

An appeal

- by -

Gary Sumner
("Mr. Sumner")

- 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/54

DATE OF DECISION: July 15, 2015

DECISION

SUBMISSIONS

Gary Sumner on his own behalf

OVERVIEW

1. Gary Sumner (“Mr. Sumner”) appeals the March 12, 2015, determination (the “Determination”) of a delegate of the Director of Employment Standards (the “Director”) requiring payment of outstanding wages, interest, and administrative penalties, in the aggregate amount of \$2,789.37. He seeks to set aside findings that he contravened sections 16, 58 and 28 of the *Employment Standards Act* (the “*Act*”) and sections 45.3 and 45.4 of the *Employment Standards Regulation* (the “*Regulation*”).
2. The deadline for filing an appeal of the Determination was 4:30 P.M. on April 20, 2015. Mr. Sumner did not deliver his appeal to the Tribunal until 4:49 on April 20, 2015. At that time, he tendered, by electronic mail, an incomplete copy of the Appeal Form, together with a copy of the Determination and a brief letter requesting an extension of the appeal period.
3. According to the Appeal Form, Mr. Sumner seeks relief from the Determination on the basis that “evidence has become available that was not available at the time the determination was being made”, one of the permitted grounds for appeal under section 112(1)(c) of the *Act*.
4. In subsequent material delivered to the Tribunal, Mr. Sumner makes additional argument that appears in part to be a submission that, in finding that the Complainant was an employee within the meaning of the *Act*, the Director also erred in law – a basis for appeal permitted under section 112(1)(a) of the *Act*.
5. At this stage, I must consider whether or not it is appropriate to summarily dismiss part or all of this appeal according to section 114(1) of the *Act*.
6. In submissions made to the Tribunal on April 30, 2015, Mr. Sumner requested an oral hearing. Having considered that request, I am satisfied that the matters I am to consider can be decided on the basis of the Director’s Record and the additional materials delivered by Mr. Sumner subsequent to the filing of his Appeal Form. For that reason, I decline to exercise my discretion, under section 36 of the *Administrative Tribunals Act*, to conduct an oral hearing.

THE FACTS AND ANALYSIS

7. Mr. Sumner is a sole proprietor, distributing chocolate under two names – “Student First Chocolates” and “Student 1st Enterprises”, and operating out of Vernon, British Columbia.
8. On December 4, 2014, the Employment Standards Branch received a complaint on behalf of JS¹ (the “Complainant”), a twelve year old boy working for Mr. Sumner from September 9, 2014, to October 25, 2014. The complaint alleged that Mr. Sumner had failed to pay minimum wage under section 16 of the *Act*, and vacation pay under section 58 of the *Act*.

¹ JS is a minor child

9. Following an investigation in which the Director received submissions from the Complainant's mother, Mr. Sumner, and a third party witness, the Director determined that the Complainant was an employee within the meaning of the *Act*, and that Mr. Sumner owed the Complainant regular wages in the amount of \$261.50, vacation pay in the amount of \$24.60, and interest calculated according to section 88 of the *Act*.
10. In addition, the Director levied administrative penalties under sections 16, 18 and 28 of the *Act*, for Mr. Sumner's respective failures to pay minimum wage to the Complainant, to pay all wages owing to the Complainant within the time required following the end of his employment, and to keep appropriate payroll records. Further penalties were levied under sections 45.3 and 45.4 of the *Regulation* because, as a child, the Complainant was found to have worked in excess of the maximum permitted time on school days, and to have worked without sufficient adult supervision.
11. Mr. Sumner disputes these findings and levies because, as he says, the Complainant is not an employee under the *Act*. In support of his position, Mr. Sumner wishes to adduce "fresh" evidence on this appeal, namely:
 - (a) eight printed pages, submitted by Mr. Sumner on May 4, 2015; and
 - (b) four digital video files, submitted by Mr. Sumner on May 19, 2015.
12. Neither the Director nor JS has been provided with copies of the latter.
13. I have additionally reviewed and considered the Director's Record, submitted to the Tribunal on May 21, 2015, together with:
 - (a) the Appeal Form, the Determination and correspondence submitted by Mr. Sumner after the close of business on April 20, 2015;
 - (b) electronic mail correspondence submitted by Mr. Sumner on April 30, 2015; and
 - (c) eight pages of written submissions submitted by Mr. Sumner on May 4, 2015.
14. I summarize the "fresh" evidence, as follows:

The Text Messages
15. Mr. Sumner has tendered eight printed pages of screenshots, apparently taken from his mobile telephone, containing excerpts of two text message conversations between Mr. Sumner, the Complainant, and the Complainant's mother.
16. The conversations are dated October 23, 2014, and October 27, 2014, and appear to relate to the incident described by Mr. Sumner to the Delegate and referenced in the last paragraph starting at the bottom of page R6 of the Determination.

Video Evidence
17. Mr. Sumner has also tendered digital video files containing interview of four individuals. I have identified each witness by letter, rather than name:

Witness “S”

This video was made on November 21, 2014. The witness, S, says that he is eighteen years old. His name is not disclosed in the video, and his face is concealed. S appears to be working for or to have previously worked for Mr. Sumner. In response to questions asked by Mr. Sumner, S provides a mixture of hearsay evidence relating to comments purportedly made by a second unidentified individual two days earlier, evidence about Mr. Sumner’s character, and a series of general statements and opinion regarding what children working with Mr. Sumner gain from that relationship. He appears not to have any involvement or dealings with the Complainant.

Witness “J”

This video was made on May 11, 2015. The witness, J, is the parent of two children who were previously involved with Mr. Sumner for a short period in 2014. In the video, J relates to Mr. Sumner what he has been told by his children. Like S, he offers opinion and makes general comment about Mr. Sumner’s character, and the nature and benefit of the “Student First” program, but has no dealings and nothing to add with respect to the Complainant.

Witness “N”

This video was made on May 12, 2015. The witness, N, is a fourteen year old boy claiming to have worked for Mr. Sumner, on and off, for three years. N knew, but did not like and tried to avoid interacting with the Complainant. In addition to offering the same general comment and opinion regarding Mr. Sumner and the “Student First” program, N, when read two quotes purporting to be from the Complainant, blows a raspberry, calls them “bogus”, and denies the truth of what was supposedly said, without offering any specific rebuttal.

Witness “D”

This video was made on May 7, 2015. The witness, D, describes Mr. Sumner as his “franchisee distributor”, although the precise relationship between the two is not explained. D’s age is not disclosed. At times, D suggests that he sells chocolates alongside other children. At other times, it is implied that D is engaged in some sort of managerial role, counting the money of the other children, and giving them direction. The latter role appears to be corroborated by the statement of N. D says that he did interact with the Complainant, but does not agree with the allegations against Mr. Sumner. As with S, N, and D, he opines on the character of Mr. Sumner and the value of the “Student First” program.

18. Section 112(1)(c) of the *Act* does not mean that Mr. Sumner can submit additional evidence simply because he is dissatisfied with the Determination. In *Davies et. al.*, BC EST # D171/03, the Tribunal held that the onus rests with an appellant to meet a strict, four part test before any exercise of discretion to accept and consider fresh evidence:

- (a) the evidence could not, with the exercise of due diligence, have been discovered or presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- (b) the evidence must be relevant to a material issue arising from the complaint;
- (c) the evidence must be credible in the sense that it is reasonably capable of belief; and

- (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

19. In my view, Mr. Sumner has failed to meet the first condition of the *Davies* test:

- (a) The conversations represented in the screenshots occurred between October 23, 2014, and October 27, 2014. That exchange of messages has been in Mr. Sumner's possession since that time, and could have been introduced during the Director's investigation.
- (b) The same can be said of the Witness S video, created in November of last year.
- (c) Although the remaining videos were not created until May 2015, the evidence of each of witnesses J, N and D was clearly available and could have been offered during the investigation, considering that Mr. Sumner knew each of these individuals, had dealings with them during the investigation, felt they could refute the evidence of the Complainant, and was given an opportunity by the Director to offer rebuttal evidence before the Determination was issued.

20. I also find that the video of Witness S fails the second and third condition of the *Davies* test – for the reasons noted in my description above, it is neither reliable, nor credible.

21. Finally, I find that the “fresh” evidence does not have high potential probative value in determining whether or not the Complainant was an employee under the *Act* or otherwise owed wages and, as such, the fourth condition of the *Davies* test is not satisfied:

- (a) the text conversations appear to be incomplete and, frankly, appear to me to support the position of the Complainant;
- (b) the witness videos are vague, and primarily contain hearsay or opinion evidence, none of which is preferable to the evidence already before the Director.

22. For these reasons, I do not agree that the “fresh” evidence now before me should be admitted. Mr. Sumner's appeal under section 112(1)(c) of the *Act* has no reasonable prospect of success.

23. Despite initially limiting his appeal to section 112(1)(c), Mr. Sumner notes his intention, in correspondence delivered to the Tribunal on April 30, 2015, to “make an argument whether [*sic*] children age 12 and up have **choices** with their parent or legal guardian about going into business in the Province of B.C.” (bold in original). In submissions delivered to the Tribunal on May 4, 2015, Mr. Sumner essentially argues that the Director erred in finding Complainant was an employee within the meaning of the *Act*.

24. To the extent that Mr. Sumner seeks to upset the Director's findings of fact, his argument cannot succeed. This appeal is not a trial *de novo*, and it is not open to the Tribunal to substitute its own judgment in place of the Director with respect to the Director's findings of fact, summarized as follows:

- (a) Mr. Sumner is engaged in the business of selling chocolates.
- (b) The Complainant is twelve years old.
- (c) Mr. Sumner provided chocolates for the Complainant to sell.
- (d) Mr. Sumner controlled where, when, and for how long the Complainant could sell.
- (e) Mr. Sumner set the fees payable for the sale, and ultimately the selling price of the chocolates.

(f) Mr. Sumner directed the Complainant with respect to what was to be said to customers.

25. To the extent that Mr. Sumner argues an error of law on the part of the Director, I disagree.

26. To establish an error of law, the Director must have:

- (a) misinterpreted or misapplied the Act or an applicable principle of general law;
- (b) acted without any evidence, or acted on an unreasonable view of the facts;
- (c) adopted a method of assessment that, in principle, is wrong.

(See *Gemex Development Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* [1998] B.C.J. No. 2275 (BCCA))

27. On review of the Determination, I am unable to find that the *Act* has been misinterpreted or misapplied.

28. Clearly, the Director acted based on evidence, and though Mr. Sumner does not agree with it, I am unable to find that the Director's view of the facts is unreasonable. On the contrary, I agree that the facts support a conclusion that the Complainant was directed and controlled by Mr. Sumner to the extent that there existed an employer and employee relationship with the Complainant, notwithstanding a contrary assertion in the document originally signed by the Complainant's mother.

29. It was open to the Director to find that wages were due and owing and that Mr. Sumner had contravened both the *Act* and the *Regulation*. In doing so, the Director has not erred in law.

30. Accordingly, to the extent that Mr. Sumner argues an appeal on the basis of section 112(1)(a) of the *Act*, this too has no reasonable prospect of success.

ORDER

31. This appeal is dismissed, pursuant to section 114(1)(f) of the *Act*. The Director's Determination, issued March 12, 2015, is confirmed pursuant to section 115 of the *Act*.

Rajiv K. Gandhi
Member
Employment Standards Tribunal