Employment Standards TRIBUNAL

An appeal

- by -

Angels There For You Home And Health Care Services Inc.
("ATFY")

- 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.: 2016A/55

DATE OF DECISION: June 24, 2016

DECISION

SUBMISSIONS

Patricia Cruz	on behalf of Angels There For You Home And Health Care Services Inc.

OVERVIEW

1. This is an appeal filed by Angels There For You Home And Health Care Services Inc. ("ATFY") pursuant to section 112 of the *Employment Standards Act* (the "*Act*"). The appeal concerns a Determination issued by a delegate of the Director of Employment Standards (the "delegate") on March 9, 2016, pursuant to which ATFY was ordered to pay the total sum of $50,368.77 on account of unpaid wages and section 88 interest owed to two former employees and five separate $500 monetary penalties (see section 98 of the *Act*).

2. After reviewing ATFY's appeal submissions, the Determination, the delegate's accompanying "Reasons for the Determination" (the "delegate's reasons") and the subsection 112(5) record that was before the delegate, I am of the view that this appeal has no reasonable prospect of succeeding. Accordingly, this appeal must be summarily dismissed pursuant to subsection 114(1)(f) of the *Act*. My reasons for arriving at this conclusion now follow.

THE DETERMINATION

3. The two complainants worked as in-home care providers for ATFY and both filed unpaid wage complaints that were subsequently investigated by the delegate. The delegate ultimately determined that one complainant, Aurora Puno ("Ms. Puno"), was entitled to $26,687.77 on account of unpaid wages and interest, an amount that included regular wages, overtime pay and statutory holiday pay. The delegate awarded the second complainant, Merlita Badua ("Ms. Badua"), the total sum of $21,181.00 representing unpaid regular wages, overtime pay, statutory holiday pay, concomitant vacation pay and interest. As noted above, the delegate also levied $2,500 on account of five monetary penalties thus bringing the total amount of the Determination to $50,368.77.

GROUNDS OF APPEAL AND ANALYSIS

4. ATFY appeals the Determination on the sole ground that the delegate failed to observe the principles of natural justice in making the determination (see subsection 112(1)(b) of the *Act*). However, as will be seen, certain of its arguments more appropriately fall within the "error of law" ground of appeal (subsection 112(1)(a) of the *Act*) and, as such, I will also consider this ground of appeal (see *Triple S Transmission Inc.*, BC EST # D141/03).

5. ATFY's appeal submission also includes several documents that are not relevant to the issues properly raised by this appeal and, in any event, do not appear to have been part of the record that was before the delegate. These documents would not appear to be admissible on appeal in light of the strict criteria governing "new evidence" as set out in *Davies et al.*, BC EST # D171/03.

Application to Postpone Appeal Adjudication

6. On May 20, 2016 (about one month after the appeal was filed with the Tribunal), ATFY filed a brief submission in which it requested that the adjudication of this appeal be postponed indefinitely "until new legislation comes into effect and our company is ready to comply with any decision coming from the Director of Employment Standards of B.C.".

7. ATFY says that it has been advised by two identified government officials that legislative changes will be introduced regarding "Live in Home Support workers" and that, as matters now stand, the current legal regime "will cause a chaos[*sic*] in the Economy" and in the health care system specifically. ATFY also advances other arguments regarding the unworkability of the current legal regime and its alleged devastating impact on businesses such as that operated by ATFY as well as on Canadian seniors in need of in-home care services.

8. I am not prepared to indefinitely postpone the adjudication of this appeal based on some uncorroborated assertion that legislative changes are pending. I am not aware of any such pending changes. Further, even if legislative changes were introduced in the near future, there is no guarantee (indeed, it is unlikely) that such changes would be applied retrospectively to effect an *ex post facto* cancellation of the Determination now under appeal (as well as this appeal decision).

9. The Tribunal is under a statutory mandate to ensure to that appeals are adjudicated fairly and efficiently (subsection 2(d) of the *Act*). This appeal affects not only ATFY's interests, but also those of the two complainants who, as matters now stand, are entitled to a significant back pay award (see subsection 2(a) of the *Act*). I see no proper justification for requiring the complainants to stand idly by to await the doubtful possibility that legislation will be introduced that will wipe out their unpaid wage awards. The complainants are immediately entitled to the wages they earned in accordance with the provisions of the *Act* – provisions that were in full force and effect during their tenure with ATFY.

10. The application to postpone the adjudication of this appeal is refused.

Failure to observe the principles of natural justice

11. ATFY says that the "claimant [*sic*] was allowed to submit documents (that were in error) that were not disclosed to me [and] Furthermore, there was no opportunity for me to submit my own corresponding documents, specifically regarding hours worked for these claimants, resulting in a miscalculation in back wages".

12. By way of remedy, ATFY seeks "a full disclosure of the documents submitted by the claimants and a complete explanation of the calculations, because those submitted in the determination are both inconsistent and in error. This has resulted in a far higher amount than my accounting professionals were able to determine is actually due".

13. There are several problems with ATFY's submission. First, it stands in marked contrast to the delegate's observation at page R3 of his reasons that "[t]here was substantially no dispute about the hours of work as evidenced by the Employer's records and the Complainant's [*sic*] records".

14. Second, the delegate's calculations are clearly set out in schedules appended to his reasons and are fully explained in both his reasons and in the schedules.

15. Third, although ATFY says that its "accounting professionals" have determined that the delegate erred in calculating the complainants' unpaid wage claims, there is no report before me from such a person and, in any event, ATFY does not specifically indicate where there calculation errors might lie. Indeed, so far as I can determine, ATFY does not actually say that there is a *calculation* error but, rather, now wishes to challenge the delegate's findings as to the *number of hours* worked by the complainants. This sort of challenge is more in the nature of an alleged error of law. However, although a factual finding can amount to an error of law, that is only the case where there is no proper evidentiary foundation for the impugned finding of fact or it is otherwise wholly unreasonable. The delegate did have a proper evidentiary foundation with respect to his findings regarding the hours worked by the complainants.

16. Fourth, although ATFY maintains that it was not advised about the nature of the complainants' unpaid wage claims prior to the issuance of the Determination, this assertion is belied by various documents contained in the subsection 112(5) record. For example, the record shows that the nature of the unpaid wages claims were discussed during telephone interviews between the delegate and ATFY's principal, were summarized (albeit in a preliminary fashion) in a detailed letter to ATFY dated July 30, 2015, and were also detailed in the actual complaints.

ATFY's "Policy" Arguments

17. The substantial thrust of ATFY's appeal submission is that the present statutory and regulatory regime – as it relates to ATFY's business model – is simply too expensive and/or unworkable and thus the Determination should be varied or cancelled on some sort of "equity" argument. I am unable to conclude that these "policy" arguments have any legal merit.

18. Briefly, ATFY's "policy" arguments – which largely replicate the arguments advanced regarding its application to indefinitely postpone the adjudication of this appeal – are as follows:

- the Tribunal should "Waive and amend the rules that regulate the Live-in services offered by the private Home Care Sector". This argument fundamentally ignores the essence of our democracy. Administrative tribunals enforce legislative rules enacted by our elected representatives. It would be a wholesale undermining of our governmental system if unelected members of tribunals took it upon themselves to "waive" or rewrite legislation – that is a function reserved to legislators; the Tribunal has no statutory authority to "waive" or amend the provisions of the *Act* or of the accompanying regulations.

- ATFY argues that the current legislative framework "does not fit" the type of service it provides. That may or may not be the case. I can think of several ways in which ATFY might reorganize its employment policies and practices in order to reduce, for example, the amount of overtime pay it might otherwise be obliged to pay to its employees. It does not appear that ATFY has explored the possibility of averaging agreements (section 37 of the *Act*) or of applying for a variance (section 72 of the *Act*). However, whether or not the *Act* and the accompanying regulations "fit" ATFY's business model is entirely irrelevant – ATFY must abide by the provisions of the *Act* as drafted, as must all other provincial employers subject to its terms.

- ATFY says its policies and practices are in line with those utilized by unionized firms. Again, without necessarily accepting that assertion (and there is nothing in ATFY's materials that would corroborate this assertion), it must be remembered that unionized employers do have greater flexibility to negotiate terms and conditions of employment with certified unions that may differ

from the baseline provisions that apply to non-union firms (see subsections 3(2)-(7) and section 4 of the *Act*).

- Finally, ATFY says that the *Act* and its accompanying regulations have "not been updated for approximately 20 years" and now no longer serve the needs of contemporary society, are "discriminatory", "too restrictive", "an open door for abuse…[of] frail and vulnerable" seniors, undermine "the initiatives and goals of the Ministry of Health", and "will bring a CHAOS [*sic*] to the different government agencies". While there is absolutely no evidence before me to support these rather heroic assertions, even if there were corroborating evidence, legislative review and amendment is a matter for the provincial legislature – it is not even remotely within the purview of the Tribunal.

19. In my view, none of ATFY's reasons for appeal has any possibility of succeeding and, accordingly, this appeal must be summarily dismissed.

ORDER

20. Pursuant to subsection 114(1)(f) of the *Act*, this appeal is dismissed.

21. Pursuant to subsection 115(1)(a) of the *Act*, the Determination is confirmed as issued in the amount of $50,368.77 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal