



An appeal

- by -

Robin Burne carrying on business as Agent 99 Express Services
(the “Appellant”)

- 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: Rajiv K. Gandhi

FILE No.: 2015A/171

DATE OF DECISION: March 9, 2016

DECISION

SUBMISSIONS

Robin Burne	on his own behalf
Kristine Booth	on behalf of the Director of Employment Standards

OVERVIEW

1. On November 3, 2015, the Director of Employment Standards (the “Director”) issued a determination (the “Determination”) according to section 79 of the *Employment Standards Act* (the “*Act*”), requiring Robin Burne, carrying on business as Agent 99 Express Services (the “Appellant”) to pay the aggregate sum of \$7,484.07 to Joanna Juffermans (the “complainant”).
2. The Director also required the Appellant to pay administrative penalties totalling \$1,500.00, for three separate contraventions of the *Act*.
3. The Appellant now says that, in making the Determination, the Director failed to observe the principles of natural justice, a permitted basis for appeal according to section 112(1)(b) of the *Act*. The Appellant seeks to have the Determination cancelled, and to have this matter referred back to the Director for further consideration.
4. Having studied:
 - (a) the Determination issued by the Director on November 3, 2015;
 - (b) submissions on behalf of the Appellant, received on December 10, 2015, January 13, 2016, and February 4, 2016;
 - (c) submissions from the Director, received on January 28, 2016; and
 - (d) the Director’s Record (the “Record”),

I conclude that this appeal should be dismissed according to section 114(1)(f) of the *Act*.

THE FACTS AND ANALYSIS

5. The complaint was submitted to the Employment Standards Branch on October 15, 2014. In it, the complainant sought to recover unpaid statutory holiday pay, vacation pay, and compensation for length of service arising out of the termination of her employment.
6. The Appellant has maintained that the complainant was not an employee to whom the *Act* applies, but an independent contractor.
7. The complaint was heard on March 20, 2015. In reasons issued 228 days later, the Director found the complainant to be an employee and, as such, entitled to wages under sections 45, 58, and 63 of the *Act*.

8. In this appeal, the Appellant argues that:
- (a) the delay between the date of hearing and issuance of the Determination; and
 - (b) the Director's failure to refer to specific evidence in the Determination, or to explain why such evidence was discounted,

amount to a failure on the part of the Director to observe the principles of natural justice.

9. In order to argue the second point, the Appellant now seeks production of a hearing transcript or, alternatively, the Director's hearing notes.

Production of Transcript / Hearing Notes

10. If there was a transcript, the Director would certainly be required to disclose it as part of the Record. In this case, however, the Director says that there is no transcript. Indeed, there is nothing in the *Act* requiring hearings to be recorded or transcribed, and it is the usual practice of the Director to do neither. I cannot order production of an item that does not exist.
11. There are notes, compiled by the Director's delegate during the hearing. The Appellant wishes to use those notes in place of the non-existent transcript. As pointed out in *Lockerbie & Hole Industrial Inc.*, BC EST # D071/05, however, notes are not intended to be a proper record of proceedings for consumption by third parties but, rather, an aid for the delegate to be used while deliberating the evidence.
12. Having regard to the materials submitted by the Appellant and the Director, I am satisfied that deciding this appeal does not require production of the notes of the Director's delegate and, in any event, extenuating circumstances do not exist which are sufficient to justify deviation from the general proposition, adopted by this Tribunal in *24/7 Excavating Ltd.*, BC EST # D066/15, at paragraph 11, and *United Specialty Products Ltd.*, BC EST # D057/12, at paragraph 18, that hearing notes are protected by deliberative privilege and, as such, should not be the subject of a production order.

Section 112(1)(b) – Failure to Observe the Principles of Natural Justice

(i) Delay

13. The Appellant says that a delay of 8 months between hearing and decision amounts to a breach of the principles of natural justice.
14. Natural justice requires the Director, at all times, to act fairly, in good faith, and with a view to the public interest (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48 at paragraph 2).
15. I agree that both the complainant and the Appellant are entitled to have the complaint resolved by the Director in a timely fashion. I agree that, ordinarily, a delay of more than seven months ought to be discouraged.
16. In the course of adjudicating the original complaint, the Director was presented with more than three hundred pages of evidence, and received testimony from multiple witnesses. Properly considering this volume of material can take time. Though unusual and very likely frustrating for both the complainant and the Appellant, I cannot say that a delay of just over seven months is unacceptably long.

17. Even if it was, there must also be evidence to show actual prejudice to the Appellant (*Atkinson*, BC EST # D113/09, at paragraph 16, adopting a ruling of the Supreme Court of Canada in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307). I find no such evidence.
18. In the circumstances, I am not persuaded that there has been a contravention of the principles of natural justice.
 - (ii) *The Director's alleged failure to refer to specific evidence.*
19. The Appellant further submits that the Director failed to consider, or to explain the reason for discounting, the following evidence, which the Appellant says is key:
 - (a) the complainant acknowledged, twice, that she was a contractor;
 - (b) the complainant acknowledged that she prepared and submitted income tax as a self-employed person, claimed input tax credits with respect to goods and services tax paid on business related expenses, and obtained her own coverage with WorkSafeBC;
 - (c) the “effective” hourly rate of the complainant was greater than \$50.00;
 - (d) witnesses on behalf of the Appellant gave two sworn statements, as well as *viva voce* evidence, confirming that the relationship between the Appellant and the complainant was one of contractor and client, not employee and employer.
20. For the purposes of this appeal, I accept that the Appellant’s description of the evidence is accurate, and that the evidence itself is uncontroverted.
21. Procedurally, each party has the right to a decision on the evidence (*Tyler Wilbur operating Mainline Irrigation and Landscaping*, BC EST # D196/05, at paragraph 15). It does not follow, however, that a Determination which fails to explicitly address all of the evidence violates the rules of natural justice.
22. In assessing the sufficiency of reasons, this Tribunal has previously adopted a “functional context-specific approach” (see, for example, *Kirk Edward Shaw*, BC EST # D089/10, and *Worldspan Marine Inc.*, BC EST # D005/121.)
23. Guidelines with respect to this sort of approach, established by the Supreme Court of Canada in *R. v. R.E.M.*, 2008 SCC 51 starting at paragraph 15, apply equally to appeals under the *Act* as they do in the criminal matter then considered:
 - (a) courts of appeal considering the sufficiency of reasons should read them as a whole, in the context of the evidence, the arguments, and the trial, with an appreciation of the purposes or functions for which they are delivered;
 - (b) the objective is to show how a decision is reached, not why;
 - (c) every finding or conclusion need not be explained in the process of arriving at a verdict; and
 - (d) there is no requirement to expound on each piece of evidence or controverted fact, so long as the findings linking the evidence to the verdict can logically be discerned.

24. I accept that the Determination might have been clearer with respect to the evidence, particularly given the passage of time between the hearing and issuance of reasons. But, on a plain reading, I do not agree with the Appellant that the Director failed to consider evidence.
25. On the contrary, the Director makes express references to the complainant's practice of submitting tax returns, claiming refunds of goods and services tax, and separately insuring for WCB coverage, on the basis that she was an independent contractor. The Director also refers in several places to the evidence of each of the Appellant's two witnesses.
26. In my view, the Director has shown how the decision was reached, and has appropriately connected the dots, tying relevant evidence to the "verdict".
27. I do not agree that the failure to refer in detail to every piece of evidence amounts to a breach of the principles of natural justice.
28. Even though the Appellant has not alleged an error in law under section 112(1)(a) of the *Act*, it strikes me that what he is really asking in this appeal is for the Tribunal to disagree with the Director's reasons because, firstly, the complainant and two other witnesses acknowledged or agreed that the complainant was a contractor, and secondly, the complainant's hourly rate was much higher than what the Appellant says she would have earned as an employee. The former is a question of law that neither the complainant nor the witnesses are qualified to answer, and the latter is an allegation of fact that does not appear to relate to a determination of the complainant's status.
29. I see nothing in the Determination that would, in my view, amount to an error by the Director in applying the law. Concluding that the complainant was an employee is as a reasonable outcome, having regard to all of the facts.
30. For these reasons, I conclude that this appeal has no reasonable prospect of success.

ORDER

31. This appeal is dismissed pursuant to section 114(1)(f) of the *Act*. Pursuant to section 115 of the *Act*, I Order the Determination, dated November 3, 2016, be confirmed.

Rajiv K. Gandhi
Member
Employment Standards Tribunal