Employment Standards TRIBUNAL

An appeal

- by -

Q&A Investments Ltd. carrying on business as Lipolaser and Spa
- and -
Downtown Tan & Spa Ltd.
(the "Appellants")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2014A/23

DATE OF DECISION: April 29, 2014

DECISION

SUBMISSIONS

Jason Ackerman	on behalf of Q&A Investments Ltd. carrying on business as Lipolaser and Spa and Downtown Tan & Spa Ltd.

INTRODUCTION

1. On January 15, 2014 a delegate of the Director of Employment Standards (the "delegate") issued a Determination, pursuant to section 79 of the *Employment Standards Act* (the "*Act*"), against Q&A Investments Ltd. carrying on business as Lipolaser and Spa and Downtown Tan & Spa Ltd. (the "Appellants") ordering the two companies to pay Peiyao (Sarah) Hu ("Hu") the sum of $1,505.54 on account of unpaid wages and interest (the "Determination"). Further, and also by way of the Determination, the delegate levied two separate $500 monetary penalties against the two companies (see *Act*, s. 98) based on their contraventions of sections 17 and 18 of the *Act*. Thus, the total amount payable under the Determination is $2,505.54.

2. The relevant background facts are briefly summarized as follows. After an oral hearing conducted on November 27, 2013, the delegate determined that the Appellants were "associated employers" under section 95 and, accordingly, were jointly and separately (severally) liable for Ms. Hu's unpaid wage claim. In regard to this latter issue, the delegate determined that Ms. Hu was an "employee" rather than an independent contractor and thus entitled to the benefit of the *Act*. The Appellants conceded that they had not paid Ms. Hu any wages and, in the absence of any payroll records from the Appellants, the delegate determined her unpaid wage claim based on her records for the period from February 28 to April 10, 2013. The delegate issued 11 single-space pages of detailed "Reasons for the Determination" (the "delegate's reasons") concurrently with the Determination.

3. On February 24, 2014, Jason Ackerman filed an appeal on behalf of both Appellant companies under section 112 of the *Act*. He says that the Determination should be cancelled based on the grounds that the delegate erred in law and failed to observe the principles of natural justice (subsections 112(1)(a) and (b)) and on the basis that evidence has become available that was not available when the Determination was being made (subsection 112(1)(c)).

ISSUE

4. At this stage, I am considering whether the appeal should be dismissed under subsection 114(1)(f) as having no reasonable prospect of succeeding. If I am satisfied that the appeal has some presumptive merit, the respondent parties will be notified and the Tribunal will request submissions from them and the Appellants will be given an opportunity to provide a reply submission.

FINDINGS AND ANALYSIS

5. I propose to deal with the Appellants' assertions regarding each ground of appeal addressing, first, the "new evidence" submitted and then I will proceed, in turn, to deal with the error of law and natural justice grounds. Although the Appellants' material is somewhat disorganized, I have endeavoured to extract the essence of their arguments on each issue based on the documents attached to the Appellants' Appeal Form: an undated 1-page memorandum from Mr. Ackerman; a 1-page letter dated February 19, 2014, from Alex Ramanathan; a 1-page letter dated February 22, 2014 from Michael Minor; a 6-page "Independent Contractor Agreement" dated May 1, 2013, between "Decimal Accounting" and "1Go Media Ltd."; and, lastly, a document described

as "Appendix # 1" which appears to be some sort of chronological summary that was submitted to the Kelowna office of the Employment Standards Branch on November 1, 2013.

New Evidence

6. As previously noted, a central issue before the delegate was Ms. Hu's status. She maintained that she was an employee whereas the Appellants took the position that she was an independent contractor. In support of this ground of the appeal, the Appellants submitted what they characterized as "NEW supporting documentation/EVIDENCE to prove [Ms. Hu] was/is a [sic] independent contractor and currently works as such".

7. In my view, this evidence is not admissible under subsection 112(1(c). First, the document was entered into on May 1, 2013, and thus it was "available" when the complaint hearing was conducted on November 27, 2013. The Appellants have not provided any explanation as to why they failed, if they thought this document relevant (and, as will be seen, I consider it to be *irrelevant*), to submit this document to the delegate at the complaint hearing. Second, new evidence must be relevant – this agreement purports to be an independent contractor agreement relating to the relationship between Ms. Hu and a third party (1Go Media Ltd.) relating to her services to be provided to that company as and from May 1, 2013. As such, it simply does not speak to the relationship between Ms. Hu and the Appellants during the relevant unpaid wage recovery period from February 28 to April 10, 2013. In my view, this evidence does not meet the criteria for admissibility set out in *Davies et al.*, BC EST # D171/03.

Error of Law

8. The Appellants say that the delegate erred in law in determining that Ms. Hu was an "employee" as defined in section 1 of the *Act* rather than an independent contractor. A true independent contractor is operating their own business and is not protected by the wage protection provisions (or, indeed, any provisions) of the *Act*. There is a well-established jurisprudence dealing with the "employee versus contractor" issue and the delegate turned his mind to the relevant legal considerations. Thus, the only proper question before the Tribunal is whether the delegate erred in applying the proper legal test to the facts as he found them.

9. The delegate's analysis of this issue is set out at pages R7 – R9 of his reasons. I wholly agree with the delegate's conclusion that Ms. Hu was an employee rather than an independent contractor. She replied to an on-line job advertisement and was subsequently interviewed. Mr. Ackerman, as the Appellants' authorized representative, fixed Ms. Hu's wage rate (to which she agreed) and placed her on an initial 3-month probationary period. She was paid a fixed salary for a specified workweek. Mr. Ackerman directed and controlled her work. She worked at her employer's premises using their tools and equipment save for her own personal computer although the Appellants' provided the relevant software packages that she required for her work (and the Appellants dictated what software packages would be used). All of these factors suggest that the parties were in an employer-employee relationship.

10. The delegate issued a section 95 declaration as against the two Appellant companies and, for my part, I do not believe that was even necessary as there was ample evidence before the delegate, discussed at page R9 of the delegate's reasons, indicating that Ms. Hu provided services to both firms as an employee (see, among other authorities, *Sinclair v. Dover Engr. Services Ltd.*, 1987 CanLII 2692 (B.C.S.C.); *Downtown Eatery (1993) Ltd. v. Ontario*, 2001 CanLII 8538 (Ont. C.A.); *Vanderpol v. Aspen Trailer Company Ltd.*, 2002 BCSC 518; *Bartholomay v. Sportica Internet Technologies Inc. et al.*, 2004 BCSC 508). However, the Appellants say that the section 95 declaration should have been extended to include a third company, 1Go Media Ltd. The delegate considered this matter but ultimately concluded that there was insufficient evidence before him to show that Ms. Hu

provided any employment services to this latter firm during the relevant time period (see delegate's reasons, page R10). There is no evidence before me, nor was there any before the delegate, of any common direction and control, common business enterprise, or integration as between 1Go Media Ltd. and either of the Appellant firms. As such, there is simply no lawful basis for extending the section 95 declaration to include 1Go Media Ltd.

Natural Justice

11. There appears to be two separate elements to this ground of appeal. First, Mr. Ackerman says that there was "a serious personality clash" between himself and the delegate and that this personality conflict influenced the delegate to determine the complaint in Ms. Hu's favour ("[the delegate] made his ruling based on this clash rather than the facts of the case"). Second, Mr. Ackerman says "One GO Media did not attend the case conference or employment standards hearing and telephoned in his attendance…Mike Minor was cut off on the phone when he called in from Ontario so this case was not properly heard with Mike Minor not being able to be properly cross examined or asked questions". I shall deal with each allegation in turn.

12. First, with respect to the wholly unsubstantiated "personality clash" assertion, I am assuming that the Appellants are, in essence, making an assertion of actual or apprehended bias against the delegate. Based on the evidence before the delegate, the decision appears to be correct and thus I do not see any basis for concluding that the decision was dictated by something other than a proper consideration of the evidence and the governing legal principles. I would also add that if Mr. Ackerman was concerned about the delegate's neutrality, he might have taken some action (say, filing a complaint with the Employment Standards Branch, with details supporting the complaint) between the date of the hearing (or even before) and the issuance of the decision. As things now stand, this bias assertion appears to be an *ex post facto* rationalization for an adverse result.

13. Second, regarding Mr. Minor's telephone attendance at the hearing, I note that he did testify at the hearing and his testimony is summarized at page R6 of the delegate's reasons. Mr. Minor apparently submitted a brief letter dated February 22, 2014, to the delegate (this is appended to the Appellants' Appeal Form) in which he claims that the delegate did not correctly record his evidence ("Your portrayal of my testimony from when we did the hearing were [sic] not entirely accurate and I strongly urge you to reconsider your position in this matter"). However, he did not particularize the alleged inaccuracies and he made no mention whatsoever of having been denied the opportunity to present his evidence in full due to some sort of technical malfunction. In sum, there simply is insufficient evidence before the Tribunal that there was a breach of the principles of natural justice based on the Appellants' allegations regarding Mr. Minor's evidence at the hearing.

14. In my view, none of the grounds of appeal advanced by the Appellants has a reasonable prospect of success and, accordingly, this entire appeal must be dismissed.

ORDER

15. Pursuant to subsection 114(1)(f) of the *Act*, this appeal is dismissed. Pursuant to section 115 of the Act, the Determination is confirmed as issued in the amount of $2,505.54 together with whatever further interest that has accrued pursuant to section 88 since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal