



An appeal

- by -

Tim Felger
(the “Appellant”)

- 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: Rajiv K. Gandhi

FILE No.: 2016A/63

DATE OF DECISION: July 15, 2016

DECISION

SUBMISSIONS

Tim Felger

on his own behalf

OVERVIEW

1. On April 5, 2016, a delegate of the Director of Employment Standards (the “Director”) issued a determination (the “Determination”) dismissing Tim Felger’s (the “Appellant”) claims for unpaid wages in the aggregate amount of \$20,200, and damages in the amount of \$3,000.
2. Dismissal was warranted, according to the Director, because the Appellant’s evidence lacked credibility and, more importantly, failed to establish that, on a balance of the probabilities, there existed as between the Appellant and his alleged employer, Selliah Sachchithanantham (“Mr. Sachchithanantham”), an employer-employee relationship falling within the scope of the *Employment Standards Act* (the “Act”).
3. Having regard to the 104 page package of materials included with the Appellant’s otherwise incomplete appeal form, I think it fair to say that, in this case, the Appellant bases his appeal on all three possible grounds set out in section 112(1) of the *Act*, and seeks any and all remedies available to him under section 115(1) of the *Act*.
4. At this stage, my role is to consider whether or not the appeal should be summarily dismissed according to section 114(1) of the *Act*.
5. Having reviewed:
 - (a) the Determination;
 - (b) the Appellant’s submissions; and
 - (c) the Director’s Record, received on May 18, 2016,

I conclude that there is no reasonable prospect that the appeal will succeed.

6. Accordingly, and for the reasons that follow, I dismiss this appeal under section 114(1)(f) of the *Act*.

FACTS

7. The Appellant alleges that he was employed by Mr. Sachchithanantham as a “senior strategist” for one hundred fifty-four days, from December 3, 2014, to May 5, 2015. He says that he worked a total of 860 hours in that period, 300 of them on an overtime basis. During the hearing conducted on October 14, 2015, the Appellant testified that he worked ten to fourteen hours per day, seven days per week. For his time, the Appellant claims that he was to be compensated at the rate of \$20.00 per hour.
8. In his testimony, the Appellant acknowledged that he had no direct dealings with Mr. Sachchithanantham, who apparently speaks little or no English, but says that he was contacted and then hired by Mr. Sachchithanantham’s son, Max Sachchi (“Mr. Sachchi”), a resident of the Philippines with whom the

Appellant had a previous acquaintance and for whom the Appellant had undertaken odd jobs, from time to time, apparently as a self-employed, independent contractor.

9. As a “senior strategist”, the Appellant says his role was to assist in valuing Mr. Sachchithanantham’s interest in a British Columbia company. The Appellant testified that he conducted a “forensic analysis” of the company’s books, had several discussions with Mr. Sachchi, and reviewed a large number of documents, culminating in a one page “guesstimate” of value. (The Appellant’s acknowledgement that these numbers were “made up” is also noted in the Determination.) He also says that he assisted in negotiating a sale of that interest, communicating with Mr. Sachchithanantham’s lawyer.
10. In support of his position, the Appellant relied upon two letters, one purported to be signed by Mr. Sachchithanantham, the other by Mr. Sachchi.
11. It is because of these letters that the Director found reason to question the credibility of the Appellant’s evidence.
12. According to the first letter:
 - (a) Mr. Sachchithanantham is identified as the Director and CEO of ShinSachi Media Inc.
 - (b) Mr. Sachchithanantham hired the Appellant on December 3, 2014, after an interview conducted on September 12, 2014.
13. However, as the Director points out, the letter is dated December 10, 2012, bears a signature that is markedly different from the signature shown on Mr. Sachchithanantham’s passport and the copy of the share certificate included in the Record, and according to the Appellant was created to assist the Appellant in a family law matter. The letter also refers to a company called ShinSachi Media Inc., although the Appellant testified that his work was undertaken with respect to ShinSachi Pharmaceutical Inc.
14. The Appellant says that the date is a typographical error. He explains the difference in signatures by suggesting - without supporting evidence - that Mr. Sachchi signed the first letter on behalf of his father. He did not explain the discrepancy with respect to the company name.
15. For these reasons, and because of the Appellant’s contradictory *viva voce* evidence (for example, the explanation given by the Appellant with respect to his alleged hiring differs significantly from what is set out in the letter), the Director gave no weight to the probative value of the first letter.
16. The second letter is dated January 18, 2015. In it:
 - (a) Mr. Sachchi is identified as the writer, and Senior Manager of ShinSachi Pharmaceutical Inc.;
 - (b) the letter states that the Appellant was hired on December 3, 2014, to work as an agent for Mr. Sachchithanantham;
 - (c) the letter set out a calculation of wages paid between December 4, 2014, and January 14, 2015, totalling \$290.00 for fifteen hours work, plus an \$80 reimbursement of travel expenses.
17. With respect to this second letter, the Director points out a glaring inconsistency between the hours of work noted in the letter and those claimed by the Appellant. In the Determination, the Director noted that the Appellant when testifying was vague as to the work actually performed, and provided nothing to corroborate

his claims. The Director also makes note of a discrepancy in the amount of money paid according to the letter, and the Appellant's testimony.

18. The Director ultimately concluded that the Appellant's complaint (a copy of which is included with the Record), the Appellant's testimony, the letter attributed to Mr. Sachchithanantham, and the letter attributed to Mr. Sachchi were sufficiently inconsistent that the Director was not able to draw from them a conclusion that the Appellant was employed by Mr. Sachchithanantham or that he worked ten to fourteen hours per day, seven days per week. As such, the complaint was dismissed.

ANALYSIS

19. I will address each potential ground of appeal, in turn.
20. Before doing so, I must make clear that an appeal to this Tribunal is not a trial *de novo*. It is not my role to unwind specific findings of fact and credibility simply because I might have decided something differently than the Director. Even if I were inclined to do so, my authority does not extend that far.

Section 112(1)(a) – Error in Law

21. The Appellant suggests that the Director erred in three of the five ways enumerated in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (BCCA) at paragraph 9. Specifically, he says that:

- (a) the Director has misapplied a principle of general law;
- (b) the Director has acted on a view of the facts which cannot reasonably be entertained;
- (c) the Director has adopted a method of assessment which is wrong in principle.

22. The Appellant's argument with respect to each of the three errors appears tied to the Director's refusal to take the Appellant's evidence at face value, without question or assessment. Specifically, the Appellant says that neither Mr. Sachchithanantham nor Mr. Sachchi participated in the hearing conducted on October 14, 2015, despite having had notice of the same. For that reason, the Director should not have made adverse findings with respect to credibility and reliability, but instead should have accepted the Appellant's evidence without question and, on that basis, awarded wages and damages as claimed.

23. I reject that argument.

24. Even where it is not challenged, the Director is obliged to weigh evidence tendered in support of a complaint under the *Act*, as if placed on a scale. Evidence tending to support the complaint will tip the scale in favour of a finding that the *Act* has been breached. Evidence that does not support the complaint will tip the scale in the opposite direction.

25. I find the Director's method of assessing the evidence to have been entirely appropriate. The Appellant's evidence clearly suffered from a number of inconsistencies that were not reconciled, and which could not be ignored simply because the alleged employer failed to participate in the hearing.

26. Having considered the credibility and sufficiency of evidence offered at the hearing, the Director concluded that the existence of an employer-employee relationship between Mr. Sachchithanantham and the Appellant had not been proved on a balance of the probabilities. That is, the Director did not think it possible to say

that it was more likely that Mr. Sachchithanantham employed the Appellant than not. That is a reasonable conclusion and one with which I can find no fault.

27. The Appellant suggests that the Director has assumed the Appellant to be “stupid”, with “criminal intentions of fraud.” I see no evidence of that in the Determination. Rather, I see the Director questioning blatant discrepancies in the evidence and drawing appropriate conclusions about the adequacy of that evidence.

28. None of that amounts to an error in law, and an appeal on that basis cannot succeed.

Section 112(1)(b) – Failure to Observe the Principles of Natural Justice

29. Natural justice requires the Director, at all times, to act fairly, in good faith, and with a view to the public interest (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48 at paragraph 2).

30. I understand the Appellant to argue that, in finding his evidence to be unreliable when Mr. Sachchithanantham did not participate in the hearing, the Director acted unfairly.

31. Once again, I reject that argument.

32. One of the primary purposes of the *Act* is to provide fair and efficient procedures for resolving disputes. When investigating or hearing a complaint, it is incumbent upon the Director to examine evidence critically, before imposing an administrative penalty or a compensatory award. This must be the case whether or not all parties chose to participate.

33. Accepting *viva voce* evidence without assessing probative value is contrary to the public interest and the underlying goal of the *Act*.

34. Finding the Appellant’s evidence lacking in credibility or sufficiency after dispassionate assessment is not unfair unless, in doing so, the Director declines to explain why. In this case, the Director very clearly provided that explanation:

- (a) with respect to the question of whether or not the Appellant was an employee, the absence of any direct contact, direction or control by Mr. Sachchithanantham, questions with respect to the legitimacy of the letter attributed to Mr. Sachchithanantham, the Appellant’s failure to produce supporting documentation, the Appellant’s failure to provide adequate detail concerning work actually performed, and the Appellant’s evidence about the nature of his past engagements all create substantial doubt as to the existence of an employer-employee relationship between Mr. Sachchithanantham and the Appellant;
- (b) discrepancies between the letter tendered by the Appellant and attributed to Mr. Sachchi, the Appellant’s testimony, and the original complaint, together with the Appellant’s failure to provide something more than a vague description of work and the Appellant’s acknowledgement that his work product was a “guess” all call into question the veracity of the Appellant’s claim that he was entitled to compensation for 860 hours of work.

35. The Appellant’s evidence, even if uncontested, must stand by itself. That may be upsetting to the Appellant, but neither is it unfair, nor does it mean that the Director has failed to observe principles of natural justice.

36. An appeal of the Determination under section 112(1)(b) of the *Act* must fail.

Section 112(1)(c) - Fresh Evidence

37. Included in the Appellant's submissions are a series of documents which he seeks to adduce as "fresh" evidence, including:
- (a) an apparent conversation, on Facebook, between the Appellant and Mr. Sachchi;
 - (b) the text of several different pieces of correspondence (but not, it seems, the actual correspondence);
 - (c) a series of letters and electronic mail messages appearing to be related to a dispute between Mr. Sachchithanantham and a third party.
38. In *Davies et. al.*, BC EST # D171/03, the Tribunal held that the onus rests with an appellant to meet a strict, four-part test before exercising any discretion to accept and consider fresh evidence:
- (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.
39. If any one part of the four-part test is not satisfied, an appeal based on "fresh evidence" must fail.
40. Having reviewed the Appellant's materials, I am satisfied that all of his evidence could have been delivered to the Director before the Determination. Indeed, the Appellant was asked to deliver relevant information before the hearing, and during the hearing claimed that he had such evidence but for his own reasons declined to produce it. The Appellant has not satisfied the first part of the *Davies* test.
41. Even if the evidence was not discoverable, some of the additional evidence is irrelevant, some of it incapable of belief (not because I think the Appellant has fabricated it, but because it does not meet an appropriate standard for admissibility).
42. For these reasons, I decline to accept this additional evidence, and an appeal under section 112(1)(c) of the *Act* must also fail.
43. In the end result, I cannot say that the Determination was unfair or that the Director erred in law, and I find that this appeal has no reasonable prospect of success.

ORDER

44. Pursuant to section 115 of the *Act*, I confirm the Determination issued on April 5, 2016, and I dismiss this appeal pursuant to section 114(1)(f) of the *Act*.

Rajiv K. Gandhi
Member
Employment Standards Tribunal