

An appeal

- by -

Skynet Travel Inc. carrying on business as General Tours & Travel
("Skynet")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2006A/122

DATE OF DECISION: January 15, 2007

ISSUE

9. The issue is whether Skynet has shown any basis for concluding the Director failed to observe principles of natural justice in making the Determination.

THE FACTS AND ARGUMENT

10. Skynet operated as a travel agency. Johal worked as a travel agent. In her complaint Johal said she had been employed by Skynet from June 8, 2005 to November 7, 2005 and that Skynet had failed to pay regular wages, statutory holiday pay, compensation for length of service and had made unauthorized deductions from her wages.
11. Skynet took the position that Johal was working for them as an independent contractor. The Director examined whether Johal was an employee for the purposes of the *Act* or was an independent contractor, and concluded Johal was an employee under the *Act*. There is no appeal from that conclusion.
12. There was a dispute about when Johal started working for Skynet. Skynet said she started working with them on June 20, 2005. Johal said she had started on June 8, 2005. The Director preferred the evidence presented by Johal on that factual dispute and accepted that she had started June 8, 2005. There is no appeal from that decision.
13. Skynet had deducted \$700.00 from Johal's final pay cheque. Skynet took the position that the deduction was justified. They alleged Johal had made a mistake that had cost Skynet that much. According to Skynet, employees must pay for their mistakes by way of a payroll deduction. The Director found that amount was a cost of doing business which in the circumstances Skynet was prohibited from deducting from Johal's wages by application of Section 21 of the *Act*. Skynet had also made other deductions from Johal which they said was for money given to her out of the cash register for lunches and other incidental expenses. Skynet was unable to demonstrate such deductions had been discussed with Johal and authorized by her in writing. The decision relating to deductions has not been appealed.
14. The Director found that Johal was entitled to, and Skynet was liable for, length of service compensation under Section 63 of the *Act*. That conclusion has not been appealed.
15. The Director found Johal should have received statutory holiday pay for August 1, 2005, September 5, 2005 and October 10, 2005. That finding has not been appealed.
16. Skynet did not pay Johal for work performed by her between June 8 and July 31, 2005. Johal claimed she had worked 296 hours during this period. Skynet took two positions on this aspect of Johal's claim. First, Skynet said the period in question was a training period and that it was agreed Johal would not be paid for training. The Director found that training hours are hours of work for which Johal was entitled to be paid. That finding is appealed.

17. Second, Skynet said, in any event, Johal had worked only 108 hours during the period. On this point, the Director found the evidence of Johal to more credible and accepted she had worked 296 hours during the period. In making this finding, the Director received information from Nirmal Dhaliwal (“Nirmal”) and Harjeet Bhamra, on behalf of Skynet, and from Johal. The Director found the information provided on behalf of Skynet was not credible, for the reasons given in the Determination. This finding has been appealed. The entirety of the appeal submission on this point reads:

M/s [sic] Johal attended an average of 3 hours a day, Monday to Friday during her training period. We have witnesses to prove that fact.

18. The “witnesses” are not identified in the appeal, nor is there any indication in the appeal what they would say on this point. Neither does the appeal indicate whether this “evidence” was or was not available during the investigation of Johal’s claims. There is nothing in the appeal that addresses why, even if the evidence was not reasonably available, the Tribunal should hear this evidence on appeal.

19. The wages owing to Johal were calculated on a finding by the Director that Johal and Skynet agreed she would be paid \$1500.00 a month. This result has been appealed. In the appeal submission, Skynet says:

The employee was hired on a commission basis. . . .

M/s [sic] Navjot Johal claims that she was hired to be paid on a monthly salary plus commission. No service contract existed or signed by either party. We have the rest of sales payroll on commission. Only M/s [sic] Johal’s claim on monthly fixed salary plus commission is difficult to believe.

20. Material in the record shows Johal did receive one paycheque in the amount of \$1500.00 for the month of August.

ANALYSIS

21. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, 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 made.

22. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to show an error in the Determination under one of the statutory grounds.

23. Skynet has grounded this appeal in the allegation that the Director failed to observe principles of natural justice in making the Determination. As the Tribunal said in *Imperial Limousine Service Ltd.*, BC EST #D014/05:

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 #D050/96).

Parties alleging a denial of natural justice must provide some evidence in support of that allegation. (see *Dusty Investments Inc. dba Honda North*, BC EST #D043/99).

24. There is no evidence in this case that Skynet was not provided an opportunity to know the claims being made against them and an opportunity to present their position on the claims.
25. At its core, however, this appeal is not about principles of natural justice at all, but is about Skynet's disagreement with the findings of fact and conclusions made by the Director on those facts. In that respect, I make two points.
26. First, the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings are found to be an error of law (see *Britco Structures Ltd.*, BC EST #D260/03).
27. Second, Skynet has not shown any error of law in respect of the findings of fact made by the Director. The challenged findings were made after an analysis of the information presented by the parties during the investigation and is rationally supported on that evidence. More particularly, Skynet has not shown those findings and conclusions were made without any evidence or were perverse and inexplicable.
28. Skynet suggests the Director erred in ordering payment of wages for the work done by Johal during the "training" period. While this argument does raise a question of the interpretation of the *Act*, there was no error by the Director on this question. There is no issue that Johal was an employee of Skynet. That was decided in the Determination and not appealed. Under Section 1(1) of the *Act*, the definition of an employee includes a person being trained by an employer for the employer's business. As an employee Johal is entitled to be paid wages for all hours worked.
29. The assertion that there was an agreement between Skynet and Johal that she would not be paid for training (and there is some dispute about that) is irrelevant. The effect of Section 4 of the *Act* is to nullify such agreements. An employer and an employee cannot agree to relieve an employer of the statutory requirement to pay wages to an employee for work performed nor can an employee agree to relinquish the statutory entitlement to receive wages for work.
30. The appeal is dismissed.

ORDER

- ^{31.} Pursuant to Section 115 of the *Act*, I order the Determination dated October 6, 2006 be confirmed in the total amount of \$7,255.39, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal