



An appeal

- by -

634245 B.C. Ltd.

(“634245”)

- 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.: 2014A/81

DATE OF DECISION: August 28, 2014

DECISION

SUBMISSIONS

Christian Saxvik

on behalf of 634245 B.C. Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), 634245 B.C. Ltd. (“634245 BC”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 30, 2014.
2. The Determination found that 634245 BC had contravened Part 3, section 18 of the *Act* in respect of the employment of Nikki Harper (“Ms. Harper”) and ordered 634245 BC to pay wages to Ms. Harper in the amount of \$5,187.73 and to pay an administrative penalty in the amount of \$500.00. The total amount of the Determination is \$5,687.73.
3. 634245 BC has filed an appeal of the Determination on the ground that the Director erred in law in finding Ms. Harper to be an employee under the *Act* or, alternatively, erred in finding Ms. Harper had not been paid for her services and finding there was a wage amount owed to her for those services.
4. On July 9, 2014, the Tribunal acknowledged to the parties that an appeal had been received from 634245 BC, requested production of the section 112(5) “record” from the Director and notified the parties, among other things, that no submissions were being sought from the other parties pending review of the appeal by a Tribunal Member and that following such review all, or part, of the appeal might be dismissed.
5. The section 112(5) “record” was provided by the Director to the Tribunal and a copy was sent to 634245 BC, who has been given the opportunity to object to its completeness. There has been no objection and, accordingly, the Tribunal accepts it as complete.
6. Consistent with the July 9, 2014, notice, I have reviewed the appeal, including the reasons for appeal submitted by 634245 BC, and the section 112(5) “record”.
7. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I am assessing this appeal based solely on the Determination, the appeal and my review of the section 112(5) “record” that was before the Director when the Determination was being made. Under section 114 of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons listed in that subsection, which states:

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 the 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.*

8. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, Ms. Harper will, and the Director may, be invited to file further submissions. On the other hand, if it is found the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

ISSUE

9. The issue to be considered at this stage of the proceedings is whether the appeal should be allowed to proceed or should be dismissed under section 114 of the *Act*.

THE FACTS

10. 634245 BC operates a property management business. Ms. Harper was engaged as a “resident caretaker” for 634245 BC from August 28, 2013, to October 23, 2013. She signed a contract that described the scope of her work as:

Deliver notice, letters, forms, collecting rent money giving receipt and deposit rent money to TD bank
Collecting tenant/resident information updating names, emails and phone numbers. To collect contractors contacting information. Showing contractors the area or work to be performed in RIDGEWOOD ESTATES and other work that may require.

11. The Director found Ms. Harper performed duties that were consistent with the above description. She was to be paid \$20.00 an hour for the work she performed.
12. Ms. Harper tracked the hours she worked, but because of a computer problem, lost the specific record of hours for work done in October and reconstructed them to the best of her ability when she prepared her “bill” for hours worked to 634245 BC and, later, when she filed her complaint with the Director.
13. Ms. Harper submitted “bills” for work done in September and October but was not paid for that work.
14. 634245 BC did not deny Harper had not been paid for the work she did, but said they were waiting for documents to show the work was done and that Ms. Harper was withholding money she had collected as rents but never deposited.
15. 634245 BC argued Harper was an independent contractor, not an employee.
16. The Director heard evidence from both parties at a complaint hearing.
17. The Director considered the definitions of “employee”, “employer” and “work” in the *Act* and several elements of the relationship, including: the degree of control exercised by 634245 BC over Ms. Harper regarding the way in which the work was done; whether Ms. Harper used her own tools, supplies and equipment or those supplied by 634245 BC; whether Ms. Harper had a chance of profit or risk of loss; whether the work was for a single service or of a more general nature; whether the work was integral to the operation of the business of 634245 BC; and whether there was an ongoing relationship.

18. The Director found, on the evidence presented, that Ms. Harper was an employee under the *Act* and was owed wages for the work she performed. The Director found several factors pointing to an employment relationship: that 634245 BC determined the scope of the work and the rate of remuneration for it; that Ms. Harper was required to obtain permission prior to performing any work not included in her contract; that she had no chance for profit or risk of loss; she provided no tools and had no financial investment in the work; she was integral to the operation of the business that was 634245 BC; her position was intended to be ongoing and there was no evidence Ms. Harper understood 634245 BC intended for her to be an independent contractor.
19. The Director also found the record maintained by Ms. Harper of the hours she worked was the “best available record” and were accepted as an accurate reflection of hours worked. The Director refused to consider acting on the allegation that Ms. Harper had not deposited all the rents, concluding that was not a matter within the jurisdiction of the *Act*.

ARGUMENT

20. 634245 BC argues the Director erred by failing to apply the correct common law test to determine the relationship.
21. 634245 BC submits the Director failed to have regard to the evidence that Ms. Harper worked independently, without supervision or control and without anyone overseeing her activities or time. 634245 BC says the contract only outlines broad objectives and ought not to have been used as evidence of control; Ms. Harper was free to perform the services personally or hire other parties and pay the costs of doing so. It is argued these facts indicate Ms. Harper was effectively operating her own business on the premises of the property. 634245 BC asserts Ms. Harper was only required to get approval for work beyond the scope of the contract; she was not required to get approval to perform work that was within the scope of the contract. 634245 BC says Ms. Harper had a chance of profit by proposing projects, additional to the contract, and working on those. 634245 BC disputes the relationship was intended to be ongoing, submitting Ms. Harper was free to take other work, and submits the relationship did not bear the hallmarks of an employer-employee relationship.
22. 634245 BC argues the Director erred by finding Ms. Harper had not been paid wages as she allegedly had retained money she had collected as rents as payment for her services.

ANALYSIS

23. When considering an appeal under section 114 of the *Act*, the Tribunal looks at its relative merits, examining the statutory grounds of appeal chosen and considering those against well established principles which operate in the context of appeals generally and, more particularly, to the specific matters raised in the appeal.
24. 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.*

25. The Tribunal has established that an appeal under the *Act* is intended to be 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 of review identified in section 112. This burden requires the appellant to provide, demonstrate or establish a cogent evidentiary basis for the appeal. An appeal to the Tribunal under section 112 is not intended simply as an opportunity to resubmit the evidence and argument that was before the Director in the complaint process, hoping to have the Tribunal review and re-weigh the issues and reach different conclusions.
26. It is well established that the grounds of appeal listed above do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The Tribunal noted in the *Britco Structures Ltd.* case that the test for establishing an error of law on this basis is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or that they are without any rational foundation. Unless an error of law is shown, the Tribunal must defer to findings of fact made by the Director.
27. In this appeal, 634245 BC alleges the Director erred in law in two respects: first by finding Ms. Harper was an employee under the *Act*; and second, by not finding she had, effectively, been paid any monies owed.
28. In my view, on the question of Ms. Harper's status under the *Act*, 634245 BC has made a fundamental error by either failing to recognize or refusing to acknowledge that the "law" relating to an individual's status under the *Act* is not determined by common law principles, but by an application of the provisions of the *Act*. In that respect, I confirm the following statement from *Project Headstart Marketing Ltd.*, BC EST # D164/98:
- ... I need not even concern myself with the question of the status of the individuals in question under the common law in the face of the statutory definitions contained in section 1 of the *Act*. The *Act* casts a somewhat wider net than does the common law in terms of defining an "employee".
29. 634245 BC has not addressed their challenge to the Director's decision concerning the status of Ms. Harper in the context of the definition of "employee" and "employer" in section 1 of the *Act*, which broadly defines the term "employee" to include, *inter alia*, a person "receiving or entitled to wages for work performed for another" and a person "an employer allows, directly or indirectly, to perform work normally performed by an employee". An "employer" is defined as including a person "who has or had control or direction of an employee", or "who is or was responsible, directly or indirectly, for the employment of an employee".
30. Many decisions of the Tribunal have considered the issue raised here and all have made it clear that the definition of "employee" is to be broadly interpreted and that the common law tests for employment developed by the courts are subordinate to the definitions contained in the *Act*, see, for example, *Kelsey Trigg*, BC EST # D040/03, *Christopher Sin*, BC EST # D015/96, and *Jane Welch operating as Windy Willows Farms*, BC EST # D161/05.
31. The limitations of applying the common law tests have been expressed by the Tribunal in a number of decisions, including *C.A. Boom Engineering (1985) Ltd.*, BC EST #D129/04, where the Tribunal noted:
- The common law tests originated chiefly for the purpose of determining whether an employer could be held vicariously liable for wrongs done by its employee, and not for the purpose of determining whether an employee is entitled to the minimum protections of the *Act*. The inadequacies of the common law tests have been noted by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, and by the Federal Court of Appeal in *Wolf v. Canada*, 2002 F.C.A. 96.

32. That is not to say the common law tests have been ignored entirely. Common law tests are useful by reason of the fact that they delineate the factors which should be examined when considering whether, in the circumstances, an employment relationship has been created. In *Cove Yachts (1979) Ltd.*, BC EST # D421/99, the Tribunal listed a number of factors as being potentially relevant to determining whether a person is an employee or an independent contractor:

- the actual language of the contract
- control by the employer over the “what and how” of the work
- ownership of the means of performing the work (e.g. tools)
- chance of profit/risk of loss
- remuneration of staff
- right to delegate
- discipline/dismissal/hiring
- right to work for more than one “employer”
- perception of the relationship
- integration into the business
- the intension of the parties
- is the work for a specific task or term?

33. Accordingly, while the common law tests remain useful in focusing attention on relevant factors, they must be applied bearing in mind the broad statutory definitions, which must in turn be interpreted in light of the policy objectives of the *Act*. The Supreme Court of Canada made the following statement in *Machtinger v. HOJ Industries Ltd.* (1992), 91 D.L.R. (4th) 491 at 507, concerning Ontario employment standards legislation, that applies equally to the *Act*:

. . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is favoured over one that does not.

34. The following excerpt from *Kimberley Dawn Kopchuk*, BC EST # D049/05 (Reconsideration denied BC EST # RD114/05), succinctly and correctly summarizes the law of the *Act* when considering the issue of whether a person is an employee under the *Act*:

The common law tests of employment status are subordinate to the statutory definitions (*Christopher Sin*, BC EST #D015/96), and have become less helpful as the nature of employment has evolved (*Kelsey Trigg*, BC EST #D040/03). As a result, the overriding test is found in the statutory definitions: that is, whether the complainant “performed work normally performed by an employee” or “performed work for another” (*Web Reflex Internet Inc.*, BC EST #D026/05). Despite the limitations of the common law tests, the factors identified in them may also provide a useful framework for analyzing the issue. In *671122 Ontario Ltd. v. Sagaž Industries Canada Inc.*, [2001] 2 S.C.R. 983, in the context of the issue of vicarious liability, the Supreme Court of Canada rejected the notion that there is a single, conclusive test that can universally be applied to determine whether a person is an employee or an independent contractor. Instead, the Court held, at paras. 47-48:

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 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 own 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.

35. Applying the above, I find the Director did not “generally misapply the general principles of law on this issue”. The Director clearly and correctly explained that determining whether a person is an employee for the purposes of the *Act* is guided by the definitions of “employer” and “employee” found in section 1, that the *Act* is remedial legislation and that the substantive nature of the relationship must be examined. In the context of the provisions in the *Act*, the Director found Ms. Harper was directed and controlled in her work by 634245 BC. The Director recognized the common law tests can be applied to “assist” in the determination of an individual's status. The Determination indicates that several factors evolving from common law tests the Tribunal has identified as being potentially relevant were considered by the Director, including the degree of control over the “what and how” of the work, ownership of the tools, supplies and equipment, the chance of profit, risk of loss, the degree of integration between the parties and the parties' perception of their relationship. The Director approached the issue in the manner required by the *Act* and endorsed by the Tribunal.
36. There is no error of law on the question of Ms. Harper's status under the *Act*. It is apparent from an analysis of the bases for the appeal that it is grounded in nothing more than disagreement with the findings of fact. I make two points on that matter: first, as noted above, the Tribunal has no authority over findings of fact unless they are shown to be errors of law (which in this case they have not) and second, the findings made in the Determination are entirely consistent with the evidence. 634245 BC has attempted to tinker and adjust the effect of the evidence, but has failed to show the conclusions reached by the Director are anything other than reasonable and logical.
37. There is absolutely no merit to this aspect of the appeal.
38. Nor does the other argument raised in the appeal fair better. The response in the Determination by the Director to this argument, that the allegation Ms. Harper had withheld rents was a matter outside the jurisdiction of the *Act*, was in my view, absolutely correct and the bald statement by 634245 BC that the rent monies is within the jurisdiction of the *Act* has failed to persuade me otherwise.
39. In sum, on an assessment of this appeal I am satisfied it has no presumptive merit and has no prospect of succeeding. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.
40. I dismiss the appeal and confirm the Determination.

ORDER

41. Pursuant to section 115 of the *Act*, I order the Determination, dated May 30, 2014, be confirmed in the amount of \$5,687.73, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal