Employment Standards TRIBUNAL

An appeal

- by -

Gut R Dun Exteriors Inc.
(the "Appellant")

- 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.: 2016A/26

DATE OF DECISION: April 21, 2016

DECISION

SUBMISSIONS

Darren Dixson on behalf of Gut R Dun Exteriors Inc.

OVERVIEW

1. On January 11, 2016, the Director of Employment Standards (the "Director") issued a determination (the "Determination") according to section 79 of the *Employment Standards Act* (the "*Act*") in which the complainant, Chad Camponi ("Mr. Camponi"), was found to be an employee within the meaning of the *Act* and, as such, entitled to an award of unpaid wages and vacation pay in the aggregate amount of $3,149.60, together with interest calculated according to section 88 of the *Act*.

2. Having found there to be a contravention of section 18 of the *Act*, the Director also levied an administrative penalty against Gut R Dun Exteriors Inc. (the "Appellant"), in the amount of $500.00.

3. In this appeal, the Appellant seeks to vary both the monetary award and the administrative penalty, ostensibly on the basis that the Director has erred in law, a permitted ground for appeal under section 112(1)(a) of the *Act*.

4. Having now had an opportunity to consider the Determination, the Appellant's submissions delivered to the Tribunal on February 18, 2016, and the Director's Record submitted on March 1, 2016, I conclude that this appeal has no reasonable prospect of success.

THE FACTS AND ANALYSIS

5. It is fair to say that the Appellant does not like the Director's finding that Mr. Camponi was, at all material times, the Appellant's employee, at least insofar as the *Act* is concerned, but the Appellant does not, in its submissions, advance any argument that the Director was wrong in reaching that conclusion.

6. Even so, the Appellant says that the Director has twice erred in law by awarding wages in respect of which it says Mr. Camponi was not entitled.

7. Specifically, the Appellant says that:

   (a) if Mr. Camponi was an employee and not an independent contractor, the Director should have used the Appellant's published employee pay rate to calculate wages payable to Mr. Camponi, not the contractor rate; and

   (b) the Director should have deducted from wages payable those payments previously made to Mr. Camponi which the Appellant says were "overcharges".

Employee Wage Rate vs. Subcontractor Wage Rate

8. In its submissions, the Appellant includes a schedule setting out the different pay rates applied to employees and contractors. The contractor rate is higher, according to the Appellant, because a contractor is required pay his, her, or its own expenses. The Appellant says that it would be unfair for Mr. Camponi to receive the contractor rate if he was an employee.

9. Regrettably, the Appellant acknowledges that it did not present evidence concerning differing pay rates to the Director before the Determination was issued.

10. Raised for the first time in this appeal, the argument is not so much one based on an error of law, but an attempt to adduce what, in these proceedings, would be new evidence. Although not a ground for appeal specifically raised in the Appellant's submissions, this is the basis upon which I consider, and ultimately reject, the Appellant's argument.

11. To consider fresh evidence under section 112(1)(c) of the *Act*, the Appellant must satisfy the four-part test best described in *Davies et. al.*, BC EST # D171/03:

> (a) the evidence could not, with the exercise of due diligence, have been discovered and 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;
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> (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.

12. If any one part of the test is not satisfied, the fresh evidence must not be accepted or considered.

13. Evidence relating to the dichotomy of pay rates was clearly presentable to the Director before Determination. The Appellant concedes that it made a conscious decision not to put that evidence before the Director. For that reason, I find that the first part of the *Davies* test has not been satisfied.

14. At this stage of proceedings, any new evidence offered by the Appellant is inadmissible, and any effort to vary the Director's monetary award by applying a pay rate different than what is shown in the invoices presented to the Director before the Determination, cannot succeed.

Overpayments

15. The Appellant also says that the Director was mistaken in refusing to deduct, from wages found to be payable to Mr. Camponi, certain overpayments claimed by the Appellant during the course of the original hearing.

16. An "error of law" exists where:

> (a) a section of the *Act* has been misinterpreted or misapplied;
>
> (b) an applicable principle of general law has been misapplied;
>
> (c) the Director acts in the absence of evidence;

(d) the Director acts on a view of the facts which cannot reasonably be entertained; or

(e) the Director adopts a method of assessment which is wrong in principle

(see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (BCCA) at paragraph 9).

17. The overpayments in question are enumerated in the Director's Record and noted, in a somewhat oblique fashion, in the Determination.

18. Ultimately, and without deciding whether or not the Appellant was correct in characterizing the "overcharges" as such, the Director concluded that a deduction from wages was not appropriate for any reason, in light of section 21(1) of the *Act*, which provides that:

> *21 (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.*

19. I agree with the Director, in part - section 21 of the *Act* clearly prohibits the recovery of an overpayment by the employer, with few exceptions, one of which includes statutory authority. However, I do not agree that the prohibition applies irrespective of whether or not the employee's consent is given, which is what the Director appears to say.

20. The British Columbia Court of Appeal has clearly opined that, while section 21 of the *Act* is meant to discourage an employer from indulging in "aggressive self-help", it applies to unilateral recoveries, not those where there is agreement (*Health Employers Assn. of B.C. v. B.C. Nurses' Union* 2005 BCCA 343, at paragraph 67).

21. That said, there is no evidence in either the Record or the Determination that Mr. Camponi gave consent or entered into any such agreement. For that reason, I cannot fault the Director for refusing to make wages adjustments on account of the alleged "overcharges" or overpayments. Applied to the facts of this case, there has been no error in law as described in *Gemex*.

22. I wish to make a distinction between the prohibition on deducting overpayments from wages, and the right of the employer to seek recovery of those alleged overpayments. Section 21 of the *Act* prevents the former, but it does not preclude the latter. Nothing in the Determination, these reasons, or the *Act*, should be interpreted as stopping the Appellant from bringing a claim for recovery against Mr. Camponi. That is not to say he will succeed, and nothing in the Determination, these reasons, or the *Act*, should be construed as supporting or speaking against recovery. Simply put, the Appellant is free to bring a claim for recovery in the appropriate venue, and to have that claim properly adjudicated. This is not that venue.

Section 88 Interest

23. Having decided that the Director has not erred in law, no adjustment need be made with respect to the Director's monetary award. Interest is to be calculated on the award in the manner required under section 88 of the *Act*. I see no basis to interfere with the Director's reckoning.

Administrative Penalty

24. The facts set out in the Determination make clear that the Appellant did not intentionally fail to pay wages. It proceeded on the basis of a presumed relationship with Mr. Camponi that was substantially different from what was ultimately determined to be the case.

25. However, the administrative penalty provisions in section 98 of the *Act* do not depend on intent. If the Director makes an order under section 79 of the *Act*, it must levy an administrative penalty. Having upheld the Director's determination with respect to the requirement to pay wages, I must also uphold the penalty.

ORDER

26. Pursuant to section 115 of the *Act*, I confirm the Determination issued on January 11, 2016, and I dismiss this appeal pursuant to section 114(1)(f) of the *Act*.

Rajiv K. Gandhi
Member
Employment Standards Tribunal