Employment Standards TRIBUNAL

An appeal

- by -

0919160 B.C. Ltd., carrying on business as Coal Harbour Pharmacy
("Coal Harbour Pharmacy")

- 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: Marnee Pearce

FILE No.: 2017A/109

DATE OF DECISION: November 7, 2017

DECISION

SUBMISSIONS

Sina Pirooz	on behalf of 0919160 B.C. Ltd., carrying on business as Coal Harbour Pharmacy

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"ESA"*), 0919160 B.C. Ltd., carrying on business as Coal Harbour Pharmacy ("Coal Harbour Pharmacy") has filed an appeal of a Determination issued by Arun Mohan, a delegate (the "delegate") of the Director of Employment Standards (the "Director"), on July 25, 2017.

2. The Determination found that Coal Harbour Pharmacy had contravened section 18 and section 40 of the *ESA* with respect of the employment of Swasan Gad ("Ms. Gad") and ordered Coal Harbour Pharmacy to pay Ms. Gad wages in the amount of $2,063.25 (including overtime and interest) and to pay administrative penalties in the amount of $1,000.00.

3. The total amount of the Determination was $3,063.25.

4. This appeal is grounded in new evidence becoming available that was not available at the time the Determination was made, errors of law, and failure to observe the principles of natural justice. Coal Harbour Pharmacy wrote that "My request is to dismiss the Mr. Mohan determination or send the matter back to Employment standard for a different delegate to review so I could be present".

5. In correspondence dated October 16, 2017, the Tribunal notified the parties, among other things, that no submissions on the merits of the appeal were being sought from any party pending a review of the appeal by the Tribunal and, following this review, all or part of the appeal might be dismissed.

6. The section 112(5) record (the "record") has been provided to the Tribunal by the Director and a copy was mailed to Coal Harbour Pharmacy and Ms. Gad on September 26, 2017, allowing both parties the opportunity to object to its completeness. No objection has been received and, accordingly, the Tribunal accepts it as being a complete record of the material that was before the Director when the Determination was made.

7. I have decided this appeal is appropriate for consideration under section 114 of the *ESA.* At this stage, I am assessing the appeal based solely on the Determination, the Reasons for the Determination (provided to the Tribunal as part of the record), the appeal, the written submissions filed with the appeal, my review of the material that was before the Director when the Determination was being made, and any other material allowed by the Tribunal to be added to the record. Under section 114(1) of the *ESA*, the Tribunal has the discretion to dismiss all or part of the appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

> 114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of the appeal if the tribunal determines that any of the following apply:
>
> (a) the appeal is not within the jurisdiction of the tribunal;
>
> (b) the appeal was not filed within the applicable time limit;
>
> (c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;
>
> (d) the appeal was made in bad faith or filed for an improper purpose or motive;
>
> (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
>
> (f) there is no reasonable prospect that the appeal will succeed;
>
> (g) the substance of the appeal has been appropriately dealt with in another proceeding;
>
> (h) one or more of the requirements of section 112(2) have not been met.

8. If satisfied that the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1) of the *ESA*, the Director will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1) it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal can succeed.

ISSUE

9. The issue at this stage is whether the appeal shows there is any reasonable prospect it will succeed.

THE FACTS

10. Ms. Gad filed a complaint with the Director alleging she had not been paid wages owed for the work she performed as a relief pharmacist for Coal Harbour Pharmacy from March 14, 2017, through March 18, 2017.

11. The Notice of Complaint Hearing and Demand for Employer Records was sent via email to Sina Pirooz, Director of Coal Harbour Pharmacy, on May 12, 2017, and confirmation of receipt of the documents as well as confirmation of attendance at the hearing scheduled for June 15, 2017 was returned on the same day.

12. The Director conducted a hearing on June 15, 2017. Testimony was provided by Ms. Gad and her witness Youssef Karras. Coal Harbour Pharmacy did not participate at the hearing, even though attendance had been confirmed.

13. The appeal form submitted by Coal Harbour Pharmacy includes the statement that Mr. Pirooz was unable to participate in the hearing "for reasons beyond my control". No further explanation was provided.

14. The Determination set out two issues – is Ms. Gad an employee as defined under the *ESA,* and does Coal Harbour Pharmacy owe Ms. Gad parking expenses, regular wages, and vacation pay?

15. Although Coal Harbour Pharmacy did not participate in the hearing, Mr. Pirooz did send an email to the Director on May 29, 2017, providing reasons why Ms. Gad should not be considered an employee. Ms. Gad was hired through a relief agency belonging to Mr. Karras; Coal Harbour Pharmacy never interviewed, hired or had any contract with Ms. Gad; there was no interaction between Ms. Gad and Coal Harbour Pharmacy before the assignment by the relief agency; there was no record of employment (ROE); Ms. Gad did not quit; and there no agreement between Coal Harbour Pharmacy and Ms. Gad to pay for parking expenses.

16. The hearing proceeded on June 15, 2017, and a determination without reasons was issued on June 27, 2017. Following a request from Coal Harbour Pharmacy, reasons for the determination were provided on July 25, 2017.

17. Mr. Karras was a witness at the June 15, 2017, hearing and he testified that he has a company that provides relief pharmacists, but that Ms. Gad did not work for him. He did however, provide her contact information to Mr. Pirooz regarding relief coverage between March 14 to March 18, 2017, and Mr. Pirooz told Mr. Karras that he had hired Ms. Gad to cover this period of absence.

18. Although Mr. Pirooz had submitted that he had "never interviewed, hired or had any contract" with Ms. Gad, the Director found the evidence established that Mr. Pirooz met Ms. Gad at the pharmacy on March 8, 2017; sent a March 10, 2017, text message confirming the dates of the shift, the hours to be worked, that someone would open and close the pharmacy for her; disclosed passwords for the computer-based pharmacy tools provided by Coal Harbour Pharmacy; and invited Ms. Gad to contact him if there were any issues. Ms. Gad was told that although there were assistants available, it would be best if she processed medications herself. On March 11, 2017, Ms. Gad asked for Mr. Pirooz's email in order to send an invoice at the completion of her employment period, and this was provided on March 12, 2017, prior to the commencement of employment.

19. The Director concluded that the definitive qualities of an employment relationship between Coal Harbour Pharmacy and Ms. Gad existed – the degree of control and direction exercised by Mr. Pirooz showed that he decided how Ms. Gad would complete her tasks. Ms. Gad was fully integrated into the Coal Harbour business model, and the tasks performed were core services. Although there was no formal contract, the text messages revealed that Ms. Gad was directed by Mr. Pirooz on how to complete her tasks, and that she was to report to him directly during this period of coverage. Wages were to be paid to Ms. Gad directly.

20. The Director concluded that as no discussion took place between the parties concerning parking expenses, there was no award for parking expenses.

21. The Director concluded that as Ms. Gad did not work more than five days, she was not entitled to vacation pay.

22. Ms. Gad provided a record of hours worked between March 14, 2017, and March 18, 2017. This amounted to total regular wages of $1,440.00 and total overtime wages of $607.50. As Coal Harbour Pharmacy did not object to the hours claimed, and provided no record of hours, this was found to be the best available evidence of wage entitlement, and was accepted by the Director.

ARGUMENT

23. Coal Harbour Pharmacy argued that Mr. Karras' claim that Ms. Gad did not work for his relief company was false, and in this regard, relied upon the text messages between Mr. Karras and Mr. Pirooz.

24. Ms. Gad was paid a higher than average rate for a relief pharmacist, reflecting the involvement of a third-party agency relationship as well as the opportunity to make profit.

25. Coal Harbour Pharmacy was not in contact with Ms. Gad prior to the commencement of her shift other than to arrange the opening and closing of the pharmacy.

26. Ms. Gad was an independent contractor, and paid for her own licence and liability insurance.

27. Ms. Gad did not work under his control or direction, but rather performed her duties under the College of Pharmacists rules and regulations.

28. Any contact Coal Harbour Pharmacy had with Ms. Gad during the coverage period was because of staff concerns.

29. Ms. Gad's tools were her pharmacist expertise and specialized training.

30. Ms. Gad used her own password and licence during practice, as required by the College of Pharmacist.

31. Ms. Gad was not integrated with Coal Harbour Pharmacy – she kept patients waiting, and her work was not satisfactory.

32. Ms. Gad had the right to provide or deny medication based on her expertise, and had control over deciding how to spend her time, be this medication reviews, injections, time preparing medication, or time spent with the patients.

ANALYSIS

33. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, 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 being made.

34. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision.

35. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal that there is an error in the Determination under one of the statutory grounds.

36. Coal Harbour Pharmacy's Appeal Form has included the ground of appeal of failure to observe the principles of natural justice in making the Determination, although nothing in the appeal documentation supports this ground of appeal.

37. Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker.

38. The record confirms that Coal Harbour Pharmacy was aware of the issues under consideration, and participated in the process leading up to the hearing. In its appeal, Coal Harbour Pharmacy does not provide a reason for not attending the actual hearing, other than "reasons beyond the control" of Mr. Pirooz. However, there was no request made for an adjournment and rescheduling of the hearing, and the decision to not cross-examine witnesses was a choice made by Coal Harbour Pharmacy.

39. I find that Coal Harbour Pharmacy had the opportunity to respond to the allegations and there was no denial of natural justice. Furthermore, there is no evidence of any bias on the part of the decision-maker.

40. Coal Harbour Pharmacy has also raised error of law as a basis for this appeal.

41. The Tribunal has adopted 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*), [1998] B.C.J. No. 2275 (B.C.C.A.):

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

42. The bulk of Coal Harbour Pharmacy's submission express disagreement with findings of fact made by the Director, as well as repeating or elaborating on prior submissions. However, in order for a factual finding to rise to the status of an error in law, the finding must be wholly lacking in any evidentiary foundation. The disputed facts relate to the Director's conclusion that Ms. Gad was an employee of Coal Harbour Pharmacy and was entitled to the wage protection provisions provided within the *ESA*. Thus, the only substantial dispute between the parties is whether the Director erred in law in determining that Ms. Gad was an 'employee' as defined in section 1 of the *ESA.*

43. The Director correctly identified the governing legal principles including the definitions of 'employee' and 'employer' contained in section 1 of the *ESA.* Although Coal Harbour Pharmacy did not attend the hearing, the evidence and arguments previously forwarded to the Director were considered within the Determination, and found to be lacking.

44. In my view, the only rational conclusion to be drawn from the totality of the evidence and arguments before the Director is that Ms. Gad, during the 5 days in issue, was in an employment relationship with Coal Harbour Pharmacy. Ms. Gad was integral to Coal Harbour Pharmacy's business, serviced Coal Harbour Pharmacy's clients, had no real risk of loss or opportunity to profit, made extensive use of Coal Harbour's tools and equipment, and Coal Harbour Pharmacy provided control and direction over her work.

45. I am satisfied, given the testimony at the hearing of Mr. Karras, that the Director correctly concluded there was no employment relationship between Ms. Gad and Mr. Karras.

46. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:

> (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
>
> (b) the evidence must be relevant to a material issue arising from the complaint;
>
> (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

47. Coal Harbour Pharmacy has indicated in the appeal documents that evidence has become available that was not available at the time the Determination was being made. However, although these submissions outline reasons for disagreement with the findings of fact and the conclusions of the Determination, there is no new fresh evidence presented that would have led the Director to a different conclusion on the employment relationship between Ms. Gad and Coal Harbour Pharmacy.

48. This argument has no reasonable prospect of succeeding and it is dismissed.

49. There is no error in this Determination. I find there is no basis in the *ESA* for this appeal and it has no reasonable prospect of succeeding. The purposes and objects of the *ESA* are not served by requiring the other party to respond to it. The appeal is dismissed under section 114(1)(f) of the *ESA.*

ORDER

50. Pursuant to section 115 of the *ESA,* I order the Determination dated July 25, 2017, be confirmed in the amount of $3,063.25, together with any interest that has accrued under section 88 of the *ESA*.

Marnee Pearce
Member
Employment Standards Tribunal