

An appeal

- by -

Active Care Youth and Adult Services Ltd.
(“ACY&AS”)

- 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: David B. Stevenson

FILE No.: 2017A/59

DATE OF DECISION: June 7, 2017

DECISION

SUBMISSIONS

Luke G. Bergerman

counsel for Active Care Youth and Adult Services Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Active Care Youth and Adult Services Ltd. (“ACY&AS”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 8, 2017.
2. The Determination found ACY&AS had contravened Part 4, section 40 and Part 8, section 63 of the *Act* in respect of the employment of Michael Donaldson (“Mr. Donaldson”) and ordered ACY&AS to pay Mr. Donaldson wages in the amount of \$4,907.11 and to pay administrative penalties in the amount of \$1,000.00. The total amount of the Determination is \$5,907.11.
3. This appeal indicates it is relying on all of the allowable grounds set out in section 112(1) of the *Act*. ACY&AS seeks to have the Determination varied or cancelled.
4. In correspondence dated April 25, 2017, the Tribunal acknowledged having received the appeal, requested the section 112(5) record (the “record”) from the Director, notified the parties that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and that following such review, all or part of the appeal might be dismissed.
5. The record has been provided to the Tribunal by the Director and a copy has been delivered to legal counsel for ACY&AS. An opportunity has been provided to object to its completeness. There has been no such objection and, accordingly, the Tribunal accepts the record as being complete.
6. I have decided this appeal is appropriate for consideration under section 114 of the *Act*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal and my review of the material that was before the Director when the Determination was being made. Under section 114(1) of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

114 (1) *At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any appeal if the tribunal determines that any of the following apply:*

- (a) *the appeal is not within the jurisdiction of the tribunal;*
- (b) *the appeal was not filed within the applicable time limit;*
- (c) *the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;*
- (d) *the appeal was made in bad faith or filed for an improper purpose or motive;*
- (e) *the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
- (f) *there is no reasonable prospect the appeal will succeed;*
- (g) *the substance of the appeal has been appropriately dealt with in another proceeding;*
- (h) *one or more of the requirements of section 112(2) have not been met.*

7. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and Mr. Donaldson will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal will succeed.

ISSUE

8. The issue here is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *Act*.

THE FACTS

9. ACY&AS operates a business providing staffed residential resources for children, youth and adults with psychological and/or physical issues requiring care that cannot be met in their regular homes. Mr. Donaldson was employed as a youth worker from September 30, 2015, to July 15, 2016, at a rate of \$18.00 an hour for shifts of less than 24 hours in duration and \$280.00 a shift for 24 hour shifts.
10. Mr. Donaldson filed a complaint claiming he was owed overtime wages and length of service compensation.
11. The Director conducted a complaint hearing on December 20, 2016.
12. Prior to the complaint hearing there was cross-disclosure of all documents submitted by the respective parties in support of their positions.
13. In response to the complaint, ACY&AS submitted Mr. Donaldson's employment was exempted from the overtime provisions of the *Act* by application of section 34(q) of the *Employment Standards Regulation* (the "*Regulation*"), alternatively, was exempted completely from the provisions of the *Act* by section 37.15 of the *Regulation* or, in the further alternative, that his overtime entitlement was modified by an averaging agreement. The position of ACY&AS was substantially set out in a three-page submission to the Director from Edward Smeeton, the owner and a director of ACY&AS, delivered to the Director prior to the complaint hearing.
14. The Director found the "averaging agreements" did not conform to the requirements of section 37 of the *Act* and were, consequently, not valid.
15. The Director found ACY&AS had provided no evidence showing Mr. Donaldson's employment fell within section 37.15 of the *Regulation*.
16. The Director found Mr. Donaldson's employment did not fall within the definition of "live-in home support worker" in the *Regulation* because the "youth being supported by Mr. Donaldson [were] not being supported in their own homes but [were] being brought into a staffed residential resource owned and operated by [ACY&AS]".

ARGUMENT

17. ACY&AS does not argue there was any error in the Director finding Mr. Donaldson's employment did not fall within the exemption in section 37.15 of the *Regulation* or that the averaging agreement was not valid. The appeal only goes to challenging the conclusion that Mr. Donaldson's employment did not fall within the definition of "live-in home support worker".

18. ACY&AS submits the Director erred in law in finding Mr. Donaldson was not a live-in home support worker, arguing the definition of live-in home support worker does not include a requirement that the person being supported must be receiving that support “in their own homes”.
19. ACY&AS submits the Director failed to observe principles of natural justice in making the Determination because it was not provided with a copy of Mr. Donaldson’s submission until after the complaint hearing commenced.
20. In the Determination, the Director stated the residential resource into which the persons being supported were brought was “owned and operated” by ACY&AS. ACY&AS argues there was no evidence that ACY&AS owned the residential properties in which the care was being provided.

ANALYSIS

21. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *Act*, which says:

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.*

22. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.
23. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.
24. A party alleging a breach of principles of natural justice must provide some evidence in support of that position: *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
25. The *Act* is remedial and benefits conferring legislation and, as such, must be construed in a broad, generous and purposive manner.
26. Any provisions that adversely impact on employees’ benefit entitlements must be narrowly construed (*Machtiger v. HOJ Industries Ltd.* [1992] 1 S.C.R. 986, *Helping Hands v. Director of Employment Standards*, (1995) 131 D.L.R. (4th) 336 (B.C.C.A) and *Re Rizzo & Rizzo Shoes* [1998] 1 S.C.R. 27). Any doubt arising from statutory construction ought to be resolved in favor of extending the statutory minimum standards to as many employees as possible.
27. If there is any uncertainty in the language it should be interpreted in the manner most consistent with the overall intention of the Statute, which is to provide minimum standards and benefits for employees.
28. I am not persuaded this appeal has any reasonable prospect of succeeding.
29. While the appeal raises natural justice arguments, ACY&AS has provided no objectively acceptable evidence showing it was denied the procedural protections reflected in section 77 of the *Act* and in the natural justice

concerns that typically operate in the context of the complaint process. These concerns have been briefly summarized by the Tribunal in an oft-quoted excerpt from *Imperial Limousine Service Ltd.*, BC EST # D014/05:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the Act, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWT Business World Incorporated*, BC EST #D050/96)

30. The suggestion in the appeal that Mr. Donaldson's submissions were not provided until after the complaint hearing commenced suffers initially from the defect of not being evidence, but it also suffers from two additional deficiencies: first, that the assertion ACY&AS was not provided with Mr. Donaldson's submissions does not equate to not being aware of the case it had to meet; and second, the assertion is not consistent with the statement in the Determination, which is supported in the record, that, "Mr. Donaldson submitted a number of documents prior to the hearing all of which were disclosed to [ACY&AS]" and a November 25, 2016 e-mail to Darlene Gibson, the Program Director for ACY&AS and their only witness at the complaint hearing, indicating all of Mr. Donaldson's documents were being forwarded to ACY&AS by regular mail.
31. I perceive this ground of appeal is simply being used as a vehicle to drive new evidence into the record to fill a perceived evidentiary gap without addressing, and satisfying, the conditions set out in *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. Based on a review of the material submitted by ACY&AS to the Director in late November 2016, ACY&AS was fully aware of the position being advanced by Mr. Donaldson and had formulated its response to it.
32. In any event., ACY&AS has not argued there is evidence which was not provided to the Director during the complaint process which ought to be accepted and considered in this appeal because it meets the conditions for allowing new, or additional evidence under section 112(1)(c) that has been adopted and applied by the Tribunal.
33. To the extent it is relied on, this ground of appeal has not been made out and fails on that basis.
34. ACY&AS argues, at least inferentially, that the Director acted without evidence in stating ACY&AS "owned" the residential properties it operates as part of its business. Even if the Director was wrong on that, ACY&AS has not demonstrated how that error affects the result and justifies cancelling the Determination. Whether ACY&AS owns the properties or only rents them to accommodate the persons placed in their care, as indicated by ACY&AS in their appeal submission, is largely irrelevant to the whether Mr. Donaldson comes within the definition of live-in home support worker. If one accepts the view of the Director that the definition requires the person be supported in their own home, it would be a strained reading of the definition to conclude the residential properties rented by ACY&AS could be deemed to satisfy that requirement.
35. To succeed on the interpretive issue, I must be satisfied that the definition cannot not be read to include a requirement that the support contemplated by that provision be provided in the ill or disabled person's own home. I am unable to do that.
36. In Mark Thompson's 1994 report: *Rights and Responsibilities in a Changing Workplace: A Review of Employment Standards in British Columbia*, which formed the basis for amendments to the *Employment Standards Act* as it then

was and which became the *Act*, there was discussion and recommendations relating to what were then called “Live-in Homemaker” and “Night Companion” – which positions, on recommendation in the report, were changed to be identified as “live-in home support worker” and “night attendant”. The discussion described one of the characteristics of the positions in the following way:

Employees in these categories *work in private residences*, the former [live-in home support worker] on a 24-hour basis and the latter for 12 hours in a situation where the client generally requires some care during the day. (at page 71; emphasis added)

37. In my view, the interpretation of the definition of live-in home support worker made by the Director is one the language can reasonably bear and is consistent with the characteristic of the position described by Prof. Thompson as being one performed “in private residences”. I am not satisfied the definition can be read without recognizing, as the Director did, that it was intended to apply to persons working in a private residence. I also find the rationale of the Director set out in the Determination for adopting the interpretation given to be correct and compelling.
38. While it is not completely necessary for the purpose of deciding this appeal, I disagree with the assertion in the appeal submission that the Employment Standards Branch Fact Sheet for live-in home support workers makes no reference to “home ownership”. Even if the terminology “home ownership” is not used there is a strong inference in the Fact Sheet that the service is one provided in the ill or disabled person’s own home. The relevant part states:
- Live-in home support workers stay at the home of the person they provide support to while they are on shift. While at the residence, there is no charge for room and board.
39. For reasons I have given above, I am unable to accede to the notion that the staffed residential resource operated by ACY&AS should be considered the “home” of the youth being cared for.
40. Based on all of the above, I find this appeal has no reasonable prospect of succeeding. The purposes and objects of the *Act* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1)(f) of the *Act*.

ORDER

41. Pursuant to section 115 of the *Act*, I order the Determination dated March 8, 2017, be confirmed in the amount of \$5,907.11, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal