erred in concluding that the Employee was entitled to paid for overtime wages, and assert that the Adjudicative Delegate's conclusion was "without legal basis and evidence". Again, I find that the Adjudicative Delegate provided a cogent analysis of the evidence adduced from the parties, and correctly applied the relevant statutory provisions in reaching the conclusion that the Employee performed overtime work for the Appellant's benefit, and was entitled to be paid overtime wages. The Adjudicative Delegate's methodology in calculating the sum owing for overtime wages was, again, rational and consistent with legislation.

35. The Adjudicative Delegate specifically identified the time period during which it could be said that the Employee provided rental property management services, namely August 1 to December 3, 2019, and excluded this time period from consideration under the *ESA*. I find that the Adjudicative Delegate correctly considered and applied the relevant provisions of the *ESA,* the *Regulation*, and the *Real Estate*

Services Act, in concluding that the Employee was employed by the Appellants and was not excluded, during the period from December 2018 to July 31, 2019, from the operation of the provisions of the *ESA*. I am also satisfied that the Adjudicative Delegate's conclusions could be reasonably entertained on the evidence adduced. As to the Adjudicative Delegate's methodology in calculating the amounts owing to the Employee, I find these rational and consistent with the legislation.

36. The Appellants contend that the Employee's evidence was falsified and inconsistent. The Adjudicative Delegate clearly stated that the evidence of the Employee was preferred over that of the Appellants, particularly in light of the fact that the Appellants had failed, as required, to maintain contemporaneous records of the hours worked by the Employee. The Adjudicative Delegate did not find that there were inconsistencies or falsehoods in the Employee's evidence, and I am satisfied that the Adjudicative Delegate acted upon a careful and fulsome examination of the evidence adduced.

37. The Appellants argue that there is no evidence or legal basis upon which to conclude that the Employee was employed by the Appellants during December 2018. I disagree. The Adjudicative Delegate clearly set out the evidence adduced as to the work performed by the Employee in December 2018, and considered the relevant provisions of the *ESA* in concluding that the Employee was employed by the Appellants during that period.

38. In summary, the Appellants have not met the burden of establishing that the Director erred in law in making the Determination. I do not find that there is a reasonable prospect that the within appeal would succeed on that ground.

Did the Director fail to observe the principles of natural justice in making the Determination?

39. In *Imperial Limousine Service Ltd.*, BC EST #D014/05, the Tribunal addressed the principles of natural justice that must be observed by administrative bodies, as follows:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the Act, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated* BC EST #D 050/96).

40. Natural justice thus requires the Director to provide certain procedural protections to all parties, and to conduct investigations in an unbiased and neutral manner.

41. The Appellants have not specifically identified any particulars in support of its allegation that the Director failed to observe the principles of natural justice in making the Determination.

42. I am satisfied that the manner in which the Investigative Delegate conducted the Investigation afforded the Appellants full opportunity to know the evidence and arguments of the Employee, and to respond thereto. The Investigative Delegate provided the Appellants with a copy of the Employee's complaint, such that they would know the case against them. The Investigative Delegate conducted a fulsome

investigation, and afforded both the Employee and the Appellants the opportunity to provide evidence and to be heard. The Investigative Delegate summarized the evidence in the form of an Investigation Report, and afforded the parties the opportunity to further respond. The Appellants have not alleged, and I do not find, that either the Investigative Delegate or the Adjudicative Delegate acted in anything but an unbiased and neutral manner.

43. Consequently, I do not find that there is a reasonable prospect that the within appeal would succeed on the ground that the Director failed to observe the principles of natural justice in making the Determination.

Has new evidence come to light that was not available at the time that the Determination was made?

44. The Appellants maintain that new evidence has become available that was not available at the time that the Determination was made.

45. This Tribunal, in *Re: Bruce Davies et al.,* BC EST #D171/03, set out the test to be applied to allegedly new evidence that is sought to be admitted on appeal, as follows:

> (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 capable 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.

46. The Appellants tendered 57 pages of supporting documents with their appeal. These documents include: Air BnB Service Agreements; a spreadsheet purporting to show the hours worked by the Employee; correspondence from the Investigative Delegate forwarding the Employee's complaint to the Appellants; Royal Bank account statements; and TD Canada Trust bank statements. In addition, the Appellants asserted in the appeal submissions that another employee is available to provide evidence that the Employee did not work the hours claimed.

47. The Appellants did not specifically address the "new evidence" that has purportedly come to light and which should be admitted upon appeal. I am, therefore, presuming that the "new evidence" consists of all of the documents appended to the Appellants' appeal submission, together with their assertion that another employee has evidence relevant to this appeal.

48. The Appellants have not identified how the "new evidence" has only been discovered after the issuance of the Determination. Indeed, all of this evidence appears to have been in existence prior to that date.

49. The Appellants have provided no explanation as to how most of the "new" materials are relevant to the matters in issue in this appeal. Without that, it is difficult to determine whether the "new evidence" is credible.

50. It is also not clear, absent any explanation, what probative value any of the "new evidence" may have.

51. In my view, the Appellants' "new evidence" does not satisfy the *Davies et al.* criteria and, as such, is not admissible in this appeal. For these reasons, I find that there is no reasonable prospect that the within appeal would succeed on the ground that new evidence has become available that was not available at the time that the Determination was made.

CONCLUSION

52. I find that the Appellants have not met the burden of establishing that there is an error in the Determination under one of the statutory grounds listed in section 112(1) of the *ESA.*

ORDER

53. Having reviewed the Determination, the *ESA* section 112(5) Record, and the Appellants' submissions filed with the appeal, I conclude that this appeal has no reasonable prospect of succeeding on any of the asserted grounds of appeal. Accordingly, this appeal is dismissed pursuant to section 114(1)(f) of the *ESA*, and the Determination is confirmed pursuant to section 115(1)(a) of the *ESA*.

James F. Maxwell
Member
Employment Standards Tribunal