

An appeal

- by -

Hannah Services Incorporated
("Hannah")

- 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.: 2007A/41

DATE OF DECISION: July 3, 2007

DECISION

SUBMISSIONS

Debra Greig, B.A., B.S.W., M.S.W, President	on behalf of Hannah Services Inc.
Robert (Scotty) Morrison	on behalf of the Director of Employment Standards
Joanne Degirolamo	on her own behalf

OVERVIEW

1. This is an appeal by Hannah Services Inc. (“Hannah”), pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), of a Determination of the Director of Employment Standards (“the Director”) issued April 12, 2007.
2. Hannah operates group homes and day programs funded by Community Living BC. Joanne Degirolamo worked for Hannah as a community support worker from June 2000 until Hannah’s contract with Community Living BC ended on December 20, 2006. Ms. Degirolamo claimed she was entitled to compensation for length of service.
3. The Director’s delegate held a hearing into Ms. Degirolamo’s complaint on March 27, 2007.
4. The delegate determined that Hannah had contravened Sections 58 and 63 of the *Employment Standards Act* in failing to pay Ms. Degirolamo compensation for length of service and annual vacation pay. He concluded that Ms. Degirolamo was entitled to wages and interest in the total amount of \$4,450.93. The delegate also imposed a \$500 penalty on Hannah for the contravention of the *Act*, pursuant to section 29(1) of the *Employment Standards Regulations*.
5. Hannah contends that the delegate erred in law in finding that Hannah was not exempt from the provisions of section 63, and failed to observe the principles of natural justice in making the Determination. Hannah seeks to have the Determination cancelled or referred back to the Director.
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). I conclude that this appeal can be adjudicated on the written submissions of the parties. This appeal deals with the question of whether the delegate erred in law, an issue which does not turn on the credibility of the parties or whether or not additional evidence needs to be considered. There is also no need to hear *viva voce* evidence on the issue of whether or not there was a denial of natural justice. This appeal is decided based on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination.

ISSUES

1. Whether the delegate erred in law in concluding that Hannah was not exempt from paying Ms. Degirolamo compensation for length of service and
2. Whether the delegate failed to observe the principles of natural justice in making his Determination.

ARGUMENT

7. Ms. Greigg contends that the delegate arrived at his conclusions based on incorrect facts and that his factual errors derived from a failure to take notes during the hearing.

THE FACTS AND ARGUMENT

8. In 2006, Community Living BC (CLBC) asked Hannah to operate a group home for two clients in Parksville. Ms. Degirolamo, who had been employed with Hannah since June 2000, asked for and obtained a transfer to work in this facility effective October 2, 2006. CLBC terminated its contract with Hannah on December 20, 2006. Hannah closed the group home and laid off all the employees effective that day.
9. Hannah argued that it was exempt from paying compensation for length of service as set out in section 63 of the *Act* by virtue of the application of section 65. Ms. Greig submitted a November 20, 2006 letter from CLBC giving Hannah notice that its group home contract would be terminated effective December 20, 2006, for reasons “discussed during the November 15th and 20th meetings”. Ms. Greig submitted that the verbal grounds for the termination were not valid and that Hannah had been given no warning or contravention notices. It appears that the termination letter referred to a frustrated contract. Ms. Greig’s evidence was that the dispute was to be referred to a conflict resolution process, and that while she had been hopeful that it could be resolved without the facility closing, there had, in fact, been no discussions between Hannah and CLBC until December 19 when Hannah was informed that the group home would be closed the following day.
10. Hannah argued that Ms. Degirolamo was aware that her contract was a fixed term contract that could be terminated by Hannah on 30 days notice. The delegate concluded that there was no fixed term employment contract between Hannah and Ms. Degirolamo. He concluded that the 30 day contract notice provision existed in a contract between Hannah and CLBC, not between Hannah and Ms. Degirolamo. He determined that section 65(d) did not apply to the parties.
11. The delegate also found section 65(4) inapplicable, as Hannah terminated less than 50 people on December 20, 2006.
12. Finally, the delegate determined that Hannah could not avail itself of section 65(d) because CLBC had informed Hannah on November 20, 2006 that the contract would be terminated. He noted that, despite this notice, Hannah continued to operate the facility as if it would still be open after December 20, 2006. Although Ms. Greig informed the employees at a staff meeting on December 8, 2006 that CLBC wanted to terminate the contract, she also stated that she did not believe that this would happen.

13. The delegate concluded that Hannah ought to have foreseen the possibility of the need to terminate Ms. Degirolamo's employment and that it could not avoid section 63 liability by relying on section 65(2).
14. Ms. Greig says that the delegate did not take notes of her evidence and was in error in concluding that Hannah had prior disputes with CLBC. She said that her references to an anticipated dispute resolution process were based on her past experiences as a social worker employed by CLBC. She said that her past experience was that where clients are to be moved from one group home to another group home, there were, in her experience, meetings between the clients and the new service providers to provide support for the clients during the transition from the old to the new residence. She said that this process was not followed prior to the termination of the contract of her group home. As a result, she says that she told the delegate that there was no evidence the clients would actually move on December 20, 2006.
15. Ms. Grieg said that her evidence was that, based on her previous experience, she could not have foreseen the closing of the group home. She says she was shocked when CLBC called on the morning of December 19th to advise that the clients would be moved the following day and that its actions were unfair to both the employees and the clients. Ms. Greig argues that she should be "exonerated" under section 65(d) of the *Act*, because the closing was unforeseen "due to the lack of due social work process and sound ethical practice on the part of CLBC".
16. Ms. Degiorlamo sought to have the Determination confirmed.

ANALYSIS

17. 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
18. The burden of establishing the grounds for an appeal rests with an Appellant. Hannah must provide persuasive and compelling evidence that there were errors of law in the Determination, as alleged, or that the delegate failed to observe the principles of natural justice. An appeal is not an opportunity to re-argue a case that has been advanced before the delegate.
19. In her appeal document, Ms. Greig does not identify any errors of law or describe how she is of the view Hannah was denied natural justice. Rather, she attempts to re-argue the case advanced before the delegate because she is dissatisfied with the result. I have concluded that Hannah has not demonstrated either an error of law or a denial of natural justice for the following reasons:

Error of Law

20. 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

21. 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.
22. 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.
23. Ms. Greig contends that the delegate erred in stating that, in Ms. Greig’s experience, disputes between Hannah and CLBC were resolved through a dispute resolution process. She says that Hannah never had a previous dispute with CLBC and that her comments about the dispute resolution process were made based on her past experience as a social worker.
24. While I accept that the delegate may have erred in making this comment, I am unable to find that it would have led him to a different conclusion. Hannah argued that it was exempt from the provisions of section 63, which set out an employer’s statutory obligation to pay compensation for length of service. The delegate considered all the exceptions, including 64 and 65. Hannah suggests that it is exempt under both sections 65(2) and 65(d) (sic) because “no recognizable social work process took place” prior to the closing of the home.
25. Section 65 (1) provides that section 63 does not apply to an employee

...

(b) employed for a definite term

...

(d) employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership...
26. Section 65(2) provides that if an employee who is employed for a definite term or specific work continues to be employed for at least 3 months after completing the definite term or specific work...
27. I am unable to find the delegate erred in his interpretation of section 65.
28. There is no evidence Ms. Degirolamo was employed for a fixed term. There was nothing before the delegate to establish that suggestion was factual, nor is there any evidence presented on appeal by which I could conclude that the delegate erred in his conclusion on this issue. Therefore, Hannah is not able to avoid its statutory obligation to pay compensation for length of service to Ms. Degirolamo under section 65(1)(b).

29. On November 20, 2006, Hannah received a letter from the CLBC notifying it that its contract would be terminated effective December 20, 2006. It was on this basis that the delegate found that the contract termination was foreseeable, a conclusion with which I agree. Foreseeable means to be aware of beforehand. While the contract termination may not be “sound ethical practise” as Ms. Greig contends, she cannot claim Hannah was unaware of the possibility of that fact. While I appreciate from Hannah’s submissions that it feels that CLBC’s decision to terminate the contract was unfair and not “based on the truth”, Hannah’s statutory obligations to Ms. Degirolamo are independent of Hannah’s contractual dispute with CLBC.

30. I find no basis for this ground of appeal.

Natural Justice

31. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker.

32. Hannah does not say how the delegate failed to observe the principles of natural justice. The record indicates that Ms. Greig participated at the hearing and was able to present her case and respond to Ms. Degirolamo’s case. The delegate considered her position and concluded that she had not met the burden of establishing that Hannah fell within the exceptions to section 63. A Determination in Ms. Degirolamo’s favour does not, in and of itself, demonstrate bias on the part of the delegate.

33. Without relevant evidence or submissions, I am unable to conclude that Hannah has substantiated this ground of appeal.

ORDER

34. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated April 12, 2007, be confirmed, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal