



An appeal

- by -

Joyce Middleton operating as Reflexology and Stress Clinic
(“RSC”)

- 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.: 2006A/89

DATE OF DECISION: September 20, 2006

DECISION

SUBMISSIONS

J. Middleton	on behalf of Reflexology and Stress Clinic
Amanda Welch	on behalf of the Director of Employment Standards
Dena Mora	on her own behalf
Melissa Banman	on her own behalf

OVERVIEW

1. This is an appeal by Joyce Middleton operating as Reflexology and Stress Clinic (“RSC”), pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued June 1, 2006.
2. Melissa Banman and Dena Mora (the “employees”) worked as therapists for RSC, a stress and reflexology clinic, between July 26, 2004 and April 6, 2005. They filed separate complaints that they were owed regular wages, annual vacation pay and compensation for length of service. Both also alleged that a \$1,000 tuition fee paid to Ms. Middleton was actually a charge for hiring in contravention of the *Act*.
3. Following an investigation of the complaints, the Director’s delegate determined that RSC had contravened Sections 10, 18, 58 and 63 of the *Act* in failing to pay the employees wages, annual vacation pay, and compensation for length of service. At issue before the delegate was whether the employees were employees, students or independent contractors, whether they were entitled to vacation pay and compensation for length of service, whether they were owed wages for time spent on training, and whether they were owed tuition money paid to RSC.
4. The delegate found that the complainants were employees, that their employment was terminated without just cause, and that the “tuition” fee Ms. Middleton charged the employees was a charge for hire, in contravention of section 10 of the *Act*. The delegate also concluded that the employees were entitled to wages for time spent training, but as those wages were earned during a period that was outside the six month limit for collecting unpaid wages, was unable to enforce payment of those wages under the *Act*.
5. The delegate found RSC owed the employees wages and interest in the total amount of \$2,542.94. The delegate also imposed a \$2,000 penalty on RSC for the contraventions of the *Act*, pursuant to section 29(1) of the *Employment Standards Regulations*.
6. RSC contends that the delegate erred in law, failed to observe the principles of natural justice in making the Determination, and that evidence has become available that was not available at the time the Determination was being made.
7. Although Ms. Middleton sought an oral hearing, I am satisfied that this matter can be decided on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination.

THE FACTS

8. The facts, as found by the delegate, are as follows.
9. Ms. Middleton advertised her business as a school of massage and alternative spa therapies. Both employees paid her tuition of \$1,000 which, according to the terms of a contract (the “tuition contract”), they were to pay off at a rate of 20% of wages earned each pay period. Under the terms of the same contract, the employees agreed that they would remain under contract to RSC for a one year period, following which the tuition would be refunded to them. At the same time as the employees signed the “tuition contract”, they entered into a three page contract that set out the therapists’ duties and the performance standards they were to meet. The contract required the employees to be present or available by telephone during scheduled working hours, to maintain records of client visits, and take payment from clients.
10. The contracts further provided that the therapist position was a contract one and that all work was to be done on the premises. The contract set out the employees’ rates of pay, and provided that that the employees would be responsible for their statutory remittances. It also contained a “non-competition” clause, and required the employees to give three months’ notice of their intention to resign.
11. The employees were also given a “Clinic Rules & Procedures” document that outlined, in the course of six pages, how staff were to behave, how they were book appointments, and how to submit records of work for payment, among other things.
12. The employees did not receive any formal training; rather, they trained by “shadowing” senior therapists. There is no dispute that RSC is not registered with the Private Career Training Institutions Agency (“PCTIA”), the provincial body that regulates private training institutions in British Columbia, nor does it have any standing with the Ministry of Advanced Education.
13. Both employees eventually became involved in disputes with Ms. Middleton over the payment of their wages. Ms. Mora disputed her status as an independent contractor while Ms. Banman disputed the payment of her “tuition”. Ms. Banman gave Ms. Middleton two weeks notice of her intention to leave the clinic and requested a refund of the tuition she had paid to date. Ms. Middleton accused Ms. Banman of theft and terminated her employment. Ms. Middleton terminated Ms. Mora’s employment shortly after their discussion about her employment status.
14. Ms. Middleton took the position that the employees were student contractors completing a practicum, and that the *Act* did not apply. She also contended that the employees were self-employed contractors. She took the position that neither of the employees were entitled to compensation for length of service because they were never actually employed with the clinic.
15. The delegate reviewed the statutory definition of employee and concluded that the complainants were trained to work for RSC’s labour needs, and that any training was minimal and would not be formally recognized in the industry. The delegate found that even if the students were practicum students they would be entitled to the protections of the *Act*.
16. The delegate noted that the contract set out the employees’ specific duties and standards of performance, prohibited them from undertaking other similar employment during the terms of their contract and set out the terms of their remuneration. The delegate further noted that RSC exercised significant control over the

employees through the “Rules and Procedures” manual. Finally, the delegate also noted that RSC owned all the equipment in the clinic and required the employees to wear uniform.

17. After reviewing the working relationship between the parties, the statutory definitions of employer and employee and the common law tests, the delegate also concluded that the complainants were employees rather than self-employed contractors. As noted above, the delegate also found that the “tuition” payment was a charge for hire.
18. The delegate further determined that the employment of both employees was terminated without cause and that they were entitled to compensation for length of service.

ISSUES

19.
 - 1) Did the delegate err in law?
 - 2) Did the delegate fail to observe the principles of natural justice in arriving at the Determination?
 - 3) Is there new evidence that was not available at the time the Determination was being made?

ARGUMENT

20. Ms. Middleton submitted a lengthy appeal document containing copies of her certificates and professional memberships, a background of her history in the business, and the rationale behind her approach of charging students “tuition”. She also enclosed numerous copies of “tuition contracts” signed by other staff, letters of reference and a lengthy explanation of the circumstances of the employees’ departure from employment. Unfortunately, I have found much of this material irrelevant to the appeal. Although I appreciate Ms. Middleton’s apparent frustration with the demands of operating a business and her unhappiness with the result of the Determination, the only issues I am able to address are those identified above.
21. Ms. Middleton contends that the delegate erred in law in determining that the complainants were employees, and that the tuition fee was a payment for hire. She also contends that the delegate erred in finding that they were entitled to compensation for length of service.
22. Ms. Middleton submits that all spa therapy courses in British Columbia are taught only by private schools, and that licensed massage therapy is only taught through public post-secondary or university level schools. She says that relaxation or spa massage is not yet standardized, and that the PCTIA schools are not able to transfer any registered massage therapy to any university. I infer from her submissions that she felt that the delegate did not fairly consider the behaviour of the employees in assessing whether their employment had been terminated for cause.
23. Finally, Ms. Middleton says the entire Determination is not just or fair.
24. The delegate submitted the record, and contended that Ms. Middleton was re-arguing her case rather than identifying an error of law, or breach of natural justice, or producing new evidence.

25. Ms. Mora and Ms. Banman made lengthy submissions which, in essence, refuted assertions made by Ms. Middleton. The submissions relate to factual issues and largely repeat submissions made to the delegate at first instance. I have not set the submissions out in any detail as they are only marginally relevant to the grounds of appeal.

ANALYSIS

26. 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;
or
- c) evidence has become available that was not available at the time the determination was being made

27. The burden of establishing the grounds for an appeal rests with an Appellant. RSC must provide persuasive and compelling evidence that there were errors of law in the Determination, as alleged, or that the delegate failed to observe the principles of natural justice. Having considered RSC's submissions, I am not persuaded the Determination should be cancelled or varied.

Error of Law

28. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.*, BC EST #D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.
29. The Tribunal must defer to the factual findings of a delegate unless the appellant can demonstrate that the delegate made a palpable or overriding error. An appeal is not an opportunity to re-argue a case simply because an appellant does not agree with the delegate's conclusions.
30. Having reviewed the material, I am not persuaded that the delegate in her conclusions that the complainants were employees, or that the "tuition" fee was a charge for hiring. The facts clearly demonstrate that the complainants were employees, both under the statutory definitions as well as the common law tests. Furthermore, the fact is that RSC is not an accredited educational facility, despite Ms. Middleton's assertions to the contrary. The fee was a payment the employer required in an attempt to ensure that the employees would remain employed for a year, was repaid on a periodic basis by the employee, but was forfeited in the event the employee did not remain in the employer's service for that period of time. However the payment is categorized, there is no statutory basis for the payment.
31. The submissions disclose that Ms. Middleton was unhappy with both employees' performance and behaviour. However, there is no evidence that they were ever warned that their job was in jeopardy or that Ms. Middleton applied progressive discipline measures. To substantiate just cause for poor job performance, an employer must meet a four part test:

1. A reasonable standard of performance was established and communicated to the employee;
2. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;
3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
4. The employee continued to be unwilling to meet the standard.

(see: *Silverline*, BCEST #D207/96 and *Kruger* BC EST #D003/97)

32. Ms. Middleton did not meet this test, nor did she make out a case that the employees' behaviour was such to justify immediate dismissal. The delegate concluded that the employees had been terminated without just cause, a conclusion I find to be supportable on the evidence.
33. I find no basis for this ground of appeal.

Failure to Observe Principles of Natural Justice

34. Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker. Although RSC contends that the Determination is not "just", that is not a basis for me to cancel it. An appeal is not an opportunity to re-argue a case that was presented to the Director in the first instance. While it is clear that Ms. Middleton is distressed by the result, I am not persuaded that she was denied the opportunity to respond fully to the employees' complaints.

New Evidence

35. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:
- 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;
 - the evidence must be relevant to a material issue arising from the complaint;
 - the evidence must be credible in the sense that it is reasonably capable of belief; and
 - 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.
36. The "new evidence" submitted by Ms. Middleton relates to whether RSC is an "accredited" institution. This information was available to Ms. Middleton at the time the delegate was investigating the complaint,

and ought to have been presented then. However, and in any event, I find little turns on this information as it would not have led the delegate to a different conclusion on any material issue.

37. I would dismiss the appeal on this basis.

ORDER

38. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated June 1, 2006, be confirmed in the amount of \$4,542.94, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal