

An appeal

- by -

Big Daddy's Capital Inc.
("Big Daddy's")

- 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.: 2016A/23

DATE OF DECISION: March 23, 2016

DECISION

SUBMISSIONS

Michael D. Bruic

on behalf of Big Daddy's Capital Inc.

OVERVIEW

1. There is a fundamental distinction in law between an “employee” and an “independent contractor”. Among other differences, employees are entitled to the benefit of the wage protection provisions of the *Employment Standards Act* (the “*Act*”) whereas independent contractors are not. Frequently, workers are engaged as “independent contractors” – and there may even be a formal agreement to that effect – when, in substance, they are actually employees. Employers, wittingly or unwittingly, hire employees but treat them as independent contractors perhaps to reduce paperwork, to avoid payroll taxes (such as employment insurance and the Canada Pension Plan), or to avoid having to pay overtime, statutory holiday pay or vacation pay under employment standards legislation.
2. In the case at hand, the appellant, Big Daddy's Capital Inc. (“Big Daddy's”), engaged the complainant, Bradley Kostachuk (“Mr. Kostachuk”), as an independent contractor (a pizza delivery driver) but an Employment Standards Branch officer determined that Mr. Kostachuk was actually an “employee” as defined in subsection 1(1) of the *Act*. On January 8, 2016, and following an investigation into Mr. Kostachuk's unpaid wage complaint, a delegate of the Director of Employment Standards (the “delegate”) issued a Determination holding Big Daddy's liable to Mr. Kostachuk for \$682.78 in unpaid wages and section 88 interest. In addition, and also by way of the Determination, the delegate levied three separate \$500 monetary penalties (see section 98 of the *Act*) against Big Daddy's based on its contraventions of sections 16 (failure to pay minimum wage), 40 (failure to pay overtime pay) and 58 (failure to pay vacation pay) of the *Act*. Thus, the total amount payable by Big Daddy's under the Determination is \$2,182.78.
3. On February 11, 2016, Big Daddy's filed an appeal of the Determination with the Tribunal alleging all three statutory grounds of appeal (see subsection 112(1) of the *Act*), namely, i) the delegate erred in law; ii) the delegate failed to observe the principles of natural justice in making the Determination; and iii) it now has relevant evidence that was previously unavailable.
4. In my view, this appeal has no reasonable prospect of succeeding and, accordingly, must be dismissed under subsection 114(1)(f) of the *Act*. My reasons for so concluding now follow.

BACKGROUND FACTS

5. As recounted in the delegate's written “Reasons for the Determination” (the “delegate's reasons”) issued concurrently with the Determination, Mr. Kostachuk responded to a website ad posted by Big Daddy's who was seeking pizza delivery drivers. Mr. Kostachuk accepted a position with Big Daddy's as an “independent contractor” and his remuneration was fixed at \$5 per delivery plus gratuities. Mr. Kostachuk used his own vehicle to make deliveries but was not reimbursed for any vehicle-related expenses. Mr. Kostachuk worked for Big Daddy's from December 27, 2014, to February 12, 2015 (when he quit) and during his tenure was paid a “gross amount” without any deductions for income tax, employment insurance, C.P.P, etc. Mr. Kostachuk was paid a total of \$630 during his tenure with Big Daddy's.

6. Mr. Kostachuk filed an unpaid wage complaint on April 8, 2015. This complaint was originally scheduled for a complaint hearing to be held on June 19, 2015, in Langley, B.C. However, by letter dated May 4, 2015, a delegate of the Director (not the delegate who issued the Determination), advised the parties that the hearing was adjourned and that a “fact finding meeting” would take place on June 26, 2015, in Langley. During the fact finding meeting a delegate met with the parties – the subsection 112(5) record includes the delegate’s notes of this meeting and it appears that Mr. Kostachuk (who was an infant at the time) and his mother attended as well as Michael Bruic (“Mr. Bruic” - Big Daddy’s sole director).
7. The adjourned complaint hearing was never convened and the complaint was subsequently dealt with as an “investigative” rather than an “adjudicative” file. As noted above, the Determination was issued on January 8, 2016.
8. The delegate concluded that Mr. Kostachuk was an employee rather than an independent contractor. The delegate noted, correctly, that the form of the work agreement is of limited assistance in determining the true nature of the parties’ relationship. The delegate identified several elements of control exercised by Big Daddy’s over Mr. Kostachuk. The business’s customers (*i.e.*, those placing pizza orders) were Big Daddy’s customers, not Mr. Kostachuk’s, and Mr. Kostachuk was an integral component of Big Daddy’s business in the sense that Big Daddy’s could not fulfill its customers’ orders without a delivery service – of which Mr. Kostachuk was an integral part.
9. The delegate also correctly noted that where the pay system is a piece-rate scheme, the employer must still pay its employees the equivalent of at least the minimum wage for all hours worked (leaving aside certain farm workers). Accordingly, and based primarily on Mr. Kostachuk’s time records (that “were congruent with the records kept by the Employer”; delegate’s reasons, page R2), the delegate determined Mr. Kostachuk’s unpaid wage entitlement to be \$682.78 including interest.
10. Although Mr. Kostachuk used his own vehicle to make the deliveries – and was not reimbursed for his associated vehicle expenses – the delegate did not make an award in favour of Mr. Kostachuk under subsection 21(2) of the *Act* since no formal claim was advanced, or any evidence provided, in that regard. In light of the fact that Mr. Kostachuk’s complaint was the subject of an investigation rather than an oral hearing, I query whether the delegate should have simply dismissed that issue without further inquiry but, in any event, since it is clear that Big Daddy’s breached subsection 21(1) of the *Act*, I am puzzled as to why an administrative penalty was not levied on that account.
11. Further, by misrepresenting to Mr. Kostachuk that he was an independent contractor rather than an employee (thereby possibly placing Mr. Kostachuk in some jeopardy with the Canada Revenue Agency), there may well have been a breach of section 8 of the *Act* for which Big Daddy’s might have been penalized.
12. However, and as noted above, three other monetary penalties were levied against Big Daddy’s based on its contraventions of sections 16, 40 and 58 of the *Act*.

APPELLANT’S ARGUMENTS AND ANALYSIS

13. Big Daddy’s appeal is predicated on all three statutory grounds. Big Daddy’s attached a 12-page memorandum to its Appeal Form setting out its various challenges to the Determination and, in addition, appended 11 “affidavits” from various individuals as well as a pie chart showing the relative number of stores operated by various pizza restaurant chains.

14. Although the particulars with respect to each ground of appeal are not clearly delineated in Big Daddy's appeal documents, I have endeavoured to extrapolate what I understand to be its main points with respect to each ground.
15. I will first address the "affidavits" that have been submitted as "new evidence".

New Evidence

16. The "affidavits" are not sworn (or affirmed) before a lawyer or notary; rather, they are simply statements signed by various individuals, including Mr. Bruic and other Big Daddy's managerial employees and several drivers.
17. The statements were all signed in January 2016 (on various dates) but, in every instance, after the date of the Determination. The evidence recounted in the statements could have been provided to the delegate prior to the issuance of the Determination if Big Daddy's wished to do so. The statements are riddled with hearsay (thus calling into question their probative value) and there is a very obvious repetitive – one might even say "boilerplate" – element to each these witness statements. The statements strike me as having been drafted by a single individual (perhaps by Mr. Bruic or someone acting on his direction) and simply presented to each of the individuals for their signature.
18. In any event, in light of the strict criteria governing the admissibility of "new evidence" in an appeal, as set out in *Davies et al.*, BC EST # D171/03, none of these statements is admissible. In short, all of this evidence *was* "available at the time the determination was being made" and, as such, does not constitute "new evidence" within subsection 112(1)(c) of the *Act*.

Natural Justice

19. The appellant's argument on this issue is not clearly set out in its appeal materials. It would appear that Big Daddy's objects to the fact that the parties were separately interviewed at the fact finding meeting, but it should be remembered that this meeting was *not* a complaint hearing. If a decision-maker, while conducting an adjudicative evidentiary hearing, receives the evidence of one party without allowing the other party to hear and respond to that evidence, that would be a breach of the rules of natural justice. But that is not the situation here.
20. Delegates conducting investigations routinely receive evidence from one party without the other party being privy to the telephone call or meeting where the evidence is being gathered and there is nothing improper about that process. So long as a party is afforded an opportunity to respond to the substance of the adverse party's evidence (and that occurred here), section 77 of the *Act* is not infringed.
21. Big Daddy's also says that the delegate relied on the "fabricated" and "tainted" evidence presented by, or on behalf of, the complainant. However, this appears to be a case – hardly unusual – where the parties gave conflicting evidence. The delegate's task, when making findings of fact, was to try and sort out the true situation based on what was most probable. While Big Daddy's clearly disagrees with the delegate's findings of fact, I am not prepared to find that they were made in breach of the rules of natural justice or that the delegate's findings lacked any evidentiary foundation.

Errors of Law

22. Big Daddy's appears to be suggesting that the delegate erred in law in at least two respects. First, Big Daddy's, as noted above, strongly disagrees with certain of the delegate's findings of fact. However, while a factual finding can constitute an error of law, that is so only if the impugned finding is devoid of any evidentiary foundation and that is simply not the case here.
23. Second, Big Daddy's says that the delegate erred in finding that there was an employment relationship between the parties. In light of the interrelated definitions of "employee", "employer", "wages" and "work" set out in subsection 1(1) of the *Act*, and the evidence that was before the delegate, I am unable to conclude that the delegate erred in determining that Mr. Kostachuk was an "employee" rather than an "independent contractor". Despite Big Daddy's rather veiled assertions to the contrary, there is absolutely no evidence in the record that Mr. Kostachuk was operating a general delivery business in which Big Daddy's was but one of several clients. The delegate appears to have considered the relevant legal criteria and properly applied those criteria in finding that there was an employment relationship between the parties.

ORDER

24. Pursuant to subsection 114(1)(f) of the *Act*, this appeal is dismissed. In accordance with subsection 115(1)(a) of the *Act*, the Determination is confirmed as issued in the total amount of \$2,182.78, together with whatever further interest that has accrued, under section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal