Employment Standards TRIBUNAL

An appeal

- by -

Dawn McConnell
("Ms. McConnell")

- 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: Shafik Bhalloo

FILE No.: 2014A/113

DATE OF DECISION: November 5, 2014

DECISION

SUBMISSIONS

Dawn McConnell — on her own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Dawn McConnell ("Ms. McConnell") has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the "Director") on July 25, 2014 (the "Determination").

2. The Determination concluded that Ms. McConnell contravened Part 3, section 18 of the *Act* in respect of the employment of Loesha Blackwell ("Ms. Blackwell"), and ordered Ms. McConnell to pay her wages and interest in the amount of $837.94.

3. The Determination also levied an administrative penalty of $500.00 against Ms. McConnell for contravention of section 18 of the *Act*.

4. The total amount of the Determination is $1,337.94.

5. Ms. McConnell has appealed the Determination on all available grounds under section 112(1) of the *Act*, namely, the Director erred in law and failed to observe the principles of natural justice in making the Determination, and new evidence has become available that was not available at the time the Determination was being made.

6. Ms. McConnell is seeking the Employment Standards Tribunal (the "Tribunal") to cancel the Determination.

7. Pursuant to section 114 of the *Act*, the Tribunal has discretionary power to dismiss all or part of an appeal without seeking submissions from the parties. This appeal will be assessed based solely on a review of the Reasons for the Determination (the "Reasons"); the written submissions of Ms. McConnell; and the "record" that was before the delegate when the Determination was being made. If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114 of the *Act*, Ms. Blackwell will and the Director may be invited to file further submissions. Alternatively, if I find the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

ISSUE

8. Is there any basis under section 112 of the *Act* on which the Determination should be cancelled?

THE FACTS

9. Ms. McConnell owns and operates vacation rentals located in Grand Forks, British Columbia, and Kauai, Hawaii, and spends time at both locations to manage and maintain her rental properties.

10. With respect to the Grand Fork rentals, Ms. McConnell has two (2) furnished rentals, namely, the Eagle Sun Lodge (the "Eagle Sun") and the Eagle Moon Guesthouse (the "Eagle Moon").

11. Ms. Blackwell became acquainted with Ms. McConnell during her stay at Eagle Moon. During this time, Ms. Blackwell became interested in assisting with the management and care of Ms. McConnell's rental properties. Subsequently, Ms. McConnell offered to lease Eagle Moon to Ms. Blackwell from October 15, 2012, to May 15, 2013, at a reduced rental fee provided Ms. Blackwell took care of Ms. McConnell's cat while the she was away in Hawaii, to which Ms. Blackwell agreed. As a result, Ms. Blackwell moved to Grand Forks at the end of October 2012, and Ms. McConnell, shortly thereafter, headed off to Hawaii, and maintained contact with Ms. Blackwell regularly via email and telephone.

12. In January 2013, Ms. McConnell invited Ms. Blackwell to oversee her vacation rentals in Hawaii during mid-May or June to September or November, and Ms. Blackwell accepted Ms. McConnell's offer. The two then discussed Ms. Blackwell's lease expiring at Eagle Moon, and Ms. McConnell offered to provide Ms. Blackwell with accommodation until she left to go to Hawaii. Ms. Blackwell was content with Ms. McConnell's proposal and offered to help her organize the rentals in Grand Forks before the upcoming season and offered to clean Eagle Sun after the current tenants' lease expired.

13. On April 1, 2013, Ms. Blackwell travelled to Hawaii and vacationed at Ms. McConnell's property to become familiar with the property. She then returned to British Columbia on April 11, 2013. Ms. McConnell, who was scheduled to return to Grand Forks on May 1, 2013, to organize her rentals in Grand Forks, was delayed because of some renovations at her Hawaii property. Since Ms. McConnell had vacation bookings for her Grand Forks properties for the May long weekend, she asked Ms. Blackwell to help her with the preparation of the rentals prior to the arrival of guests. The current tenants at Eagle Sun were vacating the property at the end of April and Ms. McConnell asked Ms. Blackwell to perform a walk-through of Eagle Sun with a view to checking for any damage, misplaced items, and to evaluate the clean-up completed by the tenants. Ms. Blackwell acceded to Ms. McConnell's request.

14. Nearer to the end of April, both Ms. McConnell and Ms. Blackwell communicated with a view to organizing a strategy for the Eagle Sun walk-through. In this regard, Ms. McConnell provided Ms. Blackwell with a list of items at Eagle Sun so that Ms. Blackwell could ensure those items were not missing when the tenants were vacating.

15. On May 1, 2013, Ms. Blackwell conducted the walk-through of Eagle Sun, and concluded that the rental required a thorough cleaning, various repairs and replacement of certain missing items. She reported her observations to Ms. McConnell, and began preparing Eagle Sun and Eagle Moon generally for the arrival of guests on May 17, 2013.

16. Since Ms. McConnell was unable to return to Grand Forks in May, she asked Ms. Blackwell if the latter was interested in cleaning Eagle Sun and Eagle Moon after the guests had left otherwise she was prepared to hire another cleaner. Ms. Blackwell agreed to clean both properties and did so.

17. Before Ms. McConnell returned to Grand Forks on June 16, 2013, Ms. Blackwell began to reconsider her decision about moving to Kauai, Hawaii, to oversee Ms. McConnell's rentals, and, ultimately, advised Ms. McConnell that she would look for employment at Christina Lake, and would eventually travel to Thailand. However, she advised Ms. McConnell that she would assist her at her Grand Forks property until Ms. McConnell returned on June 16, 2013.

18. Subsequently, on May 27, 2013, Ms. Blackwell sent an email to Ms. McConnell about the work she performed at Eagle Sun from May 1 to 10, which email set out the amount she felt she was owed for her services, namely, $500.00. She also asked Ms. McConnell to reimburse her for $570.00 for business expenses related to purchases she made for the rentals.

19. In her reply email dated June 5, 2013, Ms. McConnell thanked Ms. Blackwell for her assistance and offered to provide her with a reference letter to help her secure future jobs. She also discussed payment for Ms. Blackwell's past services. Ms. McConnell felt that any work Ms. Blackwell performed pertaining to the rentals could be exchanged for free rent during the latter's extended stay on Ms. McConnell's property in Grand Forks. Ms. McConnell also offered to pay Ms. Blackwell for the cleanup of Eagle Sun after the departure of the current tenants, and advised Ms. Blackwell that the money would be deposited into Ms. Blackwell's credit union account.

20. On June 7, 2013, Ms. Blackwell sought clarification from Ms. McConnell as to the amount the latter would deposit in Ms. Blackwell's credit union account. On June 8, 2013, Ms. McConnell replied, indicating that she was having difficulty calculating the amount of payment she would make to Ms. Blackwell since the latter had elected to discontinue their exchange of labour for accommodation, and there was uncertainty as to when Ms. Blackwell would cease relying on Ms. McConnell for accommodation. Notwithstanding, Ms. McConnell indicated that Ms. Blackwell would receive compensation for her cleaning efforts at Eagle Sun, and would reimburse her for the expenses she incurred on both her properties. Ms. McConnell also indicated that Ms. Blackwell would receive compensation for the "clean outs" she performed after the departure of vacationing guests at both properties. However, Ms. McConnell felt that the free rental accommodation she provided to Ms. Blackwell from May 15 to June 15 was satisfactory payment for Ms. Blackwell's labour and services for preparing of the rentals and yards for guests, mowing lawns, picking up mail and depositing cheques for her from vacationing guests.

21. During June 9 to 12, 2013, while the discourse between Ms. McConnell and Ms. Blackwell about payment for services rendered by Ms. Blackwell was ongoing, the Eagle Moon was occupied by guests who had made reservations near the end of May. Ms. Blackwell welcomed these guests and also cleaned the property after they departed on June 12. She also welcomed the guests who booked Eagle Sun for June 14 and 15, but did not perform any cleaning duties with respect to this booking, as Ms. McConnell returned on June 16, 2013, and Ms. Blackwell's left Ms. McConnell's property the same day.

22. On June 20, 2013, Ms. McConnell and Ms. Blackwell arranged for Ms. Blackwell to pick up her cheque representing payment for work and expenses. Ms. Blackwell attended at a local credit union where she was provided a cheque and email, dated June 20, 2013, from Ms. McConnell. In the email from Ms. McConnell to Ms. Blackwell the former explained that it was necessary for her to return to the property and evaluate the condition of the rentals before reaching a conclusion on what was an appropriate and fair payment to make to Ms. Blackwell. Ms. McConnell calculated a total value of $1,055.00 for work Ms. Blackwell performed on the rental properties as follows:

Eagle Sun: Dan and Shannon (26.5 hrs x $20/hr) + (25 hrs X $15/hr)	$905.00
Eagle Sun: cleanout after guests ($60.00 each x 1	$60.00
Eagle Moon: cleanout after guests ($45.00 each x 2)	$90.00
Wages Payable	$1,055.00

23. Ms. McConnell then attributed a rental value of $2,700.00 for the Eagle Moon property on which Ms. Blackwell was living. This calculation was based on Ms. McConnell's calculation of $90.00 per night x 30 nights of extended stay by Ms. Blackwell on the property. Ms. McConnell then showed that she offset $1,055.00 Ms. Blackwell earned from the $2,700 rental amount, leaving a deficit of $1,645.00. Therefore, Ms. McConnell concluded that she did not owe anything to Ms. Blackwell since the rental fee of $2,700.00 exceeded the value of work performed by Ms. Blackwell. Effectively, Ms. McConnell wanted to call it an

even exchange between the two. She did, however, provide a cheque in the amount of $570.00 to Ms. Blackwell for reimbursement of the expenses incurred by Ms. Blackwell.

24. On June 26, 2013, Ms. Blackwell informed Ms. McConnell that she was shocked by her calculations in light of Ms. McConnell's earlier communication to her that she would receive a cheque for work and expenses. She indicated that she was unaware that Ms. McConnell would deduct $2,700.00 rental fee from her pay.

25. Ms. McConnell responded to Ms. Blackwell explaining that the lease with Ms. Blackwell ended on May 15, 2013, and, thereafter, she said that her recollection was that the agreement between the parties was based on an exchange of work for accommodation, and Ms. Blackwell would only receive additional pay if the work performed exceeded the value of rent which it did not. Therefore, according to Ms. McConnell the dispute between them was settled.

26. On November 25, 2013, Ms. Blackwell filed a complaint against Ms. McConnell (the "Complaint") with the Employment Standards Branch claiming outstanding wages.

27. On June 3, 2014, the delegate of the Director held a hearing of the Complaint (the "Hearing") and subsequently rendered the Determination on July 25, 2014.

28. In the Reasons, the delegate considered two (2) issues, namely, whether Ms. Blackwell was an employee of Ms. McConnell for the purposes of a wage claim under the *Act* and, if she was an employee, whether Ms. McConnell was liable for any outstanding wages.

29. Ms. Blackwell and Ms. McConnell both attended at the Hearing on their own behalves.

30. In the case of Ms. McConnell, at the beginning of the Hearing, she had indicated that she would call five (5) witnesses. She was reminded by the delegate that it was her responsibility to ensure each witness was readily available by telephone and must have direct knowledge of Ms. Blackwell's efforts at the rental properties. The delegate notes in the Reasons that Ms. McConnell, after reviewing the evidence her witnesses would make available, dropped two (2) witnesses from her list of five (5) since they had no direct knowledge pertaining to the Complaint. With respect to the remaining three (3) witnesses on her list, the delegate states she advised that one of them could no longer attend because she was unavailable.

31. During the Hearing, one witness was telephoned but did not answer the telephone. The only witness who attended at the Hearing was Joanne Van Hoogevest ("Ms. Van Hoogevest"), who testified that when Ms. McConnell returned from Hawaii and Ms. Blackwell left the property, she assisted Ms. McConnell in getting the property ready for the arrival of guests and observed that the property required a thorough cleaning and the yard needed to be groomed. She admitted that she did not observe or supervise the work of Ms. Blackwell and that there was no contact between Ms. Blackwell and her, from April to June, 2013.

32. With respect to the question of whether Ms. Blackwell was an employee of Ms. McConnell, Ms. McConnell argued at the Hearing that there was not any employment relationship between Ms. Blackwell and her. They were only friends, and Ms. Blackwell was willing to help her at the rental properties in exchange for accommodation and a trip to Hawaii. In these circumstances, Ms. McConnell argued that the *Act* did not apply. The delegate rejected this argument in light of the exchanges between the parties about Ms. Blackwell being compensated for some of the work.

33. Alternatively, Ms. McConnell argued that Ms. Blackwell was an independent contractor, and the *Act* does not apply to independent contractors. In rejecting this argument, the delegate reviewed the evidence of both

parties; considered the definitions of "employee" and "employer" in the *Act*; considered the common law tests for identifying employment relationship and reasoned as follows:

> After considering all aspects of the relationship, I am not satisfied Ms. Blackwell was an independent contractor. The evidence demonstrates Ms. McConnell was in a predicament considering she was not available to operate her vacation rentals in Grand Forks. Ms. Blackwell merely assisted with the operation of the business until Ms. McConnell returned. There is no evidence that Ms. Blackwell formed a business or invested into a business for the purpose of managing and caring for Ms. McConnell's vacation rentals and others in the area. Consequently, there was no chance of profit or loss. The bill of $500.00 dated May 27, 2013 sent via e-mail and failure to provide a Social Insurance Number is not satisfactory to establish Ms. Blackwell was in business for herself. In sum, I find Ms. Blackwell was not an independent contractor.
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> For the reasons that follow, I have determined that Ms. Blackwell was an employee of Ms. McConnell for the purposes of the Act.
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> The parties' testimony and e-mail correspondence show that on a number of occasions Ms. McConnell exercised a level of control typically found in an employment relationship. E-mails pertaining to remuneration for work suggest that to some degree Ms. McConnell controlled this aspect of the relationship. Ms. McConnell directed how the work was to be done, such as providing photos of Eagle Sun to instruct Ms. Blackwell how to organize a rental. This work was inspected by Ms. McConnell as a result of photos downloaded onto a Flickr account and Ms. McConnell providing feedback to Ms. Blackwell. Moreover, Ms. McConnell provided direction on which items at the vacation rentals were to be repaired or replaced and those that could be dealt with when she returned.
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> While Ms. Blackwell used some of her personal tools and supplies to accomplish work, she also utilized tools and supplies available at Ms. McConnell's rentals. This evidence establishes that Ms. Blackwell was dependent on Ms. McConnell to accomplish work tasks at the rentals, which is indicative of an employment relationship.
>
> Ms. Blackwell was more than an ancillary to Ms. McConnell's operation. She performed duties, including maintaining the rentals, welcoming guests, responding to inquiries, collecting damage deposits and performing exit walkthroughs, which are integral parts to the operation of the business. In this case, the degree of integration indicates an employee and employer relationship.
>
> Applying the statutory definitions to the circumstances of Ms. Blackwell and her work relationship with Ms. McConnell, I am satisfied that she was an employee of Ms. McConnell under the Act. I find Ms. Blackwell was a person entitled to wages for work performed for Ms. McConnell's vacation rental business. It follows that I find Ms. McConnell was responsible for Ms. Blackwell's employment.

34. Having concluded that Ms. Blackwell was an employee, the delegate then considered the question of whether Ms. McConnell was liable to pay Ms. Blackwell any outstanding wages. In rejecting Ms. McConnell's argument that no wages were owed to Ms. Blackwell because she received free accommodation valued at $2,700.00 and a trip to Hawaii, the delegate reasoned as follows:

> Section 20 of the Act indentifies [*sic*] acceptable forms of paying an employee for work. The payment must be negotiable in Canadian currency. Methods of payment are cash, cheque, or similar financial instruments drawn on a bank, trust company, or credit union. Section 21 of the Act prohibits an employer from withholding wages for any reason, except as permitted by law. Accordingly, Ms. McConnell is prohibited from using complimentary accommodation or a trip to Hawaii as payment for work. As well, Ms. McConnell cannot withhold payment of wages because, in her view, the value of rent exceeded earnings for work.
>
> I find Ms. McConnell contravened section 18 of the Act by failing to pay all wages owing to Ms. Blackwell within six days after she quit employment on June 16, 2013. A $500.00 penalty is imposed on Ms. McConnell under sections 98 of the Act and 29 of the Employment Standards Regulation. I further find

> the contravention date is June 23, 2013, which is the day after the six day period to pay all outstanding wages.

35. The delegate then went on to determine the amount of wages, in Canadian currency, payable to Ms. Blackwell, noting that the task of determining the amount of wages owed would be difficult as there were no precise records of the hours she worked. However, the delegate noted that the absence of records will not deny Ms. Blackwell a remedy where a finding of contravention of the *Act* has been demonstrated. The delegate then went on to determine the total amount of hours worked by Ms. Blackwell, based on the best evidence. He stated:

> Ms. Blackwell does not have a record of hours worked, nor could she recall the amount of time spent on each task. The best evidence available to determine the amount of time Ms. Blackwell worked from May 1 to 10 is the evidence of Ms. McConnell. Particularly, Ms. Blackwell had listed work tasks she completed in an e-mail dated May 27, 2013 regarding 'Final recap of services provided…'. Ms. McConnell responded on June 20, 2013, by e-mail and assigned hours of work to each task serving as an explanation of wages earned for the period May 1 to 10. Ms. McConnell now argued that the hours she listed were grossly exaggerated. However, this argument is contradictory to her e-mail response on June 20, which indicated the assessment of hours was based on 'average time' for an inexperienced cleaner and caretaker. I am not persuaded that there were any gross exaggerations of hours worked. Given Ms. McConnell's experience and knowledge of the rentals and property, I accept the average time as the best evidence available to determine Ms. Blackwell's hours of work from May 1 to 10. Accordingly, I find Ms. Blackwell worked a total of 51.5 hours.
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> Ms. Blackwell argued that Ms. McConnell did not assign hours of work for the walkthrough and assessment on the condition of Eagle Sun. Indeed, Ms. Blackwell is correct. On May 1, 2013, Ms. Blackwell performed these services as required by Ms. McConnell and did not receive credit for the time worked. Under section 34 of the Act, an employee who reports for work must be paid for at least two hours, even if the employee works less than two hours. I find Ms. McConnell must pay Ms. Blackwell a minimum of two hours for the walkthrough and assessment of Eagle Sun, which brings the total to 53.5 hours of work.
>
> Ms. Blackwell was also responsible for overseeing reservations, including greeting guests, collecting damage deposit cheques and handling inquiries. She performed these tasks on May 17, 2013 for reservations of Eagle Sun and Eagle Moon; June 9 for a reservation of Eagle Moon; and June 14 for a reservation of Eagle Sun. I find the time spent by Ms. Blackwell performing these services is time worked, as such wages are payable. I further find Ms. Blackwell is entitled to two hours of pay each day under section 34 of the Act, which brings the total hours of work to 59.5.

36. Having concluded that Ms. Blackwell ought to be paid for 59.5 hours of work, the delegate then went on to consider the hourly rate Ms. Blackwell should be compensated at. After reviewing the evidence of both parties, the delegate concluded that there was no agreement between the parties on an hourly rate. He therefore applied the $10.25 per hour minimum wage rate to conclude that Ms. McConnell owed Ms. Blackwell $604.75 (59.5 hrs x $10.25/hr).

37. He added to the above amount, a further $175.00 which represented two (2) "clean-outs" by Ms. Blackwell of the Eagle Moon property and one clean-out of the Eagle Sun property. The calculation for clean-outs was based on Ms. McConnell's promised flat rate for clean-outs of $50.00 for Eagle Moon and $75.00 for Eagle Su. In the result, the delegate concluded that Ms. McConnell owed Ms. Blackwell wages of $779.75, plus vacation pay of $31.19, plus interest of $27.00, for a total of $837.94.

38. The delegate also levied an administrative penalty of $500.00 against Ms. McConnell for breach of section 18 of the *Act*.

ARGUMENT AND ANALYSIS

39. Section 112(1) of the *Act* delineates the grounds on which a person may appeal a determination:

> (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.

40. As indicated previously, Ms. McConnell appeals on all three (3) grounds available under section 112 of the *Act*. She has presented written submissions, including a handful of exhibits numbering 43 pages in total and divided her submissions into three (3) different sections with headings corresponding to each appeal ground.

41. I have reviewed Ms. McConnell's submission carefully in their entirety and, while I do not find it necessary to reiterate all of them here, I will summarize and highlight her submission in support of each ground of appeal and also review the applicable law under separate headings below.

(a) Did the Director err in law in making the Determination?

42. The Tribunal has consistently used 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)*,[1988] B.C.J. No. 2275:

> (1) a misinterpretation or misapplication of a section of the *Act*; [in *Gemex*, the legislation was the *Assessment Act*];
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> (2) a misapplication of an applicable principle of general law;
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> (3) acting without any evidence;
>
> (4) acting on a view of facts which could not reasonably be entertained;
>
> (5) adopting a method of assessment which is wrong in principle.

43. It should be noted that in *Britco Structures Ltd.* (BC EST # D260/03), the Tribunal stated that the definition of error of law should not be applied so broadly as to include errors which are not in fact errors of law, such as errors of fact alone, or errors of mixed law and fact, which do not contain extricable errors of law. The Tribunal also added that unless there is an allegation that the delegate erred in interpreting the law or in determining what legal principles are applicable, there cannot be an allegation that the delegate erred by applying the incorrect legal test to the facts.

44. It is also noteworthy that the Tribunal has consistently indicated in appeal cases that it does not have jurisdiction over questions of fact unless the matter involves errors of findings of fact, which may amount to an error of law (see *Re: Pro-Serv Investigations Ltd.*, BC EST # D059/05; *Re: Koivisto (c.o.b. Finn Custom Aluminum)*, BC EST # D006/05).

45. As to the criteria for determining findings of fact which amount to an error of law, the Tribunal, in *Re: Funk* (BC EST # D130/05), explained that the appellant would have to show that fact-finder made a "palpable and overriding error" or that the finding of fact was "clearly wrong" before an error of law will be found. Where there is no evidence that the delegate "acted without any evidence or on a view of evidence that could not reasonably be entertained" or committed a "palpable or overriding error" or arrived at a "clearly wrong

conclusion of fact", the Tribunal is reluctant to substitute the delegate's findings of fact *even if it is inclined to reach a different conclusion on the evidence*.

46. Having delineated the relevant principles, I note Ms. McConnell's submissions on the error of law ground of appeal number four (4) pages. In these submissions, she indicates that she was unfairly treated at the Hearing by the delegate and "bullied" by another member of the Employment Standards Branch who she claims intimidated and pressured her to settle and pay Ms. Blackwell what the latter demanded, and told her that she was not going to succeed.

47. In the balance of her submissions under the error of law ground, Ms. McConnell disputes the delegate's conclusion that there was an employment relationship between her and Ms. Blackwell. She submits that Ms. Blackwell presented herself "as a self-employed contractor willing, experienced and able to do property caretaking and cleaning", and solicited her as a client, and breached that contract when she attempted to alter the terms by demanding payment for her services in contravention of the verbal exchange agreement the two had; namely, exchange of Ms. Blackwell's services for free rent. Ms. McConnell then goes to reiterate her version of the events to support her claim, and argues that the delegate, in finding an employment relationship between the parties, has altered "the original verbal contract" between her and Ms. Blackwell.

48. She also submits, under the error of law ground of appeal, that some of the photographs that were presented at the Hearing by Ms. Blackwell were not pictures of the property Ms. Blackwell cleaned up and "might be a picture of Ms. Blackwell's condo or apartment in Penticton".

49. Having reviewed Ms. McConnell's submissions, I am not persuaded that Ms. McConnell has successfully discharged her burden of proof in establishing, on a balance of probabilities, that the Director erred in law in making the Determination. More specifically, I find Ms. McConnell, under the error of law ground of appeal, is disputing the delegate's findings of fact. As indicated previously, questions of fact alone are not reviewable by the Tribunal. Moreover, based on the Reasons and the "record" that was before the delegate at the Hearing, I *do not* find this to be a case of the delegate having acted without any evidence or on a view of evidence that could not reasonably be entertained, nor do I find that the delegate committed a palpable or overriding error or arrived at a clearly wrong conclusion of fact. As previously indicated, the Tribunal is reluctant to substitute a delegate's findings of fact even if it is inclined to reach a different conclusion on the evidence, which I am not, in this case.

50. In my view, the delegate properly applied the definitions of "employer" and "employee" in the *Act* and the applicable common law test for determining an employment relationship to the facts in this case, and came to a supportable decision which I am not prepared to disturb.

51. With respect to the allegations of Ms. McConnell that the delegate did not give her equal or fair consideration during the Hearing and she was bullied, or that the delegate had sided with Ms. Blackwell from the outset, these are allegations that go to the natural justice ground of appeal, however, I find them to be no more than bare assertions unsupported in the evidence and I dismiss them.

(b) Did the Director fail to observe the principles natural justice in making the Determination?

52. In *Imperial Limousine Service Ltd.* (BC EST # D014/05), the Tribunal explained the principles of natural justice as follows:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; their right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her

> delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the Act and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party: See *BWI Business World Incorporated*, BC EST #D050/96.

53. In her written submissions, Ms. McConnell presents approximately 19½ pages in submissions in support of the natural justice ground of appeal. While the majority of her submissions dispute the delegate's findings of fact and not reviewable by the Tribunal, the following submissions of Ms. McConnell arguably go to the issue of natural justice:

- The delegate interviewed Ms. Blackwell for 5 to 6 hours, and only interviewed her for 15 minutes and appeared to have predetermined that Ms. Blackwell was an employee and was simply there to determine how many hours she had worked and what wages she would be receiving.
- The delegate failed to take into consideration the written statements of her witnesses and indicated that only verbal statements would do.
- The delegate did not attempt to call any of her witnesses at the telephone numbers she provided for them until after 4:00 p.m., after they were off work.
- The delegate was only interested in hearing from those witnesses who could assist him in deciding how many hours Ms. Blackwell may have worked on the property; any of other witnesses were of no use or value to him and he was not interested in hearing from them.
- One of the witnesses, Mr. Arnold, provided a written statement which the delegate did not consider at all which is a violation of natural justice.
- There were two witnesses, Mr. Phipps and Ms. Smith, whose presences as witnesses would have been "pertinent and valuable" in determining the function Ms. Blackwell was performing and assist in determining whether Ms. Blackwell was self-employed or not but the delegate eliminated them from the witness list because "they would not support his pre-determined agendas".
- The delegate "had no intention of assessing and assigning the appropriate category to our situation, but rather had already set his goals to pigeon hole Ms. Blackwell into the category that best suited his own agenda – i.e. to determine her to be an employee".
- The delegate "admitted to having a biased intent while conducting [the] hearing".
- The delegate "avoided asking questions that would have defined Ms. Blackwell as a self-employed person".

54. Having reviewed Ms. McConnell's submissions on the natural justice ground of appeal and the Reasons as well as the "record" before the delegate at the Hearing, I am not persuaded that the Director breached the principles of natural justice in this case. More specifically, I do not find Ms. McConnell has proven on a balance of probabilities that the delegate was biased or unfair to her, or prevented her from adducing any evidence or had predetermined the case. I also find incredible Ms. McConnell's submission that the delegate admitted that he "had a biased intent while conducting [the] hearing". I find all of these assertions made by Ms. McConnell to be unfounded in evidence and effectively only bare assertions.

55. I also do not find any merit in Ms. McConnell's submissions that the delegate would not take into consideration her witnesses' written statements and required verbal statements from them but then did not attempt to call any of the witnesses until after 4:00 p.m. when the witnesses had left work. The delegate, sitting as an adjudicator, has the power to conduct a hearing in a manner he considers necessary. It is well within his discretionary authority as an adjudicator to require Ms. McConnell to produce or make her witnesses available at the Hearing to give oral evidence and thereby afford Ms. Blackwell an opportunity to cross examine them. I do not find the delegate's decision to so do inappropriate at all.

56. I also do not find any substance in Ms. McConnell's submission that the delegate "did not attempt to call" any of her witnesses until after 4:00 p.m. after they had left work. The underlying suggestion in this submission is that the delegate intentionally called the witnesses after they were off work and no longer reachable. I do not find there is any evidence to support that conclusion and I dismiss it.

57. Ms. McConnell also contended that the delegate only let her ask a few questions of Ms. Blackwell on the subject of her status before he interjected and stopped her and allegedly told her that she was asking "the wrong kinds of questions", and took over the questioning himself. I note that if the cross examination of a witness by a party becomes irrelevant or not pertinent or off the subject, the delegate, sitting as an adjudicator, may intervene and may warn the cross examiner of the unhelpful nature of the questions being asked and may terminate the cross examination and/or assist by asking relevant questions that go to the relevant issues under consideration at the Hearing. Based on my review of the Reasons, I find that the delegate appears to have gathered relevant information on the penultimate issue of the status of Ms. Blackwell, and considered the evidence of both parties sufficiently in making the Determination. I do not find there any substance in the last submission of Ms. McConnell. In the result, I dismiss Ms. McConnell's natural justice ground of appeal.

(c) Has new evidence become available that was not available at the time the Determination was being made?

58. The governing test for allowing new evidence on appeals is delineated in *Re: Merilus Technologies Inc.* (BC EST # D171/03). The Tribunal, in *Re: Merilus*, indicated that for new evidence to be considered appeal, it must satisfy the following four (4) conditions, which are conjunctive:

> (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;
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> (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
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> (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.

59. In this case, Ms. McConnell presents the Canada Revenue Agency ("CRA") ruling, dated July 15, 2014, that Ms. Blackwell was "a self-employed worker and her services were neither insurable nor pensionable" for the period April 25, 2013, to June 16, 2013, in support of her submission that Ms. Blackwell was not an employee.

60. Ms. McConnell also presents witness statements from Fran Roberts dated May 31, 2014, and an undated statement from Charles Arnold. Both appear to have done work on Ms. McConnell's property in the past.

Ms. Roberts was one of the witnesses who was unavailable to attend the Hearing and Mr. Arnold was telephoned during the Hearing and unavailable.

61. Ms. McConnell has also included pictures of email exchanges between her and Ms. Blackwell previously produced and part of the "record" that was before the delegate at the Hearing.

62. Lastly, Ms. McConnell also attaches some property pictures that Ms. Blackwell previously submitted and forms part of the "record" before the delegate at the Hearing. She disputes that these pictures are not of any her property in Grand Forks but likely Ms. Blackwell's previous home.

63. With respect to the CRA ruling, it meets the first and third conditions of the test for adducing new evidence on appeal, as set out in *Re: Merilus, supra*. The CRA ruling was made on July 15, 2014, after the conclusion of the Hearing, although it was before the Determination was issued. The CRA ruling was also credible, in the sense that it is reasonably capable of belief, but the CRA ruling fails to meet the second and fourth conditions of the new evidence test. Ms. McConnell is submitting the ruling for the sole purpose of showing that Ms. Blackwell was not her employee during the material time. The CRA ruling, in my view, is not relevant to a material issue arising from the Complaint and has little probative value for the same reason. More particularly, the opinion by CRA under the *Federal Income Tax Act*, the *Employment Insurance Act* or the *Canada Pension Plan Act* as to whether a person is an "employee" for tax or insurance purposes is not determinative as to whether a person is an "employee" within the meaning of the *Employment Standards Act* for employment standards purposes. The purposes of those federal enactments are not the same as those of the *Act*. As an example, one of the purposes of the *Act*, set out in section 2(a), is to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment. This is certainly not a purpose of the federal acts delineated above and administered by the CRA. Therefore, I reject the CRA ruling as new evidence.

64. With respect to the previously produced pictures, the statements of Mr. Arnold and Ms. Roberts, and the email exchanges between Ms. McConnell and Ms. Blackwell, I find none of these are documents satisfy the first part of the new evidence test in *Re Merilus* decision and therefore I will not consider them as new evidence.

65. I also add that in the case of the written statements of Ms. Roberts and Mr. Arnold, these were potential witnesses of Ms. McConnell and neither attended the Hearing. One was unavailable at the time of the Hearing and the other was called at work during the Hearing but did not answer. The time for adducing their evidence was at the Hearing and in the manner required by the delegate –oral evidence cross examinable by Ms. Blackwell – and not in written form on appeal.

66. As for the email exchanges between Ms. McConnell and Ms. Blackwell and the pictures of Ms. Blackwell that formed part of the "record" that Ms. McConnell is now disputing; these documents are only produced in the appeal for the sole purpose of enabling Ms. McConnell to reargue her case or advance new argument. This Tribunal has stated time and again that an appeal is not a forum for the unsuccessful party to advance new arguments or have a second chance to advance arguments already advanced in the investigation stage or at the hearing and properly rejected in the determination.

67. In these circumstances, I find Ms. McConnell has not shown, on a balance of probabilities, any reviewable error in the Determination. Therefore, pursuant to section 114(1)(f) of the *Act*, I find that Ms. McConnell's appeal of the Determination has no reasonable prospect of success

ORDER

68. Pursuant to section 115 of the *Act*, I confirm the Determination made on July 25, 2014, against Dawn McConnell.

Shafik Bhalloo
Member
Employment Standards Tribunal