Employment Standards TRIBUNAL

An appeal

- by -

Yvonne Lebedoff
("Ms. Lebedoff")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2015A/84

DATE OF DECISION: August 12, 2015

DECISION

SUBMISSIONS

Yvonne Lebedoff — on her own behalf

OVERVIEW

1. This case is a cautionary tale concerning a friendship that eventually came to be an employment relationship and that ultimately ended in acrimony and legal proceedings. Perhaps because the principals to this dispute were friends, the normal incidents associated with a formal employment relationship – such as a clear agreement and proper recordkeeping – was totally absent and this, in turn, left the initial adjudicator of this dispute in the unenviable position of having to make findings, at least to a degree, in an evidentiary vacuum.

2. I have before me an appeal filed by Ms. Yvonne Lebedoff ("Ms. Lebedoff") and I am adjudicating it, at this juncture, based solely on the submissions filed by Ms. Lebedoff. I have also reviewed the material that was before the original decision-maker, a delegate of the Director of Employment Standards (the "delegate").

3. The discrete issue raised by this appeal is whether it should be summarily dismissed under one or more of the provisions of subsection 114(1) of the *Employment Standards Act* (the "*Act*"). In my view, this appeal must be summarily dismissed. My reasons for so finding now follow.

FACTUAL BACKGROUND

4. Erlinda Abas Briones ("Ms. Briones") operates out of her residence, and as a sole proprietor under the business name "Aaliyah's Home Care", an adult care services business. Ms. Briones typically has three or fewer elderly and vulnerable adults living in her home and she assists them with daily living activities such as providing meals, helping them get dressed in the morning and undressed in the evening, administering medications and taking them to medical or other appointments. Ms. Briones and the present appellant and original complainant, Ms. Lebedoff, formerly worked together for the Interior Health Authority. In spring of 2014, Ms. Briones engaged Ms. Lebedoff to work for her and, particularly, to assist with one particular care resident. Ms. Lebedoff's employment spanned the period from April 1 to July 20, 2014, and during this time period she was paid $750 in cash for her services.

5. On September 4, 2014, Ms. Lebedoff filed an unpaid wage complaint under section 74 of the *Act* seeking a further $1,500 in wages. She claimed to have worked 110 days, working from 10 to 12 hours each day. Ms. Lebedoff's complaint was the subject of a complaint hearing on February 5, 2015, before the delegate – the hearing was conducted by teleconference. On May 15, 2015, the delegate issued the Determination now under appeal, and her accompanying "Reasons for the Determination" (the "delegate's reasons"), in favour of Ms. Lebedoff.

6. The delegate did not find Ms. Lebedoff to be a particularly credible witness (although, at the same time, the delegate did not find that Ms. Lebedoff was being deliberately untruthful). There was no dispute that "Ms. Lebedoff stayed at Ms. Briones's home, did not pay rent, and was provided free meals" (delegate's reasons, page R2). However, she ultimately concluded that Ms. Lebedoff was entitled to additional compensation under the *Act* (delegate's reasons, page R8):

> Since I accepted Ms. Briones's evidence that Ms. Lebedoff worked on average one and a half to two hours a day and the minimum daily hours for which she must be paid is two hours [note: see section 34 of the *Act*], I will use the minimum daily hours for calculating Ms. Lebedoff's hours on the days that she worked.

7. The delegate determined that Ms. Lebedoff worked more than two hours on several days (pages R8 – R9) and that she did not work at all on a few other days. The delegate, in the absence of any agreement regarding Ms. Lebedoff's wage rate, utilized the minimum wage fixed by regulation resulting in a total unpaid regular wage award of $1,494.75 (after accounting for $750 already paid). The delegate also found that Ms. Lebedoff was entitled to statutory holiday pay for two holidays she worked ($135.83; see section 45 of the *Act*) as well as 4% vacation pay ($95.22; see section 58 of the *Act*) and interest ($42.23; see section 88 of the *Act*) for a total award of $1,768.03.

8. In addition, the delegate levied three separate $500 monetary penalties against Ms. Briones based on her contraventions of sections 17 (regular payment of wages), 18 (payment of wages on termination of employment) and 28 (maintenance of payroll records) of the *Act* thus bringing the total amount of the Determination to $3,268.03.

9. At the bottom of the second page of the Determination is a text box headed "Appeal Information" that includes a notice that an appeal of the Determination must be filed with the Tribunal by no later than 4:30 PM on June 22, 2015. Presumably, this deadline was calculated in accordance with the "deemed service" provisions contained in section 122 of the *Act*.

10. On June 18, 2015, Ms. Lebedoff filed an Appeal Form to which was attached the Determination and the delegate's reasons as well as three other documents to which I will refer in greater detail, below. There are several problems with Ms. Lebedoff's appeal documents. Section 2 of the Appeal Form directs the appellant to identify their lawyer or agent, if applicable – Ms. Lebedoff wrote in this section of the form: "Seeking Lawyer!". Section 3 of the Appeal Form provides three separate boxes that may be checked to identify which of the three statutory grounds are being raised in the appeal – Ms. Lebedoff did not check any of the three boxes. Section 4 of the Appeal Form directs the appellant to provide "your reasons and argument for appeal on a separate sheet of paper" and to attach supporting documents. The only "reasons" provided by Ms. Lebedoff are as follows (contained in a fax "cover sheet" to which was attached her Appeal Form):

> Seeking lawyer to work on my behalf. Documents are needed to prove I worked for Aaliyah's Care Home re: Erlinda Abas Briones. Only lawyer can get documents. Asking extention time. [*sic*] May have to get lawyer from Kelowna, BC. No lawyer from Vernon, BC. I tried. Forwarding 3 statements"

11. Clearly, the above statement does not, even giving it the most generous interpretation (see *Triple S Transmission Inc.*, BC EST # D141/03), set out a proper ground of appeal. In section 5 of the Appeal Form, Ms. Lebedoff checked the box indicating that she wished the Tribunal to "change or vary" the Determination and she added a handwritten note: "The amount of finances alotted [*sic*] myself". I presume from the foregoing that Ms. Lebedoff's appeal is predicated on the assertion that the delegate erred in law in finding that Ms. Lebedoff did not work considerably more hours than were credited to her by way of the Determination. Finally, in section 6 of the Appeal Form, Ms. Lebedoff asks for an extension of the appeal period and, presumably, this extension request is based on the fact that she wishes to retain legal counsel to pursue the appeal on her behalf. Although the Appeal Form was submitted to the Tribunal within the statutory appeal period, an appeal is not complete (or "perfected") unless and until all of the requirements of section 112 of the *Act* have been satisfied including a statement setting out the reasons for appeal (see also Rule 18 of the Tribunal's *Rules of Practice and Procedure*).

FINDINGS AND ANALYSIS

12. As noted above, Ms. Lebedoff appended several documents to her Appeal Form: the Determination, the delegate's reasons, and three "witness statements". The first statement is a 1-sentence handwritten note, dated November 19, 2014, from an individual who says he knows that Ms. Lebedoff "worked across the street for Linda". The second is an undated typed 1-page letter from another individual also confirming that Ms. Lebedoff worked for Ms. Briones. The third document is a 1-paragraph typed letter, dated December 8, 2014, that is a hearsay statement (based on statements made by Ms. Lebedoff to the author of the document) also purporting to confirm Ms. Lebedoff's employment by Ms. Briones – this letter states: "I have no knowledge of the terms of an employment contract between Yvonne and Linda". Each of these documents was before the delegate and the documents were marked, respectively, as Exhibits 5, 4 and 2. None of these latter statements has, in my view, any probative value. There is no dispute that Ms. Lebedoff worked for Ms. Briones during the time period in question – the central dispute concerns how many hours she actually worked. None of these documents speaks to this issue. The delegate dealt with these statements at page R7 of her reasons (first paragraph following the heading "Findings and Analysis") and, quite correctly in my view, dismissed them as having no evidentiary value.

13. I now turn to the timeliness of the appeal. If this appeal is a late appeal (because it was not perfected within the statutory appeal period), the Tribunal can extend the appeal period under subsection 109(1)(b) of the *Act*. Ms. Lebedoff has applied for an extension of the appeal period. However, before the appeal period can be extended, the applicant must demonstrate the following:

- there is a reasonable and credible explanation for failing to file a timely appeal;
- there has been an ongoing *bona fide* intention to appeal;
- the respondent parties have been aware of the fact that the applicant has had an ongoing intention to appeal;
- no party will be unduly prejudiced if the appeal period were to be extended; and
- the appeal is, on its face, presumptively meritorious.

(see, for example, *Niemisto*, BC EST # D099/96; *Rathbone*, BC EST # D100/96)

14. The explanation offered in support of the application to extend the appeal period appears to be a desire to retain legal counsel because "only lawyer can get documents" [*sic*]. Ms. Lebedoff has not identified the documents that she seeks with any particularity and, for my part, I cannot conceive of any relevant documents that the appellant herself would not be able to obtain. More fundamentally, this proceeding is an appeal, not a trial *de novo* (*i.e.*, it is not a new evidentiary hearing). All of the relevant documents have already been disclosed as part of the subsection 112(5) record that was delivered to the Tribunal by the delegate and subsequently provided to Ms. Lebedoff (who was given an opportunity to comment on its completeness). If Ms. Lebedoff wishes to file new documents as part of her appeal, those documents would have to meet the criteria established in *Davies et al.* (BC EST # D171/03) in order to be admissible, namely:

(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;

(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.

15. Since Ms. Lebedoff has not identified any "new evidence" in her appeal materials, I am unable to pass any judgment on that particular ground of appeal if, indeed, that is a basis for her appeal. That said, I do not consider her request to extend the appeal period so that a lawyer might obtain some, as yet unidentified, documents – the admissibility of which might well be highly problematic – to constitute a sufficient justification for extending the appeal period.

16. Further, I note that Ms. Lebedoff has stated that she has been unable to retain a local lawyer in Vernon (near where she resides) and thus "may have to get lawyer from Kelowna". While Ms. Lebedoff has not explained why she was unable to retain a Vernon lawyer to represent her in this matter, one can envision two explanations, neither of which is a particularly compelling reason to extend the appeal period. First, it may be that the expense of retaining legal counsel, versus the potential dollar amounts at stake, simply make legal representation a highly cost-ineffective option. If that is the situation, I cannot imagine that she will have any greater success in retaining a lawyer from Kelowna. Second, the lawyers she did consult may have advised her that the appeal is simply not worth pursuing as a successful outcome is doubtful. As will be seen, that is my view of the matter. Again, I rather doubt that a lawyer's presumptive view of the merits of the appeal will vary depending on the location of the lawyer's office. It should be noted that the Tribunal will not extend the appeal period where there is little presumptive merit to the appeal.

17. On June 25, 2015, and in response to having received Ms. Lebedoff's appeal materials, the Tribunal's Appeals Manager wrote to Ms. Lebedoff requesting her to file further "written reasons and argument" in support of her application to extend the appeal period by no later than July 10, 2015. By way of response, on July 10, 2015, Ms. Lebedoff submitted to the Tribunal 83 pages of various documents (mostly, copies of a daily calendar as well as some handwritten notes relating to some of the persons who were, I gather, residents at Ms. Briones' home). It would appear that most, but not all, of these documents are contained in the section 112(5) record and, with respect to the documents that are not part of the record, their admissibility would appear to be highly doubtful in light of the *Davies et al., supra,* criteria noted above. There is nothing in these 83 pages that speaks to the issue of whether the appeal period should be extended.

18. Accordingly, and in light of the foregoing considerations, assuming it is appropriate to characterize this appeal as having been filed after the statutory appeal period expired, I am not persuaded that the appeal period should be extended.

19. Quite apart from the fact that this is arguably a late appeal, even if one were to accept that it was filed within the statutory appeal period, in my view, it has absolutely no prospect of succeeding. As I noted above, and taking an exceedingly generous view of Ms. Lebedoff's submissions, it would appear that she is arguing that the delegate erred in law in finding that Ms. Lebedoff did not work all of the hours she claimed to have worked. An error in making a factual finding can constitute an error of law where there is no evidentiary foundation for the impugned finding (in effect, the finding of fact is "perverse" since there was no evidence before the decision-maker that is capable of supporting the disputed "fact" – the Supreme Court of Canada described this sort of fact-finding error as a "palpable and overriding error" in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235).

20. In this regard, it may be helpful to recall that Ms. Lebedoff's testimony before the delegate – at least initially – was that "she worked 10 to 12 hours per day, seven days per week" (delegate's reasons, page R3). However, she also admitted that she suffered from "memory loss" and "acknowledged [that] her memory loss could

affect her evidence" (delegate's reasons, page R3). Later on in her evidence, Ms. Lebedoff conceded her initial estimate of her working hours was inflated (see delegate's reasons, page R7). The delegate concluded it was highly doubtful, given the nature of her duties, that Ms. Lebedoff would have worked anywhere near 10 to 12 hours per day (page R8). Indeed, although the delegate awarded Ms. Lebedoff unpaid wages based on a 2-hour daily minimum (section 34 of the *Act*), the delegate found that she likely only worked between 1.5 and 2 hours each day (save for a few exceptions).

21. Ms. Lebedoff's appeal is further compromised because, even if she is alleging a fact-finding error on the delegate's part, there is nothing in her materials that indicate how or why the delegate erred. In short, the "reason" for appeal on this score is nothing more than a (rather opaque) statement of disagreement with the result.

22. Ms. Lebedoff has not predicated her appeal on the ground that she has new and relevant evidence that was not available when the Determination was being made (subsection 112(1)(c)) of the *Act*). However, as I noted above, she did file some 83 pages of further documents with the Tribunal, some of which were not contained in the section 112(5) record. None of these "new" documents, so far as I can determine, has any relevance to the central issue raised by this appeal – How many hours did Ms. Lebedoff devote to her work duties and did the delegate make a fact-finding error in this regard? – and would, in any event, appear to be plainly inadmissible in light of the factors identified in *Davies et al, supra.* Thus, if Ms. Lebedoff's appeal was intended to raise a "new evidence" ground of appeal, I consider that ground, in light of the record before me, to be wholly unmeritorious.

23. I am of the view that this appeal has no reasonable prospect of succeeding and therefore must be summarily dismissed.

ORDER

24. Pursuant to subsections 114(1)(b), (f) and (h) of the *Act*, this appeal is dismissed. Pursuant to subsection 115(1)(a) of the *Act*, the Determination is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal