Employment Standards TRIBUNAL

An appeal

- by -

0902821 BC Ltd.
(the "Employer")

- 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: Shafik Bhalloo

FILE No.: 2012A/12

DATE OF DECISION: March 28, 2012

DECISION

SUBMISSIONS

Jasvir Singh Gill	on behalf of 0902821 BC Ltd.
Ravi Sandhu	on behalf of the Director of Employment Standards

OVERVIEW

1. 0902821 BC Ltd. (the "Employer") appeals a determination of the Director of Employment Standards (the "Director") issued January 31, 2012, (the "Determination"), pursuant to section 112 of the *Employment Standards Act* (the "*Act*").

2. In the Determination, a delegate of the Director (the "Delegate") found that the Employer had contravened section 28 of the *Act* by failing to maintain payroll records for one of its employees. As a result, the Delegate imposed an administrative penalty on the Employer in the amount of $500 pursuant to section 29(1) of the *Employment Standards Regulation* (the "*Regulation*").

3. The Employer now appeals the Determination on the ground that the Director failed to observe the principles of natural justice.

4. Section 36 of the *Administrative Tribunals Act*, which is incorporated into section 103 of the *Act*, and Rule 17 of the Tribunal's *Rules of Practice and Procedure* provide that the Tribunal may hold any combination of written, electronic and oral hearings. I note that neither party has requested an oral hearing and, in my view, this appeal may be decided on the section 112(5) "record", the submissions of the parties, and the Reasons for the Determination.

ISSUE

5. While the sole issue raised in this Appeal Form is whether the Director failed to observe the principles of natural justice in making the Determination, the written submissions of the Employer appear to point towards an additional ground of appeal, namely, the "error of law" ground of appeal under Section 112(1)(a) of the *Act*, which I will also consider.

BACKGROUND

6. The Employer is a licensed Farm Labour Contractor ("FLC") under the *Act* and was issued an FLC license for 30 employees, valid from June 27, 2011, to June 26, 2012. On October 25, 2011, the Employer was served with a Demand for Records pursuant to section 85(1)(f) of the *Act* (the "Demand"). The Demand required the Employer to produce and deliver, *inter alia*, payroll records (specified in section 28 of the *Act)*, cancelled cheques, and daily log records (required to be kept under section 6(5) of the *Regulation)* on or before November 8, 2011. The Employer records, received on November 7, 2011, did not contain payroll records for Kamaljit Sidhu ("Ms. Sidhu") but included a single cancelled cheque dated September 7, 2011, in the amount of $2,100.00 with a reference notation on the cheque "van driver".

7. On November 25, 2011, the Delegate sent the Employer a letter (the "Letter") setting out his preliminary finding of contravention of section 28 of the *Act* by the Employer in relation to Ms. Sidhu's employment. In

the Letter, the Delegate also afforded the Employer an opportunity to respond to his findings in writing, if the Employer took issue with those findings.

8. On December 2, 2011, Jasvir Singh Gill ("Mr. Gill"), a director and representative of the Employer, attended at the office of the Employment Standards Branch (the "Branch") to respond to the Delegate's Letter. Mr. Gill informed the Delegate that Ms. Sidhu was hired as a contractor, and not an employee, to drive the Employer's van to transport its employees to worksites. He produced a document entitled "Vehicle Driving Agreement" purportedly executed on July 28, 2011, by both himself, on behalf of the Employer, and Ms. Sidhu. The document states that Ms. Sidhu and the Employer agree that she would "pick up and drop off employees of the company for the month of August 2011, and the company will pay her $2,100.00 without any deduction". It also states that she would be responsible for taxes.

9. In reliance on the said document, Mr. Gill, on behalf of the Employer, contended that Ms. Sidhu was hired as a contractor and, therefore, she was not an employee of the Employer and section 28 of the *Act* did not apply in her case.

10. The Delegate, in rejecting Mr. Gill's explanation reasoned as follows:

> In the agriculture industry it is common practice that FLC's transport their employees to the worksite. The employees are transported in the FLC's vehicle which is driven by an employee of the FLC. 0902821 retained Ms. Sidhu to perform a service for them and paid her for that service. The service was driving 0902821's van to transport it's [*sic*] employees to the worksite. This service is work that is normally performed by an employee. I find that Ms. Sidhu was an employee of 0902821, as such Section 28 of the Act applies [*sic*].
>
> Looking past the definition of employee, the Courts have developed a set of common law tests to examine when attempting to determine an employment relationship. These tests, [*sic*] examine the degree of direction and control exercised, the ownership of tools, the chance for profit or risk of loss, the degree to which the person is integrated into and become part of the business.
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> In this case, 090281 [*sic*] exercised control by telling Ms. Sidhu which employees to transport and where to transport them to. 090821 [*sic*] owned the tool, the van, used by Ms. Sidhu. Ms. Sidhu's wage was set at $2100.00 for the month, there was no chance for her to make more or less than that. As she only worked one month I doubt Ms. Sidhu had an opportunity to get integrated into and become part of the business, however, the position of van driver is an intrinsic part of 090281's [sic] business. The business provides contract labour. The labour is transported to the customer's worksite in 090281's [*sic*] van. If the labour is not transported there is no business, accordingly the person that is driving the van is a necessary and important part of the business.
>
> In applying the definition of employee contained in the Act, together with an examination of these tests, I find that Ms. Sidhu was an employee of 0902821, as such section 28 of the Act applies [*sic*].

11. Having concluded that Ms. Sidhu was an employee, the Delegate went on to note that as part of the FLC licensing process, an FLC has to satisfy the Director of its knowledge of the *Act* and *Regulation*. In this case, Mr. Gill, on behalf of the Employer, was required to pass a written examination in order to satisfy the Director of the Employer's knowledge of the *Act* and *Regulation*. In this process, Mr. Gill was taken through an interview checklist to ensure his understanding of the requirements of the *Act* and *Regulation*. One of the requirements included in the checklist is section 28 of the *Act*. Mr. Gill acknowledged he understood the requirements contained in the interview checklist by signing the document and agreeing that all employees (including casual or part-time) must be included in payroll records. However, this requirement was breached in the case of Ms. Sidhu and, therefore, the Delegate, in the Determination, imposed an administrative penalty of $500 on the Employer pursuant to section 29(1) of the *Regulation*.

SUBMISSIONS OF THE EMPLOYER

12. Mr. Gill, in his appeal submissions on behalf of the Employer, states that all employees are paid wages by direct deposit into their bank accounts, and the Employer has employed a payroll company, Ceridian Canada, for the purpose. In the case of Ms. Sidhu, he made a contract with her to drop off and pick up the Employer's employees for only one month for which the Employer agreed to pay her $2,100.00. He asserts that Ms. Sidhu did not drive her own vehicle and drove the Employer's vehicle because the Employer's vehicle is registered with the Branch and it is not "worth to register [a] private vehicle for one month". He reiterates that she was a subcontractor and the $2,100.00 cheque was the only cheque he has written to her.

13. He also states that the Employer has followed the Branch's policy with all its employees and pays its employees through the payroll agency, Ceridian Canada, which also collects all relevant information with respect to the employees before setting up their payroll records.

14. Mr. Gill submits that the administrative penalty of $500 should be cancelled, as it is unjust in the circumstances.

SUBMISSIONS OF THE DIRECTOR

15. The Director submits that Mr. Gill's argument is the same as the one he made to the Delegate before the Determination was made, and the Delegate considered that argument before making the Determination and, therefore, the appeal should be denied.

ANALYSIS

16. The burden of proof is on the Employer in this case to show on the balance of probabilities that the Determination under appeal ought to be varied or cancelled. As indicated previously, the Employer appeals on the ground that the Director failed to observe the principles of natural justice in making the Determination. The principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; to present their evidence; and to be heard by an independent decision maker. (see *Re: 607730 B.C. Ltd. (c.o.b. English Inn & Resort)*, BC EST # D055/05; *Re: Imperial Limousine Service Ltd.,* BC EST # D014/05).

17. The Employer, in this case, must provide some evidence in support of its allegation that its natural justice rights were breached or violated by the Delegate. However, nothing in the Employer's appeal submissions addresses this allegation or ground of appeal. It appears to be a bare assertion with no evidentiary foundation. My review of the record, as well as the Reasons for the Determination, discloses that the Employer was aware of the Branch's investigation into the payroll records of the Employer, and the Delegate conveyed his findings in the investigation to the Employer by way of the Letter. Moreover, the Delegate, in the Letter, invited the Employer to respond to his findings, if the Employer was taking any issue with the findings. The Employer, through Mr. Gill, responded to the Delegate's findings in the Letter and the Delegate, in the Determination, considered the information Mr. Gill adduced. In these circumstances, I am not persuaded that there was any denial of natural justice. I also find that the Delegate's rejection of Mr. Gill's argument that Ms. Sidhu was a subcontractor and not an employee does not constitute a breach of natural justice and, therefore, I dismiss the Employer's natural justice ground of appeal.

18. Having said this, I note that the *Act* does not allow for an appeal based on errors of fact, and the Tribunal is without authority to consider appeals based on alleged errors in findings of fact unless such findings give rise to an error of law (see *Britco Structures Ltd.*, BC EST # D260/03).

19. Based on my review of the record and the submissions of Mr. Gill, it is apparent to me that the appeal is based on the Employer's assertion that Ms. Sidhu was a contractor or a subcontractor, and not an employee. If Ms. Sidhu was a contractor and not an employee, then the *Act* has no application and the Tribunal has no jurisdiction. Having said this, the question of whether a person is an employee or a contractor involves an application of a legal standard to a set of facts and is, therefore, a question of mixed fact and law (see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235). Having said this, whether the correct legal standard has been applied in this case is a question of law, and the Tribunal has consistently adopted the following definition of "error of law" set out 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;
>
> (2) A miscalculation of an applicable principle of general law;
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> (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.

20. In this case therefore, it is necessary to review the Delegate's conclusion that Ms. Sidhu was an employee and not a contractor in context of the definitions of error of law set out in *Gemex Developments Corp.*, *supra*. More specifically, the question I must consider is whether the Delegate erred in law by concluding that Ms. Sidhu was an employee based on no evidence, or on evidence that provided no rational basis for his finding. On the basis of my review of the record and the Reasons, the Delegate, in determining the nature of Ms. Sidhu's relationship with the Employer, considered and applied the definitions of "employee", "employer" and "work" in the *Act*, and took note of the common practice in the agricultural industry, namely, that FLCs transport their employees to worksites in vehicles which they own and which are driven by their employees. Therefore, according to the Delegate, the service that Ms. Sidhu was providing was work that was normally performed by an employee within the definition of "employee" in section 1 of the *Act*.

21. Moreover, I note that the Delegate also applied a set of common law tests developed by Courts and applied by the latter when determining whether or not an employment relationship exists between the parties. In particular, the Delegate examined, in this case, the degree of direction and control exercised by the Employer over Ms. Sidhu, the ownership of tools (the vehicle used by Ms. Sidhu to transport the Employer's employees), the chance for profit or risk of loss for Ms. Sidhu, the degree to which Ms. Sidhu was integrated into and became part of the business. In concluding that Ms. Sidhu was an employee, the Delegate reasoned as follows:

> In this case, 090281 [*sic*] exercised control by telling Ms. Sidhu which employees to transport and where to transport them to. 090821 [*sic*] owned the tool, the van, used by Ms. Sidhu. Ms. Sidhu's wage was set at $2100.00 for the month, there was no chance for her to make more or less than that. As she only worked one month I doubt Ms. Sidhu had an opportunity to get integrated into and become part of the business, however, the position of van driver is an intrinsic part of 090281's [sic] business. The business provides contract labour. The labour is transported to the customer's worksite in 090281's [*sic*] van. If the labour is not transported there is no business, accordingly the person that is driving the van is a necessary and important part of the business.

22. I find the Delegate's reasoning on the matter persuasive and unassailable. More specifically, I do not find any misinterpretation or misapplication of the *Act* or any applicable principles of general law on the part of the Delegate in his determination that Ms. Sidhu was an employee. I find the Delegate's conclusion that the requirements of section 28 of the *Act* apply in the case of Ms. Sidhu both rationally supported in the law and by the evidence. I am further comforted in my conclusion based on the following instructive comments of

the Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd.* (1992), 91 D.L.R. (4th) 491 at p. 507, made in context of the Court's review of the counterpart to the (BC) *Act* in Ontario and which comments would equally apply to the (BC) *Act*:

> …an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible, is favoured over one that does not.

23. In the circumstances, I dismiss the Employer's appeal.

ORDER

24. Pursuant to section 115 of the *Act*, the Determination dated January 31, 2012, is confirmed

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Shafik Bhalloo
Member
Employment Standards Tribunal