

An appeal

- by -

Lusso Verde Fine Foods & Flowers Corporation
(“Lusso Verde”)

- 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/142

DATE OF DECISION: April 16, 2015

issued a Determination in Mr. Tieri's favour but in an amount dramatically less than he had claimed (the delegate rejected Mr. Tieri's claimed \$30 per hour rate and issued the Determination based on the \$10.25 per hour minimum wage). The delegate also rejected Mr. Tieri's assertion that he worked 12-hour days, ultimately finding that he typically worked 6-hour days as was asserted by Ms. Cahill (delegate's reasons, page R7).

7. The central issue before the delegate, especially in light of the romantic cohabiting relationship between Mr. Tieri and Ms. Cahill, was Mr. Tieri's status. In other words, were Mr. Tieri's services provided as an employee or as a domestic partner? The delegate ultimately concluded that Mr. Tieri was an employee and thus entitled to the benefit of the wage protection provisions of the *Act*. In her reasons, the delegate first reproduced the relevant statutory definitions of "employee", "employer" and "work", and then issued her entire finding regarding Mr. Tieri's status by way of the following two paragraphs (delegate's reasons, page R6):

...the key factor to be addressed is whether the parties fell within the statutory definitions of employer and employee. In other words, did Mr. Tieri perform work normally performed by an employee or perform work for another and did Lusso Verde have control or direction over Mr. Tieri, or was it responsible, directly or indirectly, for his work? Furthermore, it is important to consider where the work was performed and whose business it was.

While Ms. Cahill denies that Mr. Tieri was an employee of Lusso Verde, she stated that he consistently spent time at Lusso Verde performing cleaning, stocking, food preparation, and customer service duties. Her description of the duties he performed at Lusso Verde is not much different than the description of duties that Mr. Tieri and his witnesses provided. Ms. Cahill did not argue that the duties he performed were self-serving and, even if she did, I would not be convinced. Cleaning, stocking, food preparation, and serving customers in a retail store are duties that are performed for the benefit of the business and its customers. As such, I find that Mr. Tieri was performing work as an employee of Lusso Verde. Similarly, as Mr. Tieri was permitted to perform his duties on a daily basis at Lusso Verde, I find that Lusso Verde was his employer. As an employee of Lusso Verde, Mr. Tieri is entitled to wages.

8. As previously noted, the delegate rejected Mr. Tieri's evidence regarding his daily hours and his wage rate but accepted that he worked a 7-day workweek. The delegate awarded Mr. Tieri 96 days' wages (from November 23, 2012, to March 16, 2013) based on a 6-hour workday and the minimum \$10.25 per hour wage rate. The delegate also awarded Mr. Tieri additional wages based on his not receiving at least 32 consecutive hours free from work each week (section 36), for statutory holiday pay, and for concomitant vacation pay.
9. The deadline for appealing the Determination – presumably calculated based on the "deemed service" provisions contained in section 122 of the *Act* – as set out in a text box (headed "Appeal Information") on the last page of the 3-page Determination, was October 20, 2014. On October 20, 2014, Lusso Verde's legal counsel faxed to the Tribunal a letter indicating that "we intend to appeal the...Determination" but also advising that "we are awaiting the resolution of other matters involving the alleged employee...before filing our appeal" and "please consider this notification that we intend to appeal the Determination upon the resolution of these matters by the appropriate governmental and judicial bodies" and, finally, "at this time, it is unknown how long the resolution of these matters may take". Counsel attached a completed Appeal Form indicating that the appeal was based on all three statutory grounds (error of law; breach of natural justice; new evidence). Although the box marked "Provide your reasons and argument for appeal on a separate sheet of paper" was checked off, counsel did not provide any detailed explanatory reasons supporting the asserted grounds of appeal. Rather, counsel appended a 3-paragraph note in which he indicated the following:

We are awaiting the resolution of other matters involving the alleged employee...before filing our appeal. One of these matters involves a *Family Law Act* claim...The other matter involves a claim that Mr. Tieri

has made under the *Bankruptcy and Insolvency Act* that will lend further credence to our client's position that Mr. Tieri was never an employee of Lusso Verde.

The conclusion of these matters will have considerable bearing on whether or not we will appeal the Director's Determination. It is unknown at this time when these matters will be resolved.

Should we proceed with an appeal upon the resolution of this matter, we will contend that Mr. Tieri was not an "employee" per the definition in the *Employment Standards Act* and that the Director of Employment Standards erred in law by determining that Mr. Tieri was an employee. Evidence may also come available that was not previously available at the time the Determination was made.

10. While counsel's "reasons for appeal", albeit in a very cursory fashion, provided some explication of the alleged error of law ground of appeal (namely, whether the delegate erred in finding that Mr. Tieri was an "employee"), counsel did not identify any "new evidence" that might support that specific ground of appeal. Finally, counsel's reasons simply did not particularize *any* alleged natural justice breach. Thus, clearly with respect to the "natural justice" and "new evidence" grounds, and arguably with respect to the error of law ground, the appeal was deficient. Section 112(2) states that an appellant must file, within the statutory appeal period, "a written request specifying the grounds on which the appeal is based" and Rule 18(3) of the Tribunal's *Rules of Practice and Procedure* is to like effect.
11. In essence, Lusso Verde's counsel was seeking an order from the Tribunal granting an indeterminate extension of the appeal period so that certain other legal matters could be finalized prior to the submission of full written argument and the subsequent adjudication of the appeal. Pursuant to subsection 109(1)(b) of the *Act*, the Tribunal may "extend the time period for requesting an appeal even though the period has expired". However, in my view, the Tribunal has no statutory authority to issue the form of order that was requested by counsel for Lusso Verde. In any event, the Tribunal's Appeals Manager treated the request as an application to extend the appeal period and, by letter dated October 27, 2014, wrote to counsel (and to the other respondent parties) requesting a written submission with respect to the extension request.
12. The submission with respect to the application to extend the appeal period was to be filed by no later than November 12, 2014. On November 10, 2014, Lusso Verde's counsel faxed a letter to the Tribunal indicating, in part, the following:

We maintain our intention to appeal the...Determination...

We are still awaiting the resolution of other matters involving the alleged employee...Until such time that these other matters are resolved, our client is unable to provide the Tribunal with its written arguments for the appeal...
13. In response to Lusso Verde's counsel's November 10 letter, the Tribunal Registrar, by letter dated November 20, 2014, advised that the Tribunal did not consider "that an open-ended extension is appropriate" and that "the Tribunal will not be proceeding with the incomplete appeal filed October 20, 2014, and we consider this matter closed". The letter continued: "If you intend to file an appeal at a later date, it would be considered a late appeal and among other things, you would need to provide a reasonable and credible explanation for failing to file your appeal within the statutory limit...A Tribunal Member would then decide whether an extension to the appeal period would be granted."
14. On January 20, 2015, counsel for Lusso Verde filed a second Appeal Form with attached reasons for appeal and a submission relating to an application to extend the appeal period. This second appeal, unlike the first appeal filed with the Tribunal, was based solely on the "error of law" ground and, specifically, whether the delegate erred in law in determining that Mr. Tieri was an "employee" for purposes of the *Act*.

APPLICATION TO EXTEND THE APPEAL PERIOD

15. If one considers the appeal before me to have been filed on January 20, 2015, the appeal is clearly late. On the other hand, the Appeal Form filed on October 20, 2014, was filed on the last day of the statutory appeal period. However, this latter appeal was deficient in the sense that two of the appeal grounds (the “natural justice” and “new evidence” grounds) were simply bald assertions wholly unsupported by any particulars. As I noted, above, one could argue that the appeal was not deficient with respect to the “error of law” ground inasmuch as this ground was stated to relate to the delegate’s determination regarding Mr. Tieri’s status as an “employee” for purposes of the *Act*. That said, this latter ground was particularized in only a most cursory fashion.
16. Lusso Verde now limits its appeal to the “error of law” ground and it argues, as it has from the outset, that the delegate erred in law in determining that Mr. Tieri was an “employee” for purposes of the *Act*.
17. The delegate opposes Lusso Verde’s application to extend the appeal period. Mr. Tieri apparently has no view of the matter since he did not file a submission. In light of that fact, he obviously has not claimed that he would suffer any prejudice if the appeal period were to be extended. I am, therefore, unable to conclude that he would be prejudiced by an order extending the appeal period.
18. It seems clear that Lusso Verde has had an ongoing intention to appeal the Determination as and from its date of issuance. As I noted above, Lusso Verde arguably filed a *timely* appeal at least with respect to the “error of law” ground of appeal (and this is the only ground of appeal that it now wishes to pursue). The respondent parties have been aware of Lusso Verde’s intention to appeal the Determination from a point in time very shortly after the Determination was issued. Lusso Verde has provided an explanation regarding why it did not provide fuller particulars of its reasons for appeal along with its Appeal Form filed on October 20, 2014, although, for my part, I do not find this explanation to be particularly compelling. I fail to see why the ongoing family law dispute between Ms. Cahill and Mr. Tieri prevented Lusso Verde from filing more fully particularized grounds of appeal along with its October 20, 2014, Appeal Form. Finally, as is detailed more fully, below, I consider this appeal to have strong presumptive merit.
19. Taking all of the above criteria into account (these considerations are drawn from *Niemisto*, BC EST # D099/96), I am, on balance, satisfied that this is an appropriate case to extend the appeal period. Indeed, I am not fully satisfied that such an order is even required since, in my view, the original appeal filed October 20, 2014, was minimally (but only minimally) compliant at least as it related to the “error of law” ground of appeal.

CONSIDERATION OF THE MERITS

20. The key issue in this appeal – and this was also a key issue before the delegate – is Mr. Tieri’s status. There is no doubt about whether he provided services to Lusso Verde (although there was a dispute about how many hours of service Mr. Tieri provided and his asserted pay rate – both of these issues were determined *against* Mr. Tieri calling his credibility into question). However, the mere fact that a person renders services to a firm does not necessarily determine their status as an *employee* of that firm. Partners, for example, may provide services not markedly different from an employee of the partnership but partners are not covered by the *Act*.
21. In her reasons, the delegate focused on two aspects of the section 1 definition of “employee”, namely, whether a person is receiving or entitled to receive wages and whether the person has been allowed, directly or indirectly, to perform work normally performed by an employee. Certainly, the delegate cannot be criticized for turning her mind to the statutory definition of an employee. However, in my view, the delegate

clearly fell into error when she exclusively focused on the statutory language without any consideration for the context within which the services were provided.

22. Ms. Cahill, who is Lusso Verde's principal, and Mr. Tieri were in a quasi-matrimonial relationship and according to the uncontroverted evidence before me, Ms. Cahill was providing significant, if not exclusive, financial support to Mr. Tieri and he, in turn, was making a contribution to the family unit by providing services to their only real revenue source, the Lusso Verde retail operation. Although the delegate was aware of this relationship, she simply did not turn her mind to it when considering Mr. Tieri's status. Mr. Tieri apparently worked at Lusso Verde for some four months, yet he was never paid (or apparently even sought any pay). Surely, one would question why an "employee" would behave in such a way but the delegate never turned her mind to this curious behaviour. On the other hand, this behaviour is entirely consistent with someone who did not consider himself to be an employee but rather someone working in the "family business" to, ultimately, secure his (and Ms. Cahill's) financial well-being.
23. Mr. Tieri filed a "Notice of Family Claim" in the British Columbia Supreme Court on August 23, 2013 (about three months after he filed his unpaid wage complaint). In his claim, Mr. Tieri stated that he and Ms. Cahill were living together in a "marriage-like" relationship from February 2010 to March 16, 2013 (this latter date supposedly being his last day of "work" for Lusso Verde); he sought *spousal* support; and, most tellingly, he asked for a 50% interest in Lusso Verde and that Ms. Cahill transfer 50% of her share interest in Lusso Verde to him. This latter claim is particularly cogent since, according to Lusso Verde's legal counsel, such a claim can only be advanced under the *Family Law Act* if the claimant asserts that he or she "made a contribution to the business". Counsel says that this claim shows that Mr. Tieri believed himself to be a principal, rather than an employee, of the business. The delegate did not turn her mind to this issue.
24. The delegate also had before her a decision from the Canada Revenue Agency, dated October 2, 2013, in which it concluded that Mr. Tieri never had a contract of service (and hence had no insurable employment) with respect to the services he provided to Lusso Verde. This decision arguably raised an issue estoppel or *res judicata* argument against Mr. Tieri (see, e.g., *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 and *Penner v. Niagara (Regional Police Services Board)*, [2013] 2 S.C.R. 125). Although Ms. Cahill did not use either of these terms (and that is not surprising since she is not a lawyer), it seems clear that her position was that if the Canada Revenue Agency concluded Mr. Tieri was not an employee, the Employment Standards Branch should equally do so. However, the delegate did not address this question in any fashion in her reasons. I do not wish to be taken as suggesting that, had the delegate considered the issue estoppel/*res judicata* question, she would have inevitably summarily dismissed the complaint on that basis. There may be good reasons why either of issue estoppel or *res judicata* is inapplicable in this case. However, the delegate was, in my view, obliged to turn her mind to the issue rather than simply ignoring it altogether.
25. Ms. Cahill also asserted, in effect, that Mr. Tieri's claim was filed in bad faith and retaliatory (the record includes a restraining order issued against Mr. Tieri relating to Ms. Cahill). The delegate never explored the *bona fides* of Mr. Tieri's complaint.
26. Ms. Cahill asserted that Mr. Tieri's claim lacked credibility and even though the delegate seemingly also concluded that Mr. Tieri's evidence lacked credibility in certain respects (his total hours worked/his wage rate). The delegate did not turn her mind to this fundamental question explicitly and continuously raised by Ms. Cahill, namely, whether Mr. Tieri's entire claim was completely tainted by misrepresentations, if not outright fraud, inasmuch as he was recasting himself as an employee when the true situation was quite different. I might note that there are several other documents in the record that might cause one to question Mr. Tieri's credibility. For example, the record includes a 4-page handwritten document that purports to be a complete listing of Mr. Tieri's working hours. However, the delegate rejected this document as representing

an accurate account of his working hours because “it does not appear to have been kept contemporaneously” and because “as not once during the investigation did he provide any time frames of when specific duties were performed or any breaks that he may have taken, despite receiving clear instructions to do so”.

SUMMARY

27. At this juncture, there are two matters before me. The first concerns whether Lusso Verde’s application to extend the appeal period should be granted and the second, on the assumption the appeal period is extended, concerns whether this appeal should be summarily dismissed under subsection 114(1)(f) of the *Act*.
28. In my view, Lusso Verde’s original appeal filed October 20, 2014, was timely but only with respect to the “error of law” ground. In the event that I am wrong in this conclusion, I would nonetheless extend the appeal period to January 20, 2015, being the date that Lusso Verde filed its second Appeal Form along with full particulars regarding its position that the delegate erred in law in determining that Mr. Tieri was an “employee” as defined in section 1 of the *Act*. This latter issue is the only issue presently before the Tribunal.
29. I am not satisfied that this appeal should be summarily dismissed under subsection 114(1)(f) of the *Act* as having no reasonable prospect of succeeding. It does not follow from that decision, however, that the parties should be invited to file further submissions regarding the merits of the appeal and the central question regarding Mr. Tieri’s status. As matters now stand, the delegate’s reasons do not contain any findings whatsoever regarding the principal arguments advanced by Ms. Cahill on behalf of Lusso Verde and thus one cannot say that the delegate erred, or did not err, with respect to the question, for example, of whether issue estoppel applied or whether the complaint was a bad faith attempt to recast a quasi-matrimonial dispute into a unpaid wage claim under the *Act*.
30. Although Mr. Tieri’s and Ms. Cahill’s respective versions of events could not have been more divergent, the delegate failed to conduct any sort of credibility assessment and, had she done so, she would have been hampered in this regard by the fact that this matter was adjudicated by way of an investigation rather than an evidentiary hearing where each party would have been afforded the opportunity to test the veracity of the other. So far as I can determine from the record before me, the delegate simply asked the parties to provide written summaries of their positions and arguments and never conducted any sort of direct examination of either party where issues of relative credibility could have been, at least to a degree, explored. It appears that the delegate’s dealings with the parties were conducted exclusively through regular and electronic mail. The delegate’s reasons indicate that on June 24, 2014, she did interview (presumably by telephone) three of the four witnesses who provided written statements that Mr. Tieri submitted to the delegate (delegate’s reasons, pages R3 – R4). These witnesses provided evidence regarding Mr. Tieri’s presence at the store. However, the central issue was not whether Mr. Tieri actually worked at the store, but rather his *status*. Ms. Cahill conceded that Mr. Tieri worked at the store (although she disputed the number of hours that he was on site); the fundamental issue was not whether Mr. Tieri worked at the store but whether he worked at the store as an *employee*. These witnesses had absolutely no cogent evidence to offer on this point. The only two persons who could reliably speak to this point were Ms. Cahill and Mr. Tieri and it would appear that the delegate did not personally interview (and closely question) either of them.
31. In light of the foregoing concerns, I am not satisfied that the evidentiary record is sufficiently complete so as to allow the Tribunal to make a reasoned decision regarding whether the delegate erred in law in finding that Mr. Tieri was an “employee” within section 1 of the *Act*. Ultimately, this is a question of mixed fact and law (see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235) and the requisite findings of fact have never been made although the issues that called for certain factual findings to be made were explicitly placed before the delegate. The Tribunal is not an adjudicative body of first instance nor is it a fact-finding body (save, perhaps

in the unusual situation where a fact-finding hearing could be necessary in an appeal based on the “new evidence” ground: see *Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 97 at para. 45 *et seq.*

32. In my view, the Determination cannot stand as issued and must be cancelled. Mr. Tieri is entitled to a hearing with respect to his unpaid complaint and Lusso Verde is entitled to have its response to that complaint fully considered. Thus, I am referring this matter back to the Director for a new hearing. In my view, and particularly given the clear credibility issue at stake, this matter should be the subject of an oral evidentiary hearing but I will leave that matter to the Director’s discretion.

ORDER

33. Pursuant to subsection 115(1) of the *Act*, the Determination is cancelled and Mr. Tieri’s complaint is referred back to the Director for a new hearing.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal