Employment Standards TRIBUNAL

An appeal

- by -

CSA Care and Share Agency Ltd.
("CSA")

- 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

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2004A/57

DATE OF DECISION: June 15, 2004

DECISION

SUBMISSIONS

On behalf of CSA Care and Share Agency:	Judy Dennison
On behalf of the Director of Employment Standards:	Michelle Alman
On her own behalf:	Tami Lessard

OVERVIEW

This is an appeal by CSA Care and Share Agency Ltd. ("CSA"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued February 25, 2004. The Director's delegate found that CSA contravened Section 16 of the *Act* in failing to pay Tami Lessard wages in the amount of $6,309.99. The delegate also imposed an administrative penalty of $500.00 for the contravention.

CSA contends that Ms. Lessard should be found to be a "live-in home support worker" as defined by the Act and thus not subject to the hours of work and overtime provisions set out in Part 4 of the Act, and that the administrative penalty should be cancelled.

After reviewing the written submissions, I have determined that an oral hearing is not necessary to decide the matters under appeal.

ISSUES TO BE DECIDED

1. Whether the Director erred in law in determining that Ms. Lessard was not exempt from Part 4 of the Act;
2. Whether the Director failed to observe principles of natural justice in making the Determination; and
3. Whether evidence has become available that was not available at the time the Determination was being made.

FACTS

CSA operates an assisted living program out of an apartment complex in Kelowna which houses a mixture of CSA clients and regular tenants. It provides home care to clients living in individual apartment units which CSA rents directly from the landlord. CSA in turn provides apartment units to its clients, along with hydro and cable services. One three bedroom unit is used by CSA staff.

CSA bills its clients for regular assistance services, and, if required, a separate direct care fee for other additional services. CSA pays the apartment rent, utility fees, food and medication from the regular fees it collects from the clients.

CSA's clients received funds from a variety of government programs, including Old Age Security/Guaranteed Income Supplement ("OAS/GIS"), Shelter Aid for Elderly Renters ("SAFER"),

Guaranteed Annual Income for Need ("GAIN"), Veteran's affairs, Choice in Supports for Independent Living ("CSIL") and social assistance. The majority of CSA clients pay for CSA's services from their OAS/GIS funds. CSA estimated that between 69-78 percent of its funding came through the client from a government funded program.

Ms. Lessard worked for CSA from September 10, 2001 until February 22, 2003. She worked 24 hour shifts commencing at 9:00 a.m., on a one day on, three day off schedule, and was paid $160 per shift. Her job duties included administering medication to clients four times per day, visiting with the clients, providing meals, and, if necessary, assisting clients into bed or baths. She was on call for the balance of the day in the event of emergencies. She slept in CSA's apartment unit at night. She was not charged for room and board.

CSA contended that it operated a "government funded program" as defined in the *Employment Standards Regulations*. Although Ms. Dennison acknowledged that OAS/GIS funds "flow through" CSA's clients, she argued that this money should be considered government funding for policy reasons

> if the care program has a letter from the client's doctor stating that this client has to be in a health care program provided by a private or government care program that has 24 hour qualified care staff available to them and a medication program.

CSA submitted that, for the OAS/GIS to be paid directly to each care program would be costly and administratively complex. She argued that, while a senior who lived independently could spend their OAS and GIS however they like, when that senior's health care requirements necessitated the assistance of health authorities, the money became government health care funding.

CSA asserted that, when it developed its care program in 1998, it consulted with the Branch to ensure that its employees fell within the definition of "live-in home support worker".

The delegate concluded that CSA was not operating a government funded program as that was contemplated by the Regulations. He found that, although the clients paid CSA directly from their own government funds, those funds were not necessarily meant for the provision of CSA services.

The delegate therefore determined that Ms. Lessard did not fall within the definition of live-in home support worker, and was not excluded from the hours of work and overtime provisions of the *Act*. The delegate also considered whether Ms. Lessard fell into the definitions of "night attendant", "sitter", and "residential care worker" as those were defined in the Regulations, and concluded that she did not.

The delegate calculated the wages owed to Ms. Lessard in accordance with applicable legislation during her employment period.

ARGUMENT

CSA argues that the delegate erred in finding that CSA did not qualify as a "government funded program". CSA argues that the delegate made findings of fact that were not supported by the evidence, and that he made other errors of law that led to an incorrect and just decision. CSA further contends that the delegate misinterpreted the law regarding how government funding is to be paid to an employer and failed to consider the significance of certain evidence placed before him.

Ms. Dennison submits that the delegate failed to observe the principles of natural justice in failing to address the fact that government funding includes veteran's affairs.

Ms. Dennison contends that CSA is a "conduit" for much of a client's income, and that, whether a client was in CSA's program or living independently, their costs were the same. She submits that, because the majority of CSA's funding came from government funded programs, the Act had not been contravened.

Ms. Dennison further alleges that the Determination contains inaccuracies. I have reviewed those "inaccuracies", which consist essentially of times Ms. Lessard performs certain tasks. I conclude that, even if the schedule is inaccurate, the alleged inaccuracies have no bearing on the issue before me. No further references will be made to this matter.

Ms. Dennison further contends that the delegate considered evidence from Ms. Lessard that she was not given any opportunity to respond to. I find that, in the event CSA had not been given an opportunity to respond to Ms. Lessard's allegations, on which I need not make any finding, the discrepancies in the evidence have no bearing on the issue before me. They do not relate to whether Ms. Lessard is exempt from the Act or to her hours of work.

Finally, CSA contends that it is being penalized, by way of the administrative penalty, for relying on representations made by another delegate of the Director at the time the program was being set up that its employees would be considered live in home support workers.

Although CSA indicated that it had new and relevant evidence on the appeal form, it is not clear what that new and relevant evidence is. Ms. Dennison attached calculations and spread sheets which I infer constitute, in some way, support for her arguments regarding the percentage of government funding which flows through to CSA from its clients.

Counsel for the Director submits that CSA has not established that the delegate made errors of law. She contends that, although CSA argues that the delegate made factual findings that are not supported by the evidence, the fact is that the delegate preferred other evidence to CSA's evidence. She submits it was entirely appropriate for the delegate not to accept CSA's submission that its clients were merely a conduit for government funds. She submits that this is not a factual or legal error, but a disagreement with the findings, from which there is no right of appeal.

Counsel for the Director further submits that the delegate's decision not to accept OAS/GIS income as government funding is not an error of law, nor is his failure to discuss the Branch's policy of considering Veteran's Affairs funding as "government funding".

Counsel for the Director argues that the delegate did not deny CSA natural justice, and, simply because he did not address in detail all of CSA's submissions, it could not be concluded that they were not considered by the delegate prior to the determination being issued.

Finally, counsel submits that the delegate did not breach principles of natural justice in assessing a administrative penalty after CSA allegedly consulted with the Branch and received assurances that it was in compliance with the Regulations. Counsel submits that there is no "officially induced error" defence to an administrative penalty for a breach of the Act, and that further, the Branch is not in a position to respond to allegations about what a Branch employee might have said in 1998 to questions asked by CSA at that time.

Finally, counsel for the Director submits that CSA's "new evidence" is evidence that was available at the time the Determination was being made, and seeks to have the appeal dismissed.

Ms. Lessard sought to have the Determination upheld. She submits that CSA had not provided any basis for its appeal.

ANALYSIS

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

The burden is on CSA to establish the grounds for the appeal. In other words, CSA must demonstrate that the delegate erred in law, there has been a breach of natural justice, or that new and relevant evidence that was not available at the time of the Determination has become available, and should be considered. I am unable to find that CSA has discharged that burden.

Error of law

The *Act* imposes requirements on an employer with respect to a number of things, including payment of wages, hours of work and conditions of work. Section 16 of the *Act* sets out minimum wages that must be paid and section 40 sets out overtime wage requirements. The *Act* exempts certain employees or classes of employees from these minimum standards. Section 34 of the *Employment Standard Regulations* provides that a live-in home support worker is excluded from the hours of work and overtime provisions established in Part 4 of the *Act*.

At issue on appeal is whether Ms. Lessard is entitled to the benefits of Part 4 of the *Act*, or whether she falls within the category of live-in home support worker, relieving CSA from the obligation of meeting those minimum standards.

The *Regulation* defines "live-in home support worker" as a person who

a) is employed by an agency, business or other employer providing, through a government funded program, home support services for anyone with an acute or chronic illness or disability not requiring admission to a hospital, and
b) provides those services on a 24 hour per day live-in basis without being charged for room and board

…

The Tribunal has consistently concluded that the *Employment Standards Act*, as benefits conferring legislation, must be construed in a broad, generous and purposive manner, with any doubt arising from statutory construction to be resolved in favor of claimants. Any provisions that adversely impact on employees' benefit entitlements must be narrowly construed. (*Machtinger* v. *HOJ Industries Ltd*. [1992] 1 S.C.R. 986, and *Re Rizzo & Rizzo Shoes* [1998] 1 S.C.R. 27).

In other words, any exemptions from minimum standards and overtime provisions will be interpreted in a way that extends protections to as many employees as possible.

Although I have considered all of Ms. Dennison's submissions with respect to the delegate's alleged errors of law, I will not address each one specifically. Her arguments focus largely on the delegate's perceived lack of appreciation or understanding of the administrative difficulties facing various agencies, including CSA, in obtaining the funds of those persons who receive various forms of assistance for daily living tasks. She also addresses the degree of autonomy clients of CSA in receipt of OAS/GIS have over those funds. At root of Ms. Dennison's submissions however, is her disagreement with the delegate's conclusion.

The issue is one of statutory interpretation in light of the interpretive principles set out above.

I find no error in the delegate's Determination to interpret the Regulation narrowly. He has concluded that there must be a direct connection between the government funds and the agency, business or employer to meet the requirements of this section. I find this interpretation consistent with the purposes of the Act.

Furthermore, I am unable to find that CSA is a government funded program solely as a result of the fact that the majority of CSA's funds are received by its clients from a variety of government programs.

The majority of CSA's clients receive government funds, and largely in the form of OAS/GIS. The individuals receive that money based on their age and need. The money is payable to the individual, who has a choice about how it is spent. The fact that CSA's clients have chosen to spend their money on CSA services does not transform CSA into a government funded agency. The government has not made a decision to fund CSA.

I find no basis for this ground of appeal.

Failure to observe the principles of natural justice

Apart from the appeal document itself, the only submission CSA makes on this ground is that the delegate failed to address CSA's arguments that OAS/GIS funds were to be treated the same as Veteran's Affairs funds.

Principles of natural justice are, in essence, procedural rights that ensure parties know the case against them, the right to respond, and the right to be heard by an independent decision maker.

On its face, the Determination shows that the delegate considered, and rejected, CSA's arguments. Simply because the delegate does not refer specifically in the Determination to each and every argument or submission made by CSA, and in particular to Veteran's Affairs funds, does not constitute a breach of natural justice.

It appears that CSA is contending that the delegate failed to observe the principles of natural justice in assessing a $500 administrative penalty after it allegedly consulted with a Branch official prior to establishing the program and receiving assurances that its employees fell within the live in home-care category.

Ms. Dennison provided no evidence of any "assurances" she received from the Branch official. It is impossible to determine what information might have been given to that official in order for him to make those assurances, or indeed, whether the assurances were given in respect of this facility, or others also operated by Ms. Dennison.

In any event, the Tribunal has determined that administrative penalties imposed for contraventions of the Act are absolute are "absolute liability" offences as opposed to "strict liability" offences, and a defence of due diligence is not available to an employer for a contravention: *Punjab Labour Supply Limited* (BC EST #D392/98).

New Evidence

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:

1. 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;
2. the evidence must be relevant to a material issue arising from the complaint;
3. the evidence must be credible in the sense that it is reasonably capable of belief; and
4. 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.

As I noted above, it is not clear what the new evidence is, or why CSA is relying on it. Nevertheless, this evidence does not meet the test set out above. These calculations and spread sheets contain figures that were generated, or could have been generated, before the Determination was issued. Furthermore, I am not persuaded that, even if the information was not available to CSA at that time, it would have led the Director to a different conclusion on the issue of whether CSA's program was a "government funded program" for the purposes of the *Regulation*.

The appeal is dismissed.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination dated March 1, 2004 be confirmed in the amount of $7,105.82, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal