

An appeal

- by -

Janice Castanelli carrying on business as Classy Canine Grooming
(“CCG”)

- 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.: 2015A/82

DATE OF DECISION: August 12, 2015

DECISION

SUBMISSIONS

Daniel Sorensen

counsel for Janice Castanelli carrying on business as Classy Canine Grooming

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Janice Castanelli (“Ms. Castanelli”) carrying on business as Classy Canine Grooming (“CCG”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on May 7, 2015. In that Determination, the Director found that CCG had contravened sections 17, 18, 21, 40, 45 and 58 of the *Act* in failing to pay Susan E. Miller-Beauchamp (“Ms. Miller-Beauchamp”) \$6,256.62, representing regular and overtime wages, annual vacation pay, statutory holiday pay, employer business costs and interest. The Director also imposed three administrative penalties in the total amount of \$1,500 for the contraventions, for a total amount owing of \$7,756.62.
2. CCG appeals the Determination contending that the delegate erred in law in finding Ms. Miller-Beauchamp to be an employee, and failed to observe principles of natural justice in making the Determination.
3. This decision is based on the submissions of Ms. Castanelli, the section 112(5) “record” that was before the delegate at the time the decision was made and the Reasons for the Determination.
4. Ms. Castanelli raised a preliminary issue about the completeness of the record. Specifically, she was concerned about potential missing documents or emails. The Director’s delegate indicated that the documents he received prior to the hearing were disclosed to the parties before the hearing. He says that the record is complete and that there are no additional emails or documents. Having reviewed the record and in the absence of any persuasive evidence that there are missing documents, I am persuaded that the record is complete.

FACTS AND ARGUMENT

5. Ms. Castanelli operates a canine grooming service in Vernon. Ms. Miller-Beauchamp filed a complaint alleging that she was employed at CCG and that Ms. Castanelli contravened the *Act* by failing to pay her wages, charging a fee for employment training, and withholding hair clippers without refunding the cost paid by Ms. Miller-Beauchamp.
6. Ms. Castanelli contended that Ms. Miller-Beauchamp was not an employee, but a student who received training in grooming canines.
7. The delegate held a hearing to determine whether Ms. Castanelli and Ms. Miller-Beauchamp were in an employment relationship, and if so, what wages Ms. Miller-Beauchamp was entitled to.
8. The evidence and conclusions relevant to the relationship between the parties was as follows.
9. Ms. Miller-Beauchamp resides in Fort McMurray, Alberta, and required training to become a canine groomer. Ms. Castanelli has 43 years of experience as a professional canine groomer and taught canine grooming for

several years at a college. Ms. Castanelli offered to educate and certify Ms. Miller-Beauchamp at her shop, which was predominantly a grooming service, in exchange for a tuition fee. According to Ms. Castanelli, anyone can offer canine grooming certificates and that the certificate she offered would not be recognized by a professional body, trade school or post-secondary school.

10. Ms. Miller-Beauchamp agreed to be trained by Ms. Castanelli with the understanding that the relationship would be that of teacher-student. The parties agreed that Ms. Miller-Beauchamp would volunteer at CCG for two weeks to ensure she enjoyed the work before deciding whether or not to continue with the training.
11. Ms. Miller-Beauchamp attended CCG daily from May 1, 2014, until about May 15, 2014. During that period, she was responsible for bathing and brushing canines under Ms. Castanelli's supervision, and observed Ms. Castanelli groom canines.
12. During the trial period, Ms. Miller-Beauchamp advised Ms. Castanelli she had decided to proceed with the training program and commenced her training on May 22, 2014. Tuition was \$10,000, divided into payments of \$1,500 per month. The tuition included the cost of supplies except scissors and clippers, which Ms. Miller-Beauchamp purchased. Ms. Miller-Beauchamp paid \$1,500 for each of the months of May and June. Ms. Castanelli said that the purpose of the tuition fee was to offset the reduced revenue associated with training.
13. According to Ms. Castanelli, the training included learning how to bathe, dry and brush canines as well as how to keep a tidy and clean workspace and observe interactions with customers. The training then progressed to receiving instruction on how to groom canines. Through the month of May, Ms. Miller-Beauchamp prepared canines for Ms. Castanelli to groom. Ms. Castanelli supervised and instructed Ms. Miller-Beauchamp in these tasks. Ms. Miller-Beauchamp continued to perform these tasks in June, but said the training was limited because Ms. Castanelli was busy serving customers.
14. Ms. Castanelli provided no course outline, textbooks or instructional videos. Ms. Miller-Beauchamp purchased her own books to study independently. When Ms. Miller-Beauchamp requested an education contract for the purpose of income tax, Ms. Castanelli told her it was unnecessary because the government would not recognize the training program. There was also no definite course term. Ms. Castanelli suggested that the training would continue into September and she would monitor Ms. Miller-Beauchamp's progress at that time.
15. In July, Ms. Miller-Beauchamp groomed three or four canines and Ms. Castanelli paid her \$60 cash on one occasion. She also bathed, dried and brushed five to seven canines each day, and swept the shop, folded towels, filled shampoo containers and answered the telephone. Ms. Miller-Beauchamp asserted that she completed client bookings and on a few occasions, collected fees from customers, an assertion Ms. Castanelli denied. Ms. Castanelli also contended that Ms. Miller-Beauchamp groomed three or four canines on a volunteer basis.
16. At the end of July, Ms. Miller-Beauchamp required time off for some dental work. Although Ms. Castanelli was initially agreeable, she later left Ms. Miller-Beauchamp a voice mail telling her that the training program had been terminated. According to Ms. Castanelli, Ms. Miller-Beauchamp's absence demonstrated a lack of commitment, and that lack of commitment resulted in her terminating the training program.
17. At the hearing before the delegate, Ms. Miller-Beauchamp argued that she was an employee while Ms. Castanelli argued that Ms. Miller-Beauchamp was not. Ms. Castanelli said that there was no employment

contract, discussion of a wage rate or consideration of future employment. She also contended that she would never hire anyone without any experience.

18. The delegate found that although the parties agreed to a student-teacher relationship, such an agreement did not prohibit a finding there was an actual employment relationship under section 4 of the *Act*.
19. The delegate considered the definitions of employee, employer and work contained in section 1 of the *Act*, noting that the definition of employee included a person being trained by an employer and that the *Act* was to be interpreted liberally.
20. The delegate noted that Ms. Castanelli's training program was not recognized or accredited by any professional body, trade school or post-secondary school, and had no prescribed texts, seminars or tests. He concluded :

... I am given no reason to believe that Ms. Castanelli's trial period and training program is anything but on-the-job-training which contributed to the specific purpose of Ms. Castanelli's business. Ms. Castanelli provides a number of amenities for canines, including bathing, drying, brushing and grooming. She also offers care for ears, nails, paws and skin conditions. Ms. Castanelli trained Ms. Miller to perform these services and, subsequently, Ms. Miller performed at least some of those services for Ms. Castanelli's clients.

Ms. Miller also contributed to the business by way of sweeping the shop, folding towels, filling shampoo containers and answering the telephone. These actions are in harmony with an employment relationship as Ms. Miller was performing work for Ms. Castanelli.

21. The delegate concluded that Ms. Castanelli and Ms. Miller-Beauchamp's relationship was that of employer and employee.

Argument

22. Ms. Castanelli's counsel submitted an appeal of the Determination on June 15, 2015. On July 22, 2015, Counsel sent the Tribunal an amended submission. The July 22, 2015, submission contains assertions of fact that were not contained in the Determination (paragraphs 15 - 18). As it appears that these asserted facts were never presented to the delegate at the hearing, I have not considered them.
23. Counsel for Ms. Castanelli contends that the Director erred in finding that the Director had jurisdiction to hear and determine the matter, and in particular, in concluding that there was an employment relationship between the parties.
24. Counsel contends that it is clear that the relationship was that of student and teacher and the fact that Ms. Castanelli did not offer seminars, textbooks, videos, tests or accreditation does not change that relationship. Counsel notes that canine grooming is different from other fields of study and is best learned by working directly with canines, alongside someone like Ms. Castanelli who has many years' experience.
25. Counsel refers to the Tribunal's decision in *North Delta Real Hot Yoga Ltd.* (BC EST # D026/12) in arguing that factors applied in that case to assess whether an individual is an employee or an independent contractor can be considered when determining whether an individual is a student or employee.
26. Counsel further submits that even if Ms. Miller-Beauchamp was an employee, there is no evidence Ms. Castanelli was training her for the benefit of her own business.

27. Counsel argues that the delegate's conclusion is unsupported by the facts, and in that regard, is unreasonable and procedurally unfair.
28. Finally, Counsel relies on *Fenton v. Forensic Psychiatric Services Commission*, (BCCA, 1991 Canlii 610) in support of his argument that because Ms. Castanelli received no economic benefit from Ms. Miller-Beauchamp, there was no employment relationship.

ANALYSIS

29. Section 114(1) 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 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.
30. Section 112(1) of the *Act* provides that a person may appeal a determination on 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.
31. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I conclude that Ms. Castanelli has not met that burden and dismiss the appeal.

Failure to observe the principles of natural justice

32. Ms. Castanelli contends that the Director's decision is unsupported by the facts and, as such is procedurally unfair. 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 Ms. Castanelli was denied natural justice.

Error of law

33. 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] B.C.J. No. 2275 (B.C.C.A.):
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.
34. The delegate considered Ms. Castanelli’s arguments and determined that Ms. Miller-Beauchamp fell within the definition of an employee in the *Act*. I am not persuaded the delegate made any error in arriving at this conclusion.
35. In *North Delta Real Hot Yoga Ltd., supra*, the Tribunal noted that the definition of employee is to be broadly interpreted and that the common law tests used to determine whether or not an individual is an employee are subordinate to the definitions contained in the *Act*. The Director’s delegate considered the definition of “employer” and “employee” in the *Act* and the remedial nature of the *Act* in arriving at his conclusion.
36. There is no dispute that Ms. Castanelli allowed Ms. Miller-Beauchamp to perform work normally performed by an employee, including bathing, drying and brushing canines, answering telephones, sweeping floors, filling shampoo bottles and sorting towels. Although there appears to have been two discrete periods, a “volunteer” period and a “training” period, there does not appear to have been any significant difference in the tasks Ms. Miller-Beauchamp performed during these periods. There is no dispute that Ms. Castanelli directed Ms. Miller-Beauchamp’s activities and although Ms. Miller-Beauchamp had no expectation of work at the end of the indefinite training period, in my view, the work she performed was to CCG’s benefit.
37. I find no misapplication of the general principles of law.
38. In my view, the Court of Appeal’s decision *Fenton* is of little assistance to Ms. Castanelli. It is not only dated but, as noted in *North Delta Real Hot Yoga Ltd. supra*, the common law tests of employment are subordinate to the definitions of employee and employer contained in the *Act*.
39. The appeal is dismissed.

ORDER

40. Pursuant to section 115 of the *Act*, I Order that the Determination, dated May 7, 2015, be confirmed in the amount of \$7,756.62 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