

An appeal

- by -

Hampton Park Bilingual Montessori Inc.
(“Hampton”)

- 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.: 2014A/99

DATE OF DECISION: September 26, 2014

DECISION

SUBMISSIONS

Leila Celani

on behalf of Hampton Park Bilingual Montessori Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Hampton Park Bilingual Montessori Inc. (“Hampton”), has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on June 25, 2014. In that Determination, the Director found that Hampton had contravened sections 18, 40, 45 and 58 of the *Act* in failing to pay its former employee, Jiho Katherine Uhm (“Ms. Uhm”), \$17,267.40 in wages and interest. The Director also imposed two administrative penalties in the total amount of \$1,000 for Hampton’s contravention of sections 17 and 18 of the *Act*, for a total amount payable of \$18,267.40.
2. Hampton appeals the Determination contending that the delegate failed to observe the principles of natural justice in making the Determination and asks that the Determination be cancelled.
3. These reasons are based on Hampton’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. If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, Ms. Uhm will and the delegate may be invited to file further submissions. If the appeal is not meritorious, it will be dismissed.

FACTS AND ARGUMENT

4. The essential facts are not in dispute.
5. Hampton, a company incorporated in British Columbia in June 2009, operates a preschool. Ms. Celani is the sole director and officer.
6. Ms. Uhm was employed by Hampton as a pre-school teacher under a work permit from November 2010 until June 2011. On February 14, 2011, Ms. Uhm applied for a new work/study permit as her permit was to expire in March 2011. On May 10, 2011, Citizenship and Immigration Canada (“Immigration Canada”) advised her that it had received her application and that the processing of the application would take longer than expected. Ms. Uhm notified Ms. Celani, who told her to keep her updated. On June 29, 2011, Ms. Uhm received an employment renewal contract from Hampton, effective September 6, 2011, to June 30, 2012.
7. On July 11, 2011, Immigration Canada advised Ms. Uhm that her work permit had been denied. Ms. Uhm applied for restoration consideration and advised Ms. Celani of the situation. Ms. Uhm advised the delegate that she told Ms. Celani that she was uncertain about what to do since she enjoyed her work and needed the money and experience. Ms. Uhm contended that Ms. Celani told her that she should continue working and that “they keep this information secret.” Ms. Uhm contended that she asked Ms. Celani for a written contract but Ms. Celani promised her that she would pay her after she obtained her visa. Ms. Celani advised the delegate that although she advised Ms. Uhm that she was unable to perform any work for Hampton, Ms. Uhm insisted that she continue to provide her teaching services because she enjoyed working and wanted to work until her work permit was renewed. Ms. Celani asserted that she agreed Ms. Uhm could continue to

work once she received a work permit. Until then, Ms. Celani said, Ms. Uhm was providing her services as a volunteer.

8. Ms. Uhm worked from September 2, 2011, until March 7, 2012, as a pre-school teacher working the same hours and performing the same duties she did when she had a work permit.
9. On March 7, 2012, Immigration Canada conducted a site visit at Hampton and told Ms. Celani that Ms. Uhm was unable to perform any work because she did not have a valid work permit. Ms. Uhm did not return to work.
10. Ms. Uhm eventually received her work permit on March 10, 2012, and contacted Ms. Celani about her wages. Ms. Celani told Ms. Uhm that no wages were owed because Ms. Uhm worked as a volunteer.
11. On March 27, 2012, Ms. Uhm filed a complaint alleging that Hampton had contravened the *Act* by failing to pay regular wages, overtime, statutory holiday pay and annual vacation pay. Ms. Uhm provided the delegate with a detailed schedule of her hours of work on a calendar that she asserted she maintained on a daily basis.
12. Ms. Celani's position was that Ms. Uhm was not employed by Hampton and that no wages were owed.
13. The delegate determined that Ms. Uhm fell within the *Act*'s definition of an employee, noting that Ms. Celani did not dispute that Ms. Uhm was an employee from November 2010 until June 2011, and that she performed the same duties during the period September 7, 2011, until March 7, 2012. The delegate concluded that as Ms. Celani allowed Ms. Uhm to perform "work normally employed by an employee," Ms. Uhm was therefore an employee for the purposes of the *Act* and entitled to wages.
14. In the absence of any records from Hampton, the delegate relied on Ms. Uhm's record of her hours of work, which Hampton did not dispute, in calculating wages owed.
15. Hampton's grounds of appeal are as follows:
 - Ms. Uhm was not an employee because she was legally restricted from working within Canada;
 - Hampton had no "secret agreement" with Ms. Uhm;
 - Ms. Uhm asked, and was given permission, to volunteer as a pre-school teacher assistant;
 - Ms. Uhm did not report her hours or submit timesheets;
 - Hampton agreed to re-visit the possibility of employment once Ms. Uhm received her legal working status;
 - The effect of the Determination is that Hampton is required to pay an illegal worker.

ANALYSIS

16. 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.
17. 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.
18. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.
19. I find that Hampton has not met that burden.
20. The sole ground of Hampton's appeal is that the delegate failed to observe the principles of natural justice. 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 suggests, or establishes, that Hampton's was denied natural justice.
21. Hampton's arguments on appeal are similar to the position it took before the delegate. Hampton continues to contend that Ms. Uhm was a volunteer, not an employee, and as such, she is not entitled to wages. An appeal is not an opportunity to re-argue, or re-state positions taken before the delegate. There must be some evidence that the delegate misinterpreted the evidence or arrived at a perverse conclusion or committed some other error of law.
22. The delegate considered Hampton's arguments and determined that Ms. Uhm fell within the definition of an employee in the *Act*. I am not persuaded the delegate made any error in arriving at this conclusion. Hampton allowed Ms. Uhm, directly or indirectly, to perform work she had previously been paid to do as an employee. Hampton cannot avoid liability for wages for attempting to characterize Ms. Uhm as a "volunteer." Whether or not there was a "secret agreement", the fact is that Hampton benefitted from Ms. Uhm's services and did nothing to prevent her from "volunteering" even though it was aware she had no valid work visa.
23. I find no grounds for the appeal.

ORDER

24. Pursuant to section 114(1)(f) of the *Act*, I dismiss the appeal. Accordingly, pursuant to section 115 of the *Act*, the Determination, dated June 25, 2014, is confirmed in the amount of \$18,267.40, 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