Employment Standards TRIBUNAL

Citation: Chaser Holdings Corp. (Re)
2023 BCEST 110

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Chaser Holdings Corp.
("CHC")

- of a Determination issued by -

The Director of Employment Standards

PANEL: David B. Stevenson

FILE NO.: 2023/094

DATE OF DECISION: December 11, 2023

DECISION

SUBMISSIONS

Noah Abrahams — counsel for Chaser Holdings Corp.

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (*"ESA"*) by Chaser Holdings Corp. ("CHC") of a determination issued by Mitch Dermer, a delegate ("deciding Delegate") of the Director of Employment Standards ("Director"), on May 17, 2023 ("Determination").

2. The Determination found CHC had contravened Part 3, section 18 of the *ESA* in respect of the employment of Marie Tate ("Ms. Tate") and Maritama Carlson ("Ms. Carlson") and ordered CHC to pay Ms. Tate and Ms. Carlson wages in the combined amount of $13,703.66, an amount that included interest under section 88 of the *ESA*, and to pay an administrative penalty in the amount of $500.00. The total amount of the Determination is $14,203.66.

3. CHC filed an Appeal Form with the Tribunal on June 22, 2023, indicating the appeal was grounded on an allegation the Director erred in law in making the Determination and that evidence had become available that was not available when the Determination was being made.

4. The Appeal Form did not attach the reasons and arguments for the appeal. Counsel for CHC requested an extension of the appeal submission deadline to provide reasons, argument and supporting documents, which was granted by the Tribunal in correspondence dated June 23, 2023.

5. An additional submission was provided by CHC on July 10, 2023, which the Tribunal requested CHC to make some revisions to the submission. The requested revisions were made and a submission completing the appeal was delivered to the Tribunal on July 24, 2023.

6. In correspondence dated August 10, 2023, the Tribunal acknowledged having received the appeal, summarized the steps taken by the Tribunal to gather a complete submission, invited submissions from any of the parties on document disclosure, requested the section 112(5) record ("record") from the Director, and notified the other parties that submissions on the merits of the appeal were not being sought at that time.

7. The Director has provided the record to the Tribunal and a copy has been delivered to each of the parties. The parties have been provided with the opportunity to object to the completeness of that record.

8. CHC noted some material in the record was illegible. That deficiency was corrected, and the other parties were provided with a legible copy of that material.

9. Otherwise, none of the parties has raised any objections to the completeness of the record and, for the purposes of this appeal, the Tribunal accepts it as being 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 on the Determination, the reasons for the Determination, the Appeal Form, the written submission filed on the appeal, any additional information and material submitted with the appeal and added to the record, 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 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.

11. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director, Ms. Tate, and Ms. Carlson 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 DETERMINATION

13. CHC operates a film production company in the province of British Columbia. A BC Registry Services Search conducted by the Director, having a currency dated of September 20, 2022, listed Andrew Genaille ("Mr. Genaille") as the sole director of CHC.

14. Ms. Tate was employed by CHC as a casting director from January 18, 2021, to February 1, 2021. After her employment with CHC ended, Ms. Tate filed a complaint under the *ESA* alleging CHC had contravened the *ESA* by failing to pay wages owed.

15. CHC resisted the claim, arguing Ms. Tate was not an employee but an independent contractor.

16. Ms. Carlson was employed by CHC as a production manager/line producer from January 18, 2021, to January 29, 2021. After her employment with CHC ended, Ms. Carlson filed a complaint under the *ESA* alleging CHC had contravened the *ESA* by failing to pay wages owed.

17. CHC resisted the claim, arguing Ms. Carlson was not an employee but an independent contractor.

18. The complaint was investigated by a delegate of the Director ("investigating Delegate") who produced Investigation Reports for Ms. Tate and Ms. Carlson, both dated July 18, 2022, and which were provided to CHC and the complainants. CHC and each complainant was provided the opportunity to review the Investigation Report applicable to them and respond to it.

19. CHC responded to each of the Investigation Reports, commenting on several elements in them and essentially reiterating the position it had taken in response to each of the complaints – that neither of the complainants were employees for the purposes of the *ESA*.

20. Each of the complainants also submitted a response to the Investigating Report applicable to their claim.

21. The deciding Delegate found both Ms. Tate and Ms. Carlson were employees under the *ESA* and that CHC had contravened the statute relating to their employment by failing to pay all wages owed.

22. The deciding Delegate provided reasons for the findings made for each of the complainants in separate "summary sheets" appended to the general information found in the main body of the Determination. I shall also deal separately with each of the complainants, setting out the salient parts of the summary sheets for each complainant.

Ms. Tate

23. The deciding Delegate summarized the information provided by, and the position taken by, Ms. Tate and CHC.

24. The deciding Delegate addressed the reliability of certain documents submitted by Ms. Tate and commented on by CHC, and the credibility of the parties generally.

25. In respect of the documents, which were collectively identified as the "Start Pack Documents," the deciding delegate found it was "more likely than not" that the documents were genuine (not falsified as alleged by CHC) and had been sent to Ms. Tate by an agent of CHC. With respect to the general credibility of the parties, the deciding Delegate found Ms. Tate to be more credible than CHC, specifically, Mr. Genaille. The reasons for that finding are expressed in the Determination.

26. The deciding Delegate found Ms. Tate was an employee of CHC for the purposes of the *ESA* for the reasons stated in the Determination. In making this finding the deciding delegate addressed several factors that pointed to potentially different conclusions on the status of Ms. Tate under the *ESA* and weighed those against the facts as found, the relevant statutory definitions, and the purposes expressed in section 2 of the *ESA* on this question.

27. Based on the material provided, the deciding Delegate found Ms. Tate was not entitled to the full amount of wages claimed, but only to that amount which she had earned for the period of time worked relative to the period of time she was, on the evidence, expected to work.

28. The deciding Delegate found Ms. Tate was entitled to vacation pay in the amount, and for the reasons, set out in the Determination.

Ms. Carlson

29. For much the same reasons as those expressed in the reasons for finding Ms. Tate was an employee of CHC, the deciding Delegate found Ms. Carlson was also an employee of CHC.

30. The deciding Delegate also made a similar finding on the reliability and credibility of documents, also identified as the "Start Pack Documents," provided by Ms. Carlson.

31. The deciding Delegate found Ms. Carlson had worked two working weeks and was entitled to wages for that period of work in the amount set out in the Determination, and to vacation pay on that amount.

32. The deciding Delegate imposed an administrative penalty for a contravention of section 18 of the *ESA* by CHC.

ARGUMENTS

33. On its Appeal Form, CHC alleges the deciding Delegate erred in law in finding Ms. Tate and Ms. Carlson were employees of CHC for the purposes of the *ESA*. They have also submitted material with their appeal which they seek to have considered as evidence "which has come available that was not available at the time the determination was made": section 112(1) (c). This ground of appeal is colloquially referred to as the 'new evidence' ground of appeal.

34. The material submitted in support of the new evidence ground of appeal comprises an affidavit sworn by Mr. Genaille on June 23, 2023, attaching several documents, all of which predate both the Investigation Report and the Determination. There is an undated document – Policies and Procedures Schedule "A" – but as it is referred to in the Investigation Report, I conclude it also predates the Investigation Reports and the Determination.

35. The argument of CHC in the appeal restates their position that Ms. Tate and Ms. Carlson are independent contractors to, not employees of, CHC. The reasons attached to this contention are identical to those made during the complaint process and are summarized as follows:

i. Both Ms. Tate and Ms. Carlson were hired as independent contractors and any documents relied on by either of them to show otherwise are illegitimate, were never authorized by CHC, and have been fraudulently created by them;

ii. The terms of Ms. Carlson's engagement by CHC are set out in a Deal Memo, authorized by CHC and signed by Mr. Genaille;

iii. The deciding Delegate erred in relying on the Start Pack Documents submitted by Ms. Carlson when considering her status for the purposes of the *ESA*;

iv. There was no written agreement relating to Ms. Tate's engagement and the deciding Delegate erred in relying on the Start Pack Documents submitted by Ms. Tate when considering her status for the purposes of the *ESA*; and

v. There were several factors which should have directed the deciding Delegate to have found both Ms. Tate and Ms. Carlson to be independent contractors for CHC and not employees.

ANALYSIS

36. 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.

37. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant, in this case CHC, to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

38. CHC raises the error of law and new evidence grounds of appeal.

New Evidence

39. I shall first address the new evidence ground of appeal.

40. The Tribunal has discretion to accept or refuse new evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations: whether such evidence was reasonably available and could have been provided during the complaint process; whether the evidence is relevant to a material issue arising from the complaint; whether it is credible, in the sense that it be reasonably capable of belief; and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the determination (see *Davies et al (Merilus Technologies Inc.)*, BC EST # D171/03).

41. New evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see sections 2(b) and (d) of the *ESA*.

42. For the reasons stated below, I do not find the affidavit of Mr. Genaille, or the assertions contained in it, satisfies the conditions for allowing it as 'new evidence.'

43. First, none of the assertions in the affidavit are 'new.' All of the assertions contained in the affidavit comprise information that existed at the time the complaints of Ms. Tate and Ms. Carlson were investigated and decided.

44. I do not need to address the documents attached to the affidavit as they are all found or referred to in the record and are, on that basis, already evidence. They are, seemingly, attached to the affidavit only for the purpose of giving the assertions made by Mr. Genaille some context.

45. Second, I do not find the information submitted under this ground of appeal to be particularly credible or probative. In my view, the so-called 'new evidence' does nothing more than attempt to re-assert a set of facts on which to ground the central contention made in the appeal without apparent regard to the findings made by the deciding Delegate in the Determination. More to the point, there is no attempt to balance the assertions made against the findings in the Determination.

46. Some of the assertions directly contradict findings of fact made by the deciding Delegate without there being any attempt to demonstrate such findings are reviewable as an error of law. For example, in paragraph 8 of the affidavit, Mr. Genaille avers, "Ms. Carlson provided the Respondent, Marie Tate, without any authorization, with copies of documents which are only provided to employees of Chaser." The deciding Delegate, on the other hand, found, it was "more likely than not that these documents are genuine and were sent to [Ms. Tate] by an agent of [CHC]": Determination, page R6. At paragraph 10 of the affidavit, Mr. Genaille avers that, "At no point in time did I apply my signature to this Employee Crew Deal Memo", while the deciding Delegate stated, "I prefer [Ms. Tate's] evidence as to the veracity of the signature and accept her evidence that it is genuine": Determination, page R6. There are other examples, but the point is that placing assertions in an affidavit that are inconsistent with both the evidence and the findings of fact based on that evidence does not make those assertions credible.

47. Nor, based on the findings made and conclusions reached in the Determination, would these assertions compel a different result than what is found in the Determination. They do not demonstrate the findings and conclusions made by the Director amounted to an error of law.

48. Other assertions contained in the affidavit – that both Ms. Tate and Ms. Carlson were paid a flat fee and invoiced for payment – was information that was before the deciding Delegate and was addressed in the Determination.

49. There are assertions made – that all crew members hired by CHC for the film being made were engaged as independent contractors – that have no apparent relevance. If CHC felt this information to be relevant and probative to whether Ms. Tate and Ms. Carlson were employees for the purposes of the *ESA*, it was under some obligation to submit that information to the investigating Delegate in a way that would have allowed the complainants to respond.

50. In sum, there is a burden on CHC to demonstrate there is new evidence which should be accepted in the appeal; CHC has failed to meet that burden and I exercise my discretion to not accept the information submitted with the appeal under this ground.

Error of Law

51. 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.

52. The proper approach to deciding the question of the status of Ms. Tate and Ms. Carlson is to determine whether the relationship of the putative employee and employer can be found within the relevant provisions and purposes of the ESA. This is done by determining the reality of the relationship through objective facts. In this respect, as a starting point, I fully endorse the comment made in the Determination that:

> . . . Section 4 of the Act provides that parties cannot contract out of the Act; in other words, regardless of how the parties agreed to describe their relationship, the true nature of the relationship as described by the Act is the determining factor: at pages R7 and R13.

53. I find the deciding Delegate adopted this approach and made no error in applying the appropriate statutory provisions and principles, or the general law, to the issue of the status of Ms. Tate and Ms. Carlson under the *ESA*. I fully endorse the analysis undertaken by the deciding Delegate of the legal principles and considerations applicable to the question of whether these persons were employees under the *ESA*. The operative legal principles that apply to the question of employee status are well-established and have been consistently applied; there is nothing in the Determination that deviates from those principles.

54. The application of the law, correctly applied, to the facts as found by the deciding Delegate is only reviewable by the Tribunal as an error of law on the facts; such a review arises in limited circumstances and the test for establishing an error of law on the facts is stringent.

55. An assessment of the reasons for Determination clearly shows the deciding Delegate was aware of all the reasons advanced by CHC to support their position that Ms. Tate and Ms. Carlson were not employees under the *ESA* and answered each of them. The deciding Delegate considered numerous contextual factors and then weighed the evidence provided by Ms. Tate, Ms. Carlson, and CHC in relation to those factors in the context of the provisions and purposes of the *ESA*. Based on that analysis, the deciding Delegate concluded that the complainants had established they were in an employment relationship with the CHC.

56. The appeal submission made by CHC does no more, on my review of the arguments and responses made by CHC during the complaint process, than challenge findings of facts and reiterate arguments that were

made during that process, were substantially addressed in the Determination and, on the facts as found, not accepted.

57. The grounds of appeal do not provide for an appeal based on errors of fact. Under section 112 of the *ESA*, the Tribunal has no authority to consider appeals which seek to have the Tribunal reach different factual conclusions than were made by the Director unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

58. The principal conclusion being challenged in these appeals – that Ms. Tate and Ms. Carlson were employees of CHC for the purposes of the *ESA* – is a question of mixed law and fact. In *Britco Structures*, the Tribunal considered the application of the *Gemex* test to questions of mixed fact and law, and concluded that "error of law" should not be applied so broadly as to include errors of mixed law and fact which do not contain extricable errors of law.

59. It is well established that, provided the established legal principles have been applied, and I find they were, a conclusion on whether a person is an employee under the *ESA* is essentially a fact-finding exercise.

60. In this case I am looking at whether the submission of CHC, which in effect challenges central findings of fact made in the Determination, shows an error of law.

61. In order to establish the deciding Delegate committed an error of law on the facts, CHC is required to show the findings of fact and the conclusions reached by the deciding Delegate 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. (Jonathan's Restaurant),* BC EST #D041/13 at paras. 26-29. CHC can succeed only if it establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination.

62. Applying the above considerations and principles, I find CHC has not met the onus on it to establish an error of law on the facts.

63. Simply disagreeing with the conclusion of the deciding Delegate, which was made by applying the legal principles of the *ESA* to the relevant facts as found, and asking the Tribunal to reassess that conclusion based on assertions of fact and arguments that have been addressed by the deciding Delegate in the Determination is entirely inconsistent with the error-based approach required for setting aside a determination under section 112 of the *ESA*.

64. CHC has not shown their disagreement with the result on the issue of Ms. Tate's and Ms. Carlson's status under the *ESA* is an error that may be reviewed under section 112(1).

65. Nothing in the appeal of CHC provides a basis for review.

66. I find there is no merit to this appeal; it has no reasonable prospect of succeeding and is, accordingly, dismissed.

ORDER

67. Pursuant to section 115(1) of the *ESA*, I order the Determination dated May 17, 2023, be confirmed in the amount of $14,203.66, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal