Employment Standards TRIBUNAL

An appeal

- by -

Arion Therapeutic Riding Association
("Arion")

- 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: Carol L. Roberts

FILE No.: 2017A/82

DATE OF DECISION: July 24, 2017

DECISION

SUBMISSIONS

Michelle Warren — on behalf of Arion Therapeutic Riding Association

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Arion Therapeutic Riding Association ("Arion") has filed an appeal of a Determination issued by the Director of Employment Standards (the "Director") on April 24, 2017. In that Determination, the Director found that Arion had contravened sections 45 and 58 of the *Act* in failing to pay Brooke Halldorson statutory holiday and annual vacation pay. The Director ordered Arion to pay $1,028.08 in wages and interest. The Director also imposed two $500 administrative penalties for the contraventions, for a total amount owing of $2,028.08.

2. Arion appeals the Determination contending that the delegate failed to observe the principles of natural justice in making the Determination.

3. Arion's appeal, dated June 1, 2017, was apparently faxed to the Tribunal that day, although there is no record of the Tribunal receiving the appeal. Arion re-submitted the appeal documents on June 15, 2017. As the deadline for filing the appeal was June 1, 2017, Arion also sought an extension of time in which to file the appeal in light of these circumstances.

4. This decision is based on Arion's written submissions, the section 112(5) "record" that was before the delegate at the time the decision was made, and the Reasons for the Determination.

FACTS AND ARGUMENT

5. Arion was a British Columbia registered society that operated a therapeutic farm from January 2009 until it was dissolved in March 2017. The property is now operated by a different legal entity, Arion Therapeutic Farm.

6. Ms. Halldorson began working for Arion as a horse manager on December 30, 2015. She worked part-time until March 1, 2016, after which she worked full time until the end of her employment. On January 4, 2017, Ms. Halldorson gave Arion a "Self-Help Kit" regarding her statutory holiday pay. On January 7, 2017, Ms. Halldorson filed a complaint with the Branch alleging that Arion contravened the *Act* by failing to pay her statutory holiday pay. Ms. Halldorson's last day of work was February 26, 2017.

7. The delegate held a hearing into the complaint on March 17, 2017. Ms. Halldorson appeared on her own behalf and Heather Henderson and Michelle Warren appeared on Arion's behalf.

8. At issue before the delegate was whether or not Ms. Halldorson was a farm worker or a manager as defined in the *Employment Standards Regulation* ("*Regulation*").

9. Also at issue at the hearing was whether or not Ms. Halldorson's employment was terminated because she filed a complaint under the *Act*. The delegate determined that the evidence did not support such a conclusion. As Ms. Halldorson did not appeal this aspect of the Determination, I have not referred to any of the evidence on this issue.

10. Ms. Halldorson took three days off work in December 2016, for which Arion deducted $385 from her pay. These were the only vacation days Ms. Halldorson took during the period of her employment. She also worked each statutory holiday with the exception of Christmas Day 2016.

11. Ms. Halldorson discussed the deduction with Ms. Warren in December, as Ms. Halldorson believed that she was entitled to vacation pay for those days. They had another discussion on January 5, 2017, after Ms. Halldorson gave Arion the completed "Self-Help Kit". Ms. Warren informed Ms. Halldorson that Arion considered her to be a manager and thus not entitled to statutory holiday pay. Ms. Warren believed that the matter had been resolved.

12. Ms. Halldorson's evidence was that she performed no management duties and did not supervise staff. She said that her tasks consisted of feeding and cleaning up after horses, mowing lawns, shoveling snow and cleaning the tack room. She also said that although she also made some decisions regarding the care of horses, those decisions were subject to review, and reversal, by Arion's managers. Ms. Halldorson reported to Ms. Henderson and Ms. Warren, and was in touch with them almost daily regarding her activities. Ms. Halldorson directed the work of volunteers performing work for Arion in the barn, but not with horses. She also provided direction regarding special tasks, such as fence construction, to some volunteers.

13. Arion's witness, Nicole Carrier, testified that she was employed as a riding instructor for 30 hours per week, taking direction from Ms. Halldorson regarding feeding the horses and barn chores. If Ms. Halldorson was unhappy with a job Ms. Carrier had performed, Ms. Halldorson discussed it with her. Ms. Halldorson did not have input into Ms. Carrier's performance reviews. Ms. Carrier testified that although Ms. Halldorson assigned chores to other employees, she did not supervise their work.

14. Another Arion witness, Penny Chapman, testified that she was involved in hiring Ms. Halldorson, and that Ms. Halldorson never questioned the managerial nature of her position. Ms. Chapman testified that she expected Ms. Halldorson to supervise the volunteers, direct their work and raise any concerns she had with their work with the horses. Ms. Chapman observed Ms. Halldorson performing other tasks on the property, including mulching the fields and repairing fences with volunteers.

15. The delegate also reviewed additional documentation provided by the parties including Ms. Halldorson's employment contract, payroll records and performance appraisals, Board meeting minutes, Arion's financial statements, job descriptions and written statements from various parties.

16. The delegate considered whether or not Ms. Halldorson was a "farm worker" as defined in the *Regulation* even though neither party had addressed that issue at the hearing. He concluded that she was not, primarily because Arion was a charity established to operate a therapeutic farm rather than "an agricultural or ranching operation established to breed and raise livestock."

17. The delegate also determined that although Ms. Halldorson's job title included the word "manager" and the fact that she may have been hired for her managerial experience, the test of whether she was a manager under the *Act* was whether or not she carried out managerial duties. The delegate concluded that Ms. Halldorson did not. He noted her unchallenged evidence that the preponderance of her time was spent feeding and cleaning up after horses with much of the rest of her time spent on maintaining Arion's property. The delegate noted that two of Arion's witnesses, Ms. Carrier and Ms. Chapman, confirmed Ms. Halldorson's evidence regarding her duties. Accordingly, the delegate determined that Ms. Halldorson was entitled to statutory holiday pay for the final six months of her employment.

Argument

18. Arion's appeal submission refers to sections of the Determination it asserts is "false". Specifically, Arion contends that Ms. Halldorson's evidence that Ms. Carrier was not under her supervision was false. Arion says that Ms. Carrier was not responsible for fulfilling Ms. Halldorson's duties when Ms. Halldorson was not at work. Arion says that Ms. Carrier did not perform Ms. Halldorson's managerial tasks, as those tasks were left for Ms. Halldorson to complete when she returned. In its appeal document, Arion outlines those managerial tasks as "grain shopping, hay ordering, farrier co-ordination and scheduling and facility maintenance."

19. Arion also cites portions of the Determination which refer to Ms. Halldorson as an employee, reporting to Ms. Warren or Ms. Henderson, and contends that this is an improper characterization of the relationship. It argues that Ms. Halldorson had the autonomy and capability to make decisions on her own, saying that she accomplished her duties without interacting with Ms. Warren or Ms. Henderson. Arion submits that there were only two instances of the Executive Director disagreeing with, and changing, a decision Ms. Halldorson made.

20. Arion argues that Ms. Halldorson was, in fact, a manager.

ANALYSIS

21. Section 114 of the *Act* provides that 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, 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.

22. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- the director erred in law;
- the director failed to observe the principles of natural justice in making the determination;
- evidence has become available that was not available at the time the determination was being made.

23. Acknowledging that the majority of appellants do not have any formal legal training and, in essence, act as their own counsel, the Tribunal has taken a liberal view of the grounds of appeal. As the Tribunal held in *Triple S Transmission*, (BC EST # D141/03), while

> most lawyers generally understand the fundamental principles underlying the "rules of natural justice" or what sort of error amounts to an "error of law", these latter terms are often an

> opaque mystery to someone who is untrained in the law. In my view, the Tribunal must not mechanically adjudicate an appeal based solely on the particular "box" that an appellant has--often without a full, or even any, understanding--simply checked off.
>
> The purposes of the *Act* remain untouched, including the establishment of fair and efficient dispute resolution procedures and, more generally, to ensure that all parties receive "fair treatment" [see subsections 2(b) and (d)]. When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, *prima facie,* invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant's explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

24. Where there is any doubt about the grounds of an appeal, the doubt should be resolved in favour of the appellant. I have therefore considered whether or not Arion has demonstrated any basis for the Tribunal to interfere with the Determination. I conclude that Arion has not met that burden.

Failure to observe the principles of natural justice

25. Arion contends that the Director's decision is unsupported by the facts. As set out below, acting without any evidence or acting on a view of the facts that cannot be reasonably entertained constitutes an error of law. I will address that ground of appeal later in these reasons. Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker. There is nothing in the appeal submission that establishes that Arion was denied natural justice. I find that Arion was fully aware of the case it had to meet and had full opportunity to respond to that case at the hearing before the delegate. I find no merit in this ground of appeal.

Error of Law

26. The Tribunal as adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] BCJ No. 2275 (BCCA):

> 1. a misinterpretation or misapplication of a section of the *Act* [in *Gemex*, the legislation was the *Assessment Act*];
> 2. a misapplication of an applicable principle of general law;
> 3. acting without any evidence;
> 4. acting on a view of the facts which could not reasonably be entertained; and
> 5. adopting a method of assessment which is wrong in principle.

27. As I understand Arion's submission, the delegate erred in concluding that Ms. Halldorson was not a manager. I also understand Arion to say that the delegate either misapprehended the evidence or improperly found Ms. Halldorson's evidence to be credible.

28. The *Regulation* defines "manager" as:

> *(a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or*
>
> *(b) a person employed in an executive capacity.*

29. In *Re Amelia Street Bistro*, (BC EST # D108/98, Reconsideration denied BC EST # D474/99) the Tribunal considered the definition of manager. Although the definition of manager has changed somewhat since that decision was issued, the analysis remains the same (see *Howe Holdings Ltd.*, BC EST # D131/04).

30. If the employee's duties do not primarily consist of supervising and directing other employees and the employee is not employed in an executive capacity (actively participating in the control, supervision and management of the business (see *Howe Holdings* (*supra*)), then the individual is not a manager. (see also *Whitehall*, BC EST # D026/10)

31. As the Tribunal has stated on many occasions, it is irrelevant to the conclusion that the person is described by the employer as a "manager," as that would be putting form over substance:

> Typically, a manager has a power of independent action, autonomy and discretion; he or she has the authority to make final decisions, not simply recommendations, relating to supervising and directing employees or to the conduct of the business. Making final judgments about such matters as hiring, firing, disciplining, authorizing overtime, time off or leaves of absence, calling employees in to work or laying them off, altering work processes, establishing or altering work schedules and training employees is typical of the responsibility and discretion accorded a manager. We do not say that the employee must have a responsibility and discretion about all of these matters. It is a question of degree, keeping in mind the object is to reach a conclusion about whether the employee has and is exercising a power and authority typical of a manager. It is not sufficient simply to say a person has that authority. It must be shown to have been exercised by that person. (*Director of Employment Standards (re Amelia Street Bistro)*, *BC EST # D479/97*)

32. Furthermore, as the Tribunal has noted on many occasions (see particularly *Frontier-Kemper Constructors ULC* (BC EST # D078/12), benefits-conferring legislation is to be interpreted in such a way that exclusions from statutory protections are narrowly construed. As remedial legislation, the *Act* is to be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects. (see, for example, *On Line Film Services Ltd*, BC EST # D319/97, and *Helping Hands v. Director of Employment Standards*, (1995) 131 D.L.R. (4th)336 (B.C.C.A.))

33. Having reviewed the record, I find that the evidence supported the delegate's factual conclusions. In other words, there was evidence upon which the delegate could rely in concluding that Ms. Halldorson's principal employment responsibilities did not consist of supervising or directing human or other resources. I note, in particular, Ms. Halldorson's oral evidence about her daily activities was consistent with the duties outlined in her job description. Those tasks were primarily concerned with the welfare of horses, including planning, managing and administering a feeding regime, scheduling vet appointments, regular cleaning of paddocks and arena and grooming. Furthermore, Arion's own witnesses corroborated much of Ms. Halldorson's evidence about her normal daily duties, which were caring for horses and cleaning the barn.

34. While the evidence also indicated that Ms. Halldorson supervised some of the volunteers, there was no evidence that supervising employees was Ms. Halldorson's principal employment responsibility. Not only were those volunteers only part-time employees, they also reported to a number of other individuals at Arion. Although Arion asserts that Ms. Halldorson performed managerial tasks such as "grain shopping, hay

ordering, farrier co-ordination and scheduling and facility maintenance," those employment responsibilities do not meet the definition of a manager's responsibilities.

35. There is no evidence Ms. Halldorson had any authority over the hiring, firing or discipline of any other Arion employee, or that she had any input into Arion's business operations.

36. I find no error in the delegate's conclusion that Ms. Halldorson was not a manager.

37. The appeal is dismissed. Pursuant to section 114(1) of the *Act*, I deny the appeal.

ORDER

38. Pursuant to section 115 of the *Act*, I Order that the Determination, dated April 24, 2017, be confirmed in the amount of $2,028.08 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal