



An appeal

- by -

Gene C. Matchitt
(“Matchitt”)

- 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: David B. Stevenson

FILE No.: 2009A/103

DATE OF DECISION: October 20, 2009

DECISION

SUBMISSIONS

A. Paul Devine	on behalf of Gene C. Matchitt
Arthur E. Chouinard and Cheryl Dewey	on their own behalf
John Dafoe	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Gene C. Matchitt (“Matchitt”) of a Determination that was issued on June 26, 2009 by a delegate of the Director of Employment Standards (the “Director”). The Determination found that Matchitt had contravened Part 3, Sections 17 and 18 of the *Act* in respect of the employment of Arthur E. Chouinard (“Chouinard”) and Cheryl Dewey (“Dewey”), collectively “the complainants”, and ordered Matchitt to pay the complainants an amount of \$14,671.02, an amount which included wages and interest.
2. The Director also imposed an administrative penalty on Matchitt under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1000.00.
3. The Determination was issued following an investigation by the Director.
4. The total amount of the Determination is \$15,671.02.
5. In this appeal, Matchitt alleges the Director erred in law by concluding he was an employer under the *Act* and that Chouinard and Dewey were his employees.
6. None of the parties to this appeal has requested a hearing before the Tribunal and while we have a discretion whether to hold a hearing on an appeal – see Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s. 103), Rule 17 of the Tribunal’s *Rules of Practice and Procedure* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575 – I have reviewed the appeal, the submissions and the material submitted by all of the parties, including the Section 112 (5) record filed by the Director, and have decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

7. The issue in this appeal is whether Matchitt has demonstrated the Director erred in law in finding Chouinard and Dewey were employees under the *Act* and that he was their employer.

THE FACTS

8. The appeal provides an overview of the findings of fact made by the Director. While that overview does not directly challenge those findings, there are elements of the appeal that suggest different factual findings and conclusions than were actually made in the Determination. For example, there is a suggestion in the appeal that the Director found Chouinard and Dewey provided services to Matchitt as “home support workers”. The Determination contains no such finding. Rather, the Determination found that Chouinard and Dewey

performed support services for Matchitt – which are listed in the Determination, and repeated below – on a regular and ongoing basis.

9. In order to ensure there is no confusion about the factual grounding for the Determination, I shall refer to and use the findings and conclusions of fact as they appear in the Determination.
10. During the period of time covered by the complaints filed by Chouinard and Dewey, Matchitt and the complainants lived in Sandspit in Haida Gwaii. During this period, and for some time before this period, Matchitt was chronically ill. He was living at home and had been receiving some assistance from the complainants. In April 2008, following a stay in the hospital, Matchitt was to return home. He had some in-home support from public home care service, but required an additional amount of assistance with his daily living needs that the public home care service was not able to provide. The complainants provided this assistance, which included a regular and ongoing regimen during which Chouinard performed services 6 hours a day, seven days a week and Dewey performed services 2 hours a day, five days a week. Generally, these services were performed for 3 hours every morning and three hours every evening. The duties performed in the morning included:
 - Assisting Matchitt out of bed;
 - Preparing breakfast and lunch;
 - Toileting, bathing, dressing Matchitt;
 - Applying medicated cream to Matchitt's back and legs;
 - Cleaning the bathroom;
 - Bleaching the urine buckets;
 - Making the bed (stripped and laundered once a week);
 - Doing breakfast dishes;
 - Vacuuming and washing the floors (usually on the weekend).
11. The duties performed in the evening included:
 - Finishing daily laundry;
 - Replacing bedding and bathroom items a necessary;
 - Putting away groceries;
 - Preparing dinner, evening snacks and drinks for Matchitt;
 - Washing and putting away lunch and other dishes;
 - Taking out or burning household garbage.
12. In addition to the regular duties listed above, the complainants also performed other services that included yard work, shopping, picking up medications for Matchitt and transporting him to medical appointments.
13. The complainants performed the regular and ongoing services described above from April 17, 2008 until September 28, 2008. There was also a period from October 1, 2008 until October 16, 2008, where the Director found the complainants performed clean-up work in Matchitt's house and yard.
14. The Director noted the complainants received free accommodation in a trailer owned by Matchitt and understood they would be given title to the trailer by Matchitt when he left the country. For a number of reasons the trailer was not transferred to the complainants but was sold to another individual.

15. The Director accepted the support services provided to Matchitt by the complainants were “extremely beneficial” to him, were provided daily, could not be provided to the required level by the public home care service in Sandspit, were of a high quality and allowed him to remain in his home rather than be hospitalized.
16. The Director found there was an understanding between Matchitt and the complainants that they would be compensated for their efforts, but that there was no expectation the compensation would take the form of an hourly payment of wages.
17. The clean-up work performed by the complainants in October 2008 was performed alongside other persons who were paid for their work. The reason advanced by Matchitt during the complaint process for not paying the complainants for this work was that they were not deserving of pay because they had allegedly caused a financial loss to Matchitt relating to some transactions involving an ATV.
18. The Director found the complainants were employees of Matchitt under the *Act* for the period claimed and he was an employer. The Director found the complainants’ status as employees was clear in respect of the clean-up work and less clear in respect of the support services work.
19. The finding that the complainants were employees of Matchitt when providing the support services took into consideration those matters described in the paragraphs above – the nature and extent of the services provided by the complainants and the understanding of the parties about compensating for those services. The relevant portion of the Determination summarizing this finding is found on page R8:

... were Mr. Chouinard and Ms. Dewey employees within the meaning of the *Act*? Was either of them a person that the employer allowed to perform work normally performed by an employee? The difficulty in answering this question is that it is possible to argue that the sort of support provided by the Complainants would often be provided by an employee, but could also be provided by a family member or, rarely, a friend. The factor that weighs most heavily in favour of a finding that this was an employment relationship is the regular and ongoing nature of the provision of support by the Complainants. This is not a situation where they occasionally lent a hand or where other friends and relatives would share the load, but where the expectation was that they would provide certain services regularly on a daily basis. This description simply fits more easily with the idea of “work normally performed by an employee”.

20. The Director also analyzed whether the complainants fell within the definition of “sitter” in the *Regulation* and found they did not.
21. The Director made findings concerning the rates of pay and amounts owed that are not at issue in this appeal, except in the general context of whether there are any wages at all owed by Matchitt to the complainants.

ARGUMENT

22. Counsel for Matchitt submits the Director erred in law by concluding Matchitt was an employer under the *Act* and the complainants were his employees, asserting there was no evidence the complainants were formally employed by either Matchitt or his daughter on his behalf. He submits that proof of an employment relationship is essential to a finding that wages are owed and that the Director had an onus to show the employment relationship existed on the facts.
23. Counsel says the question of whether there was an employment relationship between Matchitt and the complainants should be viewed over two periods: the period from April 17, 2008 until September 28, 2008,

when the complainants were performing support services; and the period from October 1, 2008 until October 16, 2008, when the complainants were performing clean-up work.

24. In respect of the first period, counsel says there was no reasoned analysis in the Determination for finding an employment relationship. Counsel submits it was insufficient for the Director to have found an employment relationship from the regular and recurring nature of the services provided without considering how there could be an employment relationship without “some evidence of the establishment of such a relationship”. Counsel argues that in the circumstances, the onus of demonstrating an employment relationship was established should have included a consideration that one of the parties to the purported relationship, Matchitt, was of “diminished capacity”.
25. Essentially, counsel for Matchitt contends the relationship between Matchitt and the complainants during this period was one in which the complainants provided their services based on their friendship with Matchitt and in consideration of the free use of a trailer owned by Matchitt and the apparent promise by him to sign over title to the trailer at some point.
26. In respect of the second period, counsel for Matchitt concedes there was an employment relationship but asserts the “employer” for that period was Matchitt’s daughter.
27. The Director and the complainants have replied to the appeal.
28. The Director, with the exception of four matters raised in the appeal submission, refers to and relies on the Determination.
29. On those four matters, the Director first addresses the assertion that Matchitt’s daughter was the complainants’ employer for the period they were doing clean-up and says that assertion was not made during the complaint process, even though Ms. Matchitt was acting on behalf of and with the authority of Matchitt during that process. Second, the Director disagrees there was any finding that the complainants were “home support workers”. Third, the Director says it is not correct that the Community Health Case Manager, Elsie Wolter, indicated Matchitt was of diminished “mental” capacity, as stated by counsel for Matchitt in his submission. The Director says Ms. Wolter, in her evidence, which is set out in the Determination, referred to Matchitt as an individual with “diminished capacity”, which the Director understood to refer to Matchitt’s physical condition. In any event, the Director says no evidence has been provided to show Matchitt was mentally incapable of making decisions with respect to his personal affairs, including the decision to engage the complainants to provide support services for him. Fourth, the Director says the decision relied on by counsel for Matchitt is significantly different on its facts than this case.
30. The complainants have filed a lengthy reply that addresses several of the assertions of fact raised in the appeal submission and provides some additional factual information that presumably was considered necessary to place parts of their reply in a factual context.
31. The final response of counsel for Matchitt answers, and disputes, many of the assertions of fact made by the complainants and responds to the four matters raised in the reply of the Director. In the course of that response, counsel questions the reliability of the information contained in the letter provided to the Director by Ms. Norman, the Community Health Nurse. The response also attempts to introduce additional evidence into the process, consisting of a denial by Matchitt that the complainants performed the services or worked

the hours claimed by them and accepted by the Director in the Determination¹, additional comments from Ms. Wolter which are said to contradict assertions made by the complainants in their response and which address Matchitt's mental condition and information provided by a friend of Matchitt's, Lew Rutherford, that he had visited Matchitt in September 2008 and had not seen the complainants working as they alleged and that, on one occasion, he had driven Matchitt to see his doctor.

ANALYSIS

32. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

112. (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*

(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 made.*

33. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

34. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

1. NEW EVIDENCE

35. As indicated above, both Matchitt and the complainants have sought to introduce new, and additional, factual elements into this appeal. Matchitt has not grounded this appeal on new evidence becoming available. At the outset of my analysis I will address whether any of the new and additional evidence submitted by either party will be considered in this appeal. I note the evidence being considered here has all been provided by way of assertions unsupported by any objective material.

36. The Tribunal is given discretion to accept or refuse new or additional evidence. The Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. New or additional evidence which does not satisfy any of these conditions will rarely be accepted.

¹ The Director notes in the Determination that neither Matchitt nor Ms. Matchitt specifically challenged either the description by the complainants of the services they performed or the amount of time each contributed to performing these services: see page R9.

37. I conclude the new or additional evidence should not be accepted. All of the factual assertions made by the parties in their submissions were known to those parties before the Determination was made and could have been raised during the complaint process. As well, there is nothing in the submissions of either party that has convinced me this “evidence” is either credible or probative. Finally, parts of the “evidence” provided by counsel for Matchitt directly challenge findings and conclusions of fact made by Director without establishing any basis for doing so. On this point, I reiterate that the Tribunal has limited authority to consider appeals based on alleged errors in findings and conclusions of fact made in the Determination.

2. ERROR IN LAW

38. While the sole ground of appeal is framed as an error of law, the appeal has been argued from the perspective that the Director could not, on the evidence, find an employment relationship between Matchitt and the complainants for the support services provided; that the evidence demonstrated the relationship was one of friendship in which the complainants received free accommodation in a trailer owned by Matchitt in return for the services provided.
39. The Determination is grounded in a finding that the complainants were employees as they performed work normally performed by employees. The Director reached this conclusion from an assessment of the nature and scope of the services provided by the complainants to Matchitt and the circumstances in which they were provided. The Director found Matchitt was an employer.
40. One of the principal arguments raised by counsel for Matchitt is that there was no evidence that an employment relationship was entered into by Matchitt. Part of this argument is premised on the suggestion of Matchitt’s “diminished capacity”. There is, however, no factual basis for suggesting Matchitt was mentally incapable of forming the relationship with the complainants for their services and I do not accept that suggestion. If there is any basis for such a suggestion, one would have expected it to be raised during the complaint process and acceptable medical evidence provided to support it. On the facts there was an adequate basis for concluding Matchitt consciously and voluntarily entered the relationship under which the complainants provided the support services. That conclusion is supported in the Determination and on the material in the section 112(5) Record. The Determination, in describing the argument and evidence provided by the complainants, notes that:

Ms. Dewey claims that Mr. Matchitt felt he was not receiving sufficient care from the public home care service and told the home care service that he would make his own arrangements for personal care until his daughter arrived.

41. The Determination, in describing the argument and evidence provided by the employer, notes that the first argument raised by Matchitt was that there was no intention to create an employment relationship but rather, “there was an arrangement arrived at between friends which provided mutual benefits to both parties”. The April 22, 2009 draft sent to the parties by the Director stated that Ms. Wolter had “indicated it [the service and support provided by the complainants] was a reciprocal arrangement”. Whether Matchitt did not intend the relationship to be an employment relationship is irrelevant. The Tribunal has frequently found the existence of an employment relationship is not dependent on the intention of one or both of the parties, but can be established by showing work was performed (and allowed to be performed), which is identifiable as work normally performed in an employment relationship: see for example *Thursday’s Sports Plus Ltd.*, BC EST # D146/97, *Debra Hantula operating as Cambie Country Garden*, BC EST # D277/97, *Arbutus Environmental Services Ltd.*, BC EST # D088/01, *Robert Brand*, BC EST # D159/00 and *Balwinder Grewal and Harvinder Grewal o/a P&M Farms*, BC EST # D019/06.

42. Those findings were made in this case and they are legally consistent with the definitions of employee and employer contained in the *Act*, the relevant portions of which state:

“employee” includes

(a) a person, including a deceased person, receiving or entitled to wages for work performed for another,

(b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee, . . .

“employer” includes a person

(a) who has or had control or direction of an employee, or

(b) who is or was responsible, directly or indirectly, for the employment of an employee;

43. There are two considerations that arise from the definitions as they are interpreted and applied in the context of this claim. First, the definitions of employee and employer are inclusive, not exclusive. The Tribunal has embraced the comments of the Court of Appeal in *Fenton v. Forensic Psychiatric Services Commission* (1991) 56 BCLR (2d) 170, that the definitions of employer and employee are to be given a liberal interpretation:

. . . the definitions in the statute of “employee” and “employer” use the word “includes” rather than “means”. The word “includes” connotes a definition which is not exhaustive. Its use indicates that the legislature casts a wide net to cover a variety of circumstances.

44. Second, while it has been noted by the Tribunal that the legislative provisions defining employee, employer, wages and work are somewhat circular, it is accepted that the *Act* is remedial legislation and should be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects, see *Machtiger v. HOJ Industries Ltd.* (1992) 91 D.L.R. (4th) 491 (S.C.C.), *Rizzzo & Rizzzo Shoes Ltd.* (1998) 154 D.L.R. (4th) 193 and *Helping Hands v. Director of Employment Standards* (1995) 131 D.L.R. (4th) 336 (B.C.C.A.). I adopt with the following comment from *Machtiger v. HOJ Industries Ltd.*, supra, that:

. . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible is favoured over one that does not.

45. On the facts, the complainants and Matchitt quite comfortably fit within the definitions of employee and employer, respectively, for the support services work and the conclusion by the Director that they were employees and an employer under the *Act* is consistent with those definitions and with the policy objectives of the legislation. Matchitt may not agree that the relationship between him and the complainants should be found to be an employment relationship, but the appeal does not show that finding was an error of law.
46. In respect of the work performed by the complainants in October, the burden is on Matchitt to show the Director erred in finding he was the complainants’ employer for that work. The concession by Ms. Matchitt that she could be considered the employer does not demonstrate an error in the Determination.
47. Finally, I agree with the Director that the case relied on by counsel for Matchitt is significantly different on its facts than this case and provides no assistance in this appeal.
48. The appeal is dismissed.

ORDER

49. Pursuant to Section 115, I order the Determination dated June 26, 2009, be confirmed in the amount of \$15,671.02, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal