

An appeal

- by -

Sunny Trails Club carrying on business as The Campground
(“STC”)

- 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: Carol L. Roberts

FILE No.: 2008A/8

DATE OF DECISION: April 14, 2008

DECISION

SUBMISSIONS

John S. Piamonte	on behalf of Sunny Trails Club
Ken White	on behalf of the Director of Employment Standards
Shellan Rigg	on his own behalf
Lucienne Winder	on her own behalf

OVERVIEW

1. This is an appeal by Sunny Trails Club c.o.b.a. The Campground, (“STC”), pursuant to Section 112 of the *Employment Standards Act* (“the Act”), against a Determination of the Director of Employment Standards (“the Director”) issued January 4, 2008.
2. Shellan Rigg worked for STC from April 1, 2003 until September 1, 2006. Lucien (although Ms. Winder’s name appears to be Lucienne, her complaint was filed in the name “Lucien”) Winder worked for STC from June 15, 2006 until September 15, 2006. In late 2006, Mr. Rigg and Ms. Winder filed complaints alleging that they were owed regular wages, annual vacation pay, statutory holiday pay and compensation for length of service.
3. The Director’s delegate investigated the complaints. At issue before the delegate was whether the complainants were employees or contractors, and if they were employees, whether they were entitled to wages as claimed.
4. Following the investigation, the delegate determined that STC had contravened Sections 17, 18, 46 and 58 of the *Employment Standards Act* in failing to pay the complainants wages, annual vacation pay and statutory holiday pay. He concluded that the complainants were entitled to wages and interest in the total amount of \$11,472.80. The delegate also imposed a \$2,500 penalty on STC for the contraventions of the Act, pursuant to section 29(1) of the *Employment Standards Regulations*.
5. STC contends that the delegate erred in law in finding that the complainants were employees rather than contractors. STC says that even if the complainants were determined to be employees, the delegate erred in calculating their wage entitlement. STC also contends that the delegate failed to observe the principles of natural justice in making the Determination. Finally, STC says that new evidence is available that was not available at the time the Determination was being made.
6. Section 36 of the *Administrative Tribunals Act* (“ATA”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal’s Rules of Practice and Procedure provide that the tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). STC sought an oral hearing given “the conflicting evidence and credibility concerns raised”. I conclude that this appeal can be adjudicated on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination.

ISSUE

7. Did the delegate err in law in finding that the complainants were employees or their wage entitlement?
8. Did the delegate fail to observe the principles of natural justice in arriving at the Determination?
9. Is there new and relevant evidence available that was not available at the time the Determination was being made?

THE FACTS AND ARGUMENT

10. STC, a social club, operates a campground for its members. It also provided some camp sites to the public.

Employment Status

11. Mr. Rigg worked for STC from April 1, 2003 until September 1, 2006. On June 16, 2006, Mr. Rigg and STC entered into a contract for the period June 1, 2006 until December 31, 2006. Under the terms of that contract Mr. Rigg was to be on duty Wednesday through Sunday inclusive. His duties included answering the telephone, registration, orientation and placement of guests and the collection of fees, monitoring guests' behaviour, cleaning the men's campground washroom and office, weed cutting and hand mowing some areas of grass. His remuneration was \$1300 per month for the months of June, July and August, \$500 for September and \$400 for October, November and December. STC also provided him with an RV site each month of the contract period.
12. On June 17, 2006, Ms. Winder entered into an agreement with STC to work at the campground from June 15, 2006 until September 15, 2006 at a rate of \$1,000 per month. Her duties included orientation, registration and placement of guests, the collection of fees, answering the telephone, cleaning the women's washroom and laundry/utility room, cleaning fire pits and monitoring guests' behaviour. She was required to be on duty Thursday through Monday, inclusive.
13. The delegate concluded that both complainants were employees. He concluded that STC determined what work they were to perform, the days on which they were to work and their remuneration. He determined that the contracts put the complainants under the direction and control of management. The delegate also determined that the work the complainants performed was not specialized, was integral to the operation of the campground, was performed on a daily basis and that the tasks were all ones which would be performed by an employee.
14. STC contends that the delegate erred in concluding that the complainants were employees rather than contractors. Counsel submits that many of the delegate's findings of "fact" were contrary to the evidence before him and led to an erroneous conclusion on this issue.
15. The delegate submits that the appeal is an attempt to re-argue the case on its merits and that, as an appeal only on the facts, there is no proper ground of appeal.
16. The complainants' submissions were fact specific and did not address the grounds of appeal. Their submissions repeated or supplemented much of the material before the delegate at first instance.

Wage entitlement

17. Mr. Rigg alleged that he was required to work 12 – 14 hours a day and that he was required to be on call the rest of the day. He claimed that he was forced to take 12 days off in August for which he was not paid. He indicated in one document that he was not seeking compensation for hours worked in excess of 12 hours per day while in another document he indicated he was not claiming compensation for hours worked in excess of 14 hours per day. Mr. Rigg's paycheques were not accompanied by any pay statements.
18. Ms. Winder's pay cheques were also not accompanied by any pay statements. She said the parties had established no rate of pay so she claimed the minimum wage for the hours of work she alleged she had worked.
19. STC denied that either complainant worked full time. It said the work they did was "minimal", that they spent much of the day socializing, that the rate of remuneration was negotiated with them and that they could have subcontracted their work with consent of management. STC also said that Mr. Rigg would often sleep until noon and that Ms. Winder would complete her tasks early in the day and go about her own business.
20. STC denied that Mr. Rigg was ever on call. It took the position that although Mr. Rigg was at the campground 7 days per week he was not authorized to work 7 days per week and did not work 7 days per week. STC provided the delegate with its view of the hours Mr. Rigg worked, based on receipts and the alleged number of times the washrooms were cleaned. It indicated that the hours cited were the maximum Mr. Rigg could have worked and that he overstated his actual hours of work. STC provided the delegate with a number of instances when Mr. Rigg could not have been working although he alleged he had and that there was insufficient business to warrant the number of hours Mr. Rigg alleged he had worked. STC further alleged that Mr. Rigg was not authorized to patrol the campground or to deal with monthly guests.
21. The complainants provided the delegate with the names and telephone numbers of "approximately 32 people" who were at the campground during the period March 1, 2006 until September 1, 2006 in support of their claimed hours of work as well as letters of support from 12 other persons.
22. The record discloses that the delegate contacted some or all of the witnesses who provided him with information about the nature and hours of performed by the complainants.
23. The delegate issued his preliminary findings on November 21, 2007. The report concluded that the complainants were employees and that they were entitled to wages.
24. On December 6, 2007, STC responded to the preliminary findings. It sought disclosure of the statements provided to the delegate on the complainants' behalf. STC also provided the delegate with documents including financial records, minutes, campground plans and rules as well as statements from 5 witnesses, three of whom had previously worked at the campground. The witnesses outlined their tasks and how long it took them to complete them. One statement, which was quite specific, set out the witness's observations of the types of work the complainants performed and the hours he saw them perform it in. In essence, STC's evidence was that that the campsite was rarely busy and the tasks performed by the complainants occupied very little of their time.

25. Neither STC nor either of the complainants maintained a daily record of hours and the delegate found the parties' submissions on the complainants' hours of work to be implausible. Accordingly, he concluded that he was required to determine the complainants' hours of work based on the "best evidence" rule set out in *Pelican Rouge Coffee Company* (BC EST #D244/98).
26. The delegate reviewed the evidence of the complainants' witnesses. He noted that while they all confirmed that the complainants performed work, they could not provide any evidence on the times they started or ended work or the number of hours they worked. He determined that the only STC witness that could be of any assistance was a monthly renter and discounted his evidence on that basis.
27. The delegate found that Mr. Rigg had no exact start or finish time and that he spent times during the day in his residence. The delegate relied on *Knutson First Aid Services (1994) Ltd.* (BC EST #D095/01) in concluding that the time Mr. Rigg spent at his residence could not be characterized as being "on call" or working hours. In determining Mr. Rigg's hours of work, the delegate took a view to "the number of hours a reasonable person would find Rigg worked under the circumstances". He determined that his hours were driven by the number of people in the campground at any given time. He found it reasonable to conclude that Mr. Rigg worked fewer hours in March, April and May. He also concluded that Mr. Rigg would work longer hours when the manager and her husband were away from the campground. He preferred the evidence of Ms. Gordon on her times away over that of the complainants. He determined that Mr. Rigg worked 8 to 10 hour days, five to six days per week between February and September 2006 and calculated his wage entitlement on that basis.
28. Although the Determination is silent on Mr. Rigg's entitlement to compensation for length of service, the record discloses that he received a cheque on August 31, 2006 which included "one week contract payment in lieu of notice" and "one week site rental in lieu of notice".
29. The delegate rejected STC's assertion that Ms. Winder was not entitled to any additional wages. He noted that the campground manager was away for 27 days that Ms. Winder worked and thus would not be aware of the hours she worked. The delegate did not accept that Ms. Winder worked as many hours as Mr. Rigg and concluded that she was able to "divest herself from the job and the campground." He determined that she worked more hours when the manager was away as well as the period of time Mr. Rigg was away. The delegate concluded that Ms. Winder worked 8 to 10 hour days, five days per week, between June 15 and September 15 and calculated her wages based on that determination.
30. The delegate concluded that Ms. Winder quit her employment and was not entitled to compensation for length of service.
31. Counsel for STC contends that, even if the complainants were properly characterized as employees, the delegate's approach to the determination of wages is "critically flawed". He argued that, having found both complainants' record of hours worked to be unreliable, to then rely on evidence of undisclosed witnesses while disregarding the evidence of the witnesses of STC was a failure to observe the principles of natural justice. STC contends that the identity of the 32 people who had stayed in the campground and the specifics of their evidence were never disclosed to STC. It argues that the failure of the Director to disclose this evidence and giving STC an opportunity to respond to that evidence constitutes a breach of natural justice.

32. The delegate submits that STC's appeal is an attempt to re-argue the case on the merits and should be dismissed. He submits that STC participated fully in the investigation and had opportunity to question the evidence of the complainants and to provide a response to the preliminary findings.
33. The complainants seek to have the Determination upheld.

ANALYSIS

34. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- (a) the director erred in law
 - (b) the director failed to observe the principles of natural justice in making the determination; or
 - (c) evidence has become available that was not available at the time the determination was being made
35. The burden of establishing the grounds for an appeal rests with an Appellant. STC must show clear and convincing reasons why the Tribunal should interfere with the delegate's decision on one of the three stated grounds of appeal.

New Evidence

36. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:
- the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - the evidence must be relevant to a material issue arising from the complaint;
 - the evidence must be credible in the sense that it is reasonably capable of belief; and
 - the evidence must have high potential probative value, in the sense that , if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
37. STC has not identified what the new evidence is, or how it might have led the Director to a different conclusion. I find no basis for this ground of appeal.

Error of Law

38. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:
1. A misinterpretation or misapplication of a section of the 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 be reasonably entertained; and
 5. Exercising discretion in a fashion that is wrong in principle
39. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.*, BC EST #D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.
40. The Tribunal must defer to the factual findings of a delegate unless the appellant can demonstrate that the delegate made a palpable or overriding error.
41. Having reviewed the Determination, I am not persuaded that the delegate erred in concluding that the complainants were employees. While I agree that some of the delegate's factual findings on this issue were erroneous, I nevertheless find that his conclusion is correct.
42. Remedial and benefits conferring legislation is, in general, to be given broad and liberal interpretation, as are definitions contained within legislation itself. (see s. 8, *Interpretation Act*, R.S.B.C. , *Fenton v. Forensic Psychiatric Services Commission* (1991) 56 BCLR (2nd) 170, and *Machtinger v. HOJ Industries Ltd.* , [1992] 1 S.C.R. 986)
43. The overriding test is whether the complainants "performed work normally performed by an employee," or "performed work for another." The Tribunal has held that the definition is to be broadly interpreted: (*On Line Film Services Ltd v Director of Employment Standards* BC EST #D 319/97), and the common law tests of employment are subordinate to the statutory definition (*Christopher Sin* BC EST #D015/96).
44. The delegate applied the statutory definition and concluded, correctly in my view, that the complainants performed work normally performed by an employee.
45. The evidence is that STC entered into contracts with both of the complainants. While there is no evidence which party drafted the agreement, I infer it was STC as it was typed and in the same format as contracts with other "contractors". Although it contained references to the complainants as "contractors", it is not the form but the substance of the duties that will determine an employment relationship. There was no evidence that either of the complainants had been in business for themselves previously and there was no evidence they understood the distinction between an employee and a contractor.
46. The agreement specified that the complainants were to answer telephones, clean washrooms, partially maintain the grounds and look after guests, all duties that are normally performed by an employee. The

complainants were required to account for the cash received and maintain the washroom to a standard of cleanliness acceptable to the public.

47. Applying the common law tests, there is no evidence that either of the complainants owned their own tools or took any financial risks. The business was that of STC not the complainants'. The complainants could not subcontract their work without the permission of STC. All of these indicia are reflective of an employment relationship, and I confirm this aspect of the Determination.
48. However, I agree with STC's submission that the delegate's approach to a determination of the complainants' wages is flawed. I find that the delegate failed to properly investigate the conflicting claims of the parties.
49. Having found the evidence of both parties on the issue of number of hours worked to be unreliable, the delegate applied a "reasonable person" test. The test for determining an entitlement to wages is the "best evidence" rule established by the Tribunal in *Gordon Hofer* (BC EST #538/97). That is, the delegate must make a reasoned decision, based on an evaluation of all the available evidence, to determine each of the complainants' hours of work.
50. I find that the delegate acted on a view of the facts which cannot be reasonably entertained in arriving at his conclusion. It does not appear that he took into account the specific tasks outlined in the written agreement along with the parties' evidence as to the number of people in the campground during those periods. There was evidence that during some periods there were very few guests at the campground. There was some evidence that many of the required tasks took very little time to complete. It is unclear to me how the delegate arrived at his conclusion that either Mr. Rigg or Ms. Winder worked 8 to 10 hours days in light of this evidence. It appears that he did not take into consideration any of the evidence of STC's witnesses, people who had previously performed these tasks for STC, or STC's evidence that the campground operations required minimal work. Further, it is not apparent to me why the delegate would discount the evidence of one of STC's witnesses solely on the basis that he was a monthly renter. The evidence is that the campground was fairly small and there appears to be no reason why that witness's observations should not have been afforded some weight.
51. I also find that the delegate failed to observe the principles of natural justice in not disclosing the names of the witnesses for the complainants to STC. After reviewing the record which contained the delegate's notes and the names and statements of the witnesses, STC alleges that there is no evidence some of those witnesses were ever in the campground, one of the witnesses was related to one of the complainants and that some of the statements were unsigned. Although STC's counsel sought disclosure of this evidence before the Determination was issued, it was not provided. I find the delegate's failure was a breach of fairness. As this Tribunal said in *J.C. Creations o/a. Heavenly Bodies Sport* (Reconsideration Decision BC EST #RD317/03) statutory decision makers have a duty to ensure that parties who may be adversely affected by a decision be given a chance to respond to the essentials of the case they have to meet. Given that the delegate appeared to rely on the witness statements to corroborate, at least in part, the complainants' claims, he ought to have afforded STC the opportunity to respond to it. Apart from the fairness considerations, the delegate had no basis on which to assess the credibility or reliability of those statements.
52. I remit this issue back to the delegate to reconsider the complainants' hours of work and wage entitlement.

ORDER

53. I Order, pursuant to Section 115 of the Act, that the Determination, dated January 4, 2008, be referred back to the delegate for reconsideration of the complainants' wage entitlement.

Carol L. Roberts
Member
Employment Standards Tribunal