

An appeal

- by -

Green Team Eco Clean Ltd. formerly known as Dutch Ethical Maintenance Ltd.
("Green Team")

- 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: Robert E. Groves

FILE No.: 2013A/36

DATE OF DECISION: July 25, 2013

DECISION

SUBMISSIONS

Eddy Jalbert

on behalf of Green Team Eco Clean Ltd. formerly known as Dutch Ethical Maintenance Ltd.

OVERVIEW

1. This is an appeal brought by Green Team Eco Clean Ltd. formerly known as Dutch Ethical Maintenance Ltd. (“Green Team”), pursuant to section 112 of the *Employment Standards Act* (the “*Act*”).
2. Green Team challenges a determination of the Director of Employment Standards (the “Director”) dated April 23, 2013 (the “Determination”), which followed an investigation of a complaint filed by one No Thi Mai (the “Complainant”).
3. The Director found that Green Team owed the Complainant the sum of \$2,560.21, comprised of wages, annual vacation pay, compensation for length of service, and accrued interest.
4. The Director also imposed two administrative penalties of \$500.00 each; one in respect of Green Team’s failure to pay wages, and the other because it failed to respond to a Demand for Employer Records.
5. The total found to be owed, then, was \$3,560.21.
6. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 8 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic, telephone and in person hearings when it decides appeals. I find that the matters raised in this appeal can be decided on the basis of a review and consideration of the materials now before me, which include the Determination, the Director’s Reasons for the Determination, Green Team’s Appeal Form and attached letter, and the record delivered to the Tribunal by the Director pursuant to section 112(5) of the *Act*.

FACTS

7. Green Team operates a janitorial business. At all times material to this appeal the name of the company was Dutch Ethical Maintenance Ltd. The company changed its name to Green Team Eco Clean Ltd. in December, 2009. For ease of reference, I will refer to the appellant as Green Team throughout.
8. The Complainant performed work for Green Team as a janitor from May 5, 2008, until April 13, 2009, at which time Green Team summarily terminated the relationship.
9. The Complainant argued that she was an employee under the *Act*, and that Green Team had failed to pay her wages for work she had performed. She also claimed a week’s compensation for length of service, and holiday pay.
10. Green Team did not participate actively in the Director’s investigation. It failed to respond to a Demand for Employer Records, and to a letter which set out the preliminary findings of the Director.

11. Green Team did, however, deliver a form of contractor agreement to the Director. The agreement is entitled “Independent Sub-Contractor Agreement” (the “Agreement”). The copy of the Agreement contained in the record provided by the Director does not name, or otherwise identify, the Complainant as the “Sub-contractor.” It is not signed by any party. Dutch Ethical Maintenance Ltd., the previous incarnation of Green Team, is named as the “Contractor.” The Complainant acknowledged, however, that she entered into the Agreement with Dutch Ethical/Green Team.
12. The substance of Green Team’s submission to the Director was that the Complainant was an independent contractor, not an employee, and so the Director lacked jurisdiction to consider the complaint. After carefully considering the true nature of the relationship between Green Team and the Complainant, the Director decided otherwise.

ISSUE

13. Is there a basis on which the Determination should be varied or cancelled, or referred back to the Director?

ANALYSIS

14. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:

- 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
 - (a) the director erred in law;
 - (b) the director failed to observe the principles of natural justice in making the determination;
 - (c) evidence has become available that was not available at the time the determination was being made.

15. Section 115(1) of the *Act* should also be noted. It says this:

- 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
 - (a) confirm, vary or cancel the determination under appeal, or
 - (b) refer the matter back to the director.

16. Green Team’s Appeal Form alleges that the Director erred in law and failed to observe the principles of natural justice.
17. A difficulty posed on this appeal is that Green Team has provided no formal submission in support of these assertions. The letter attached to its Appeal Form merely refers the Tribunal to the “original documents” submitted by Green Team in its “defence.”
18. On June 4, 2013, the Tribunal wrote to Green Team advising that it had no documents relating to the matter, but that the Director would forward the section 112(5) record, which would include the material delivered to the Employment Standards Branch by the parties. The letter informed Green Team that it would have an opportunity to review the record for completeness upon receipt. It also reminded Green Team that no submission had been included with its Appeal Form, and that if it wished to deliver a submission it would need to be received by June 18, 2013.

19. In due course the Tribunal received the record from the Director, and forwarded a copy to Green Team, along with a letter dated June 20, 2013. That letter asked Green Team to provide any objections to the completeness of the record by July 5, 2013.
20. No written submission, or objection to the contents of the record, was ever delivered to the Tribunal by Green Team.

Natural Justice

21. A challenge to a determination on the basis that there was a failure to observe the principles of natural justice raises a concern that the procedure followed by the Director was somehow unfair. Two principal components of fairness are that a party must be informed of the case it is required to meet, and offered an opportunity to be heard in reply. A third component is that the decision-maker be impartial.
22. The requirement for fairness is also mandated in section 77 of the *Act*, which reads:

77 If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

23. I see no basis for Green Team's assertion that the Director failed to observe the principles of natural justice. As I have indicated, Green Team has delivered no submission identifying facts and circumstances which might ground such a claim. The record shows that the Director wrote to Green Team on February 25, 2011, advising it of the complaint, and inviting a response. Then, on September 14, 2011, the Director wrote a further letter to Green Team setting out in detail the facts surrounding the complaint, the Director's preliminary view that the complaint was well-founded, and the legal rationale for same. The September 14, 2011, letter also requested a response from Green Team.
24. No response to either of the February 25, 2011, or the September 14, 2011, letters was provided by Green Team. The September 14, 2011, letter specifically warned Green Team that if no response was delivered by September 30, 2011, a determination would issue.

Error of Law

25. Regarding error of law, a review of the material before me suggests that the only possible matter to be considered is whether the Director was correct in deciding that the Complainant was an employee, and not a contractor.
26. In the Reasons for the Determination, the Director refers to the relevant definitions of "employee" and "employer" in the *Act* and states, correctly in my view, that they should be interpreted expansively. This is in accord with the comments of the Supreme Court of Canada to the effect that the *Act* is benefits-conferring legislation. It ought, therefore, to be interpreted in such a manner as to extend its protections to as many employees as possible (see: *Machtinger v. HOJ Industries Ltd.* [1992] 1 S.C.R. 986, and *Rizzolo & Rizzolo Shoes Ltd.* [1998] 1 S.C.R. 27).
27. That being said, the *Act* does contemplate that some persons performing work may be exempted from its protections because they are found to be independent contractors.

28. The leading decision of the Supreme Court of Canada that discusses the variables determining the legal status of a person performing work is *671122 Ontario Ltd. v. Sagaz Industries Canada Ltd.* [2001] 2 S.C.R. 983. There, the court said this, at paragraphs 46-48:

[T]here is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor.... [W]hat must always occur is a search for the total relationship of the parties....

...The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

29. Here, Green Team relies on the wording of the Agreement to ground its argument that the Complainant was an independent contractor. There are aspects of the Agreement which would suggest that such a result was intended. They include the fact that the Agreement was stated to be between a "Contractor" and a "Sub-contractor." There were also clauses stating that:

- the Sub-contractor would have no claim against the Contractor for benefits like vacation pay, which would clearly be payable under the *Act* if the Sub-contractor was an employee;
- remuneration for work would be payable on the tenth day of each month following the submission of monthly invoices, and not at least semi-monthly as required by section 17 of the *Act*;
- both the Contractor and Sub-contractor were "aware of their responsibilities/obligations as independent lawful business operators in the province of British Columbia, Canada."

30. I also note, however, that there are portions of the Agreement which would suggest an employment relationship. For example, the clauses which state that:

- workers' compensation would be "covered" by the Contractor;
- emergency janitorial supplies purchased by the Sub-contractor could be billed to the Contractor, except in certain "extreme" cases;
- the Sub-contractor would represent the Contractor's goodwill "through uniform," by which I infer the Sub-contractor agreed to wear a uniform identifying the Contractor while performing work.

31. I conclude, therefore, that the Agreement was at least ambiguous on the issue of the Complainant's status while working for Green Team.

32. It is important to remember, too, that the total relationship of the parties must be considered in any case involving a determination of the legal status of a person performing work. It is not the law that the terms of

a written agreement will always override a conclusion based on a review of all the factors identified in the *Saga* decision (see: *Walden v. Danger Bay Productions Ltd.* [1994] B.C.J. No. 841).

33. In this case, the Reasons for the Determination refer to, and apply, the correct tests as set out in *Saga*. They enumerate several factual conclusions that clearly point to a determination that the Complainant was an employee.
34. There was, for example, no compelling evidence leading to a conclusion that the Complainant was in business for herself. Her work at Green Team provided her sole source of income over the relevant period. Her income was fixed, based on a set schedule of hours to be worked. The work she performed was closely supervised. There was no chance she could earn a “profit,” or for that matter, suffer a “loss,” based on the manner in which she performed her work.
35. All the equipment and materials necessary for the Complainant to perform her janitorial work were supplied to her by Green Team. She did not supply her own “tools.”
36. Green Team did not retain the Complainant to complete a project within a finite timeframe. The work was generic, and might have continued indefinitely had Green Team not terminated the arrangement.
37. The Complainant’s work was integral to Green Team’s operation. Indeed, without the work provided by the Complainant, and other janitors like her, one expects that Green Team would have been providing little of value to its clients.
38. In the circumstances, and in the absence of any submission from Green Team, I am not persuaded that the Director erred in law in determining that the Complainant was Green Team’s employee.

ORDER

39. Pursuant to section 115(1)(a) of the *Act*, I order that the Determination be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal