

An appeal

- by -

Daniel J. Barker Law Corporation
(“Barker”)

- 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: Kenneth Wm. Thornicroft

FILE No.: 2015A/128

DATE OF DECISION: December 29, 2015

DECISION

SUBMISSIONS

Daniel J. Barker	on behalf of Daniel J. Barker Law Corporation
Tyrone Daum	on his own behalf
Micah Carmody	on behalf of the Director of Employment Standards

INTRODUCTION

1. This is an appeal filed by Daniel J. Barker Law Corporation (“Barker”) under subsection 112(1)(a) of the *Employment Standards Act* (the “Act”). Barker appeals a Determination issued by a delegate of the Director of Employment Standards (the “delegate”) on August 31, 2015, pursuant to which it was ordered to pay Tyrone Daum (“Mr. Daum”) \$1,979.61 on account of unpaid wages and section 88 interest. Further, and also by way of the Determination, the delegate levied five separate \$500 monetary penalties against Barker based on its contraventions of sections 17 (regular payment of wages), 18 (payment of wages on termination of employment), 45 (statutory holiday pay) and 46 (premium pay for working on a statutory holiday) of the Act and section 46 (production of employment records) of the *Employment Standards Regulation* (the “Regulation”). Accordingly, the total amount of the Determination is \$4,479.61.
2. I am adjudicating this appeal based on the written submissions filed by the parties and, in addition, have reviewed the delegate’s “Reasons for the Determination” (the “delegate’s reasons”) issued concurrently with the Determination and the subsection 112(5) record that was before the delegate when he issued the Determination.

FACTUAL BACKGROUND

3. The relationship between Barker, and more particularly its principal, Mr. Daniel Barker, and Mr. Daum was very unusual. Mr. Barker carries on a law practice through a professional corporation (Barker) and is the only director and one of two officers (the other being Ms. Michelle Cyd Barker) of that corporation. Mr. Barker apparently represented Mr. Daum many years ago and in 2014 successfully represented Mr. Daum in a B.C. Supreme Court action (see *Daum v. Clapci*, 2014 BCSC 1524). I note that Justice Macintosh in his reasons expressed the following sentiment (at para. 39): “Finally, I want to add that I am grateful to Mr. Barker and [counsel for the defendants] for taking over a very difficult case not long before trial and presenting their clients’ positions professionally”. I shall refer to this latter dispute as the “Clapci litigation” and it has major bearing on the dispute between Messrs. Barker and Daum.
4. One of the central issues in dispute in this case arises, or is otherwise closely connected with, the Clapci litigation. Mr. Daum was working out of Barker’s law offices, principally on his own case (and some others he was also pursuing), although he also provided some assistance to Mr. Barker. While the parties’ relationship may have initially taken the form of some sort of barter agreement whereby Mr. Barker assisted Mr. Daum with his personal litigation claims in return for Mr. Daum carrying out some tasks on Barker’s behalf, the relationship was never documented and the parties, after having had a severe falling out, now have very different views about what actually transpired.

5. Eventually, Mr. Barker took over the Clapci litigation on Mr. Daum's behalf and the parties' relationship quickly deteriorated when Mr. Barker issued accounts for professional services to Mr. Daum after the case was successfully prosecuted.
6. As recounted in the delegate's reasons, in late 2012 Mr. Daum delivered file materials to Mr. Baker relating to the Clapci litigation as well as another matter in which he was involved. The relationship between the two men developed and in time Mr. Daum, who "used a spare desk in Mr. Barker's offices to work on [two files]", became both a friend to, and a casual employee of, Mr. Barker (delegate's reasons, page R2). The delegate noted:
 - Mr. Daum "had access to the photocopier, fax machine and other equipment [and] in return, Mr. Daum provided companionship in the office and would occasionally assist Mr. Barker in other matters, such as swearing affidavits on information and belief";
 - "Although Mr. Daum did not have a university or college education, he had experience in legal proceedings"; and
 - Mr. Barker reviewed documents and provided advice on Mr. Daum's matters, and acted on Mr. Daum's behalf from time to time"(delegate's reasons, page R2).
7. The Clapci litigation followed a hotel fire in Beavertown (near Penticton) and, among other things, concerned the disbursement of insurance proceeds. The delegate's reasons report the outcome of this litigation as follows: "In June, 2014, Mr. Barker conducted the Clapci matter over a five-day trial. The result was that Mr. Daum recovered over \$300,000.00. In September 2014, when those monies appeared to be forthcoming, the parties' relationship rapidly deteriorated as they disagreed over Mr. Barker's fees".
8. With respect to this latter dispute, in *Barker v. Daum*, 2015 BCSC 1316, Registrar Nielsen reduced Mr. Barker's original accounts (including fees, disbursements and taxes) from \$107,815.75 to "\$70,000 plus applicable taxes" and "\$250 in disbursements plus applicable taxes". In his reasons, Registrar Nielsen noted (at para. 11): "Although not directly relevant, the Client alleges that the Lawyer agreed to pay him \$45 an hour for the work he did at the Lawyer's office. The Client filed an Employment Standards Claim on October 17, 2014 seeking \$87,123 in alleged unpaid wages only three days after the Lawyer presented his bill for fees in the Clapci and Daum matters". I should note, for the sake of accuracy, that the complaint, as noted above, was actually filed on October 23, 2014, and was originally for \$103,233.80 (subsequently reduced to \$52,480) in unpaid wages. Mr. Daum's appeal of Registrar Nielsen's order was dismissed with costs: *Barker v. Daum*, 2015 BCSC 1958.
9. Mr. Daum last attended at Mr. Barker's offices on or about September 18, 2014, and the next day sent Mr. Barker an e-mail terminating Mr. Barker's legal retainer. By way of response, Mr. Barker advised Mr. Daum that "he would be asserting a solicitor's lien against the monies held in trust in the Clapci matter" (delegate's reasons, page R3). The delegate's narrative continues (at page R3):

On October 14, 2014, Mr. Barker emailed Mr. Daum three separate statements of account for services rendered, totalling \$101,080.00.

On October 20, 2014, Mr. Daum emailed Mr. Barker a Request for Payment (part of the Self Help Kit). He claimed for 1,936 unpaid hours of work at \$45.00 per hour, along with statutory holiday pay, compensation for length of service, and vacation pay, less \$4,000 wages received, for a total of \$103,233.80.

On October 21, 2014, Mr. Barker emailed Mr. Daum, stating that no payment would be made and denying that Mr. Daum was ever an employee of [Barker]. Mr. Daum filed his complaint on October 23, 2014 ... [and] upon being informed of the six-month limit on the amount of wages required to be paid under section 80 of the Act, Mr. Daum revised the total amount of wages owing under his complaint to \$52,480.00.

10. As noted above, Mr. Daum filed his unpaid wage complaint against Barker on October 23, 2014, and initially claimed \$103,233.80 in unpaid wages which he later reduced \$52,480. This complaint was the subject of a complaint hearing before the delegate on May 19, 2015, and, about 3 ½ months later, the delegate issued the Determination and his accompanying reasons (on August 31, 2015).

THE DETERMINATION

11. The delegate addressed two issues in his reasons: i) whether there was an employment relationship between the two parties; and ii) if so, whether Mr. Daum had a legitimate claim for unpaid wages.
12. The delegate determined that Mr. Daum's status was that of an employee rather than, as had been alleged by Barker, an independent contractor. Barker does not challenge this aspect of the Determination in this appeal.
13. With respect to Mr. Daum's unpaid wage claim, the delegate noted the following (at page R10):

The relationship [between the parties] is more complex than simply "employer and employee" or "contractor and principal". There also existed a lawyer-client relationship, which was further complicated by the unusual circumstance that Mr. Daum occupied [Barker's] offices while advancing his own cases. In my view, the lawyer-client relationship and the work Mr. Daum performed in his own cause can be separated from the work he performed for [Barker]. Mr. Daum did not argue that he was employed by [Barker] to work on his own case, nor that he should be paid for such work. He only seeks wages for the work he performed for [Barker's] benefit. He may have been fairly compensated for this work by a discount on Mr. Barker's legal services, but that is not for me to determine. Such services are not considered wages under the Act, and their value, even if it could be determined, cannot be set off against wages.

14. The delegate rejected Mr. Daum's position that the parties had a at \$45 per hour wage agreement – there was no written evidence of such an agreement and the delegate found Mr. Daum's assertions on this point to lack credibility. In the absence of any credible evidence regarding an agreed wage rate, the delegate issued an unpaid wage award based on the minimum wage in effect during the relevant time frame (\$10.25 per hour).
15. With respect to the hours Mr. Daum's actually worked, the delegate noted that Mr. Daum did not keep any time records (nor, for that matter, did Barker). Mr. Daum claimed he worked an 8-hour day each regular weekday for a total 40-hour week (delegate's reasons, page R11). The delegate rejected this claim as "inaccurate" and lacking credibility. The delegate calculated Mr. Daum's unpaid wage entitlement based on the following reasoning (page R12):

In determining the hours that Mr. Daum worked for [Barker], I can only attempt an approximation based on the evidence of what tasks Mr. Daum performed, which for the most part were not in dispute. Those tasks, which included receiving and relaying messages, preparing lists of documents, filing and serving documents, making and accepting deliveries, and taking deposits to [Barker's] bank, were performed in an ad-hoc [*sic*] manner. Mr. Daum did not dispute Mr. Barker's evidence that these tasks were performed occasionally rather than routinely. In my view, Mr. Daum performed those tasks sporadically as needed because he was usually present in the office working on his own case, and because he and Mr. Barker

were friends. I find that for the vast majority of the time Mr. Daum occupied [Barker's] offices, he was working for his own purposes, on his own cases.

Nonetheless, it is reasonable to conclude Mr. Daum did some work for [Barker] on most weekdays, and that Mr. Barker came to rely on his presence in the office generally from Monday through Friday. Under section 34 of the Act, if an employer requires an employee to report for work on any day, the employer must pay the employee for a minimum of two hours at the regular wage.

(my underlining; these particular passages are discussed in greater detail, below)

As I have found that Mr. Daum's regular wage was minimum wage, he is entitled to \$10.25 per hour for two hours per weekday for the last six months of his employment, or March 19, 2014 to September 18, 2014. This amounts to 254 hours, or \$2,603.50.

16. The delegate credited Barker an agreed \$1,050 paid "towards the work Mr. Daum performed in the last six months [of his employment]" (page R12). The delegate also noted that "there may have been some small cash payments as well, but Mr. Barker did not track those payments" and, accordingly, no credit was given on this account. Thus, the delegate awarded Mr. Daum \$1,553.50 on account of regular wages.
17. The delegate stated that Barker "provided no evidence that Mr. Daum did not work on statutory holidays" (page R13) and, accordingly, awarded Mr. Daum statutory holiday pay for the five separate holidays that fell within the 6-month wage recovery period for an additional \$153.75 (section 46), as well as a further \$104.04 in wages for statutory holiday pay payable under section 45 (an average day's pay for each statutory holiday within the wage recovery period).
18. The delegate rejected Mr. Daum's claim for compensation for length of service (see section 63) because he voluntarily quit (subsection 63(3)(c) of the *Act*).
19. Together with 4% vacation pay on all wages earned during the wage recovery period (\$114.45) and section 88 interest (\$53.87), Mr. Daum's unpaid wage award totalled \$1,979.61. As noted at the outset of these reasons, the delegate also levied five separate \$500 monetary penalties and thus the total amount of the Determination was \$4,479.61.

ISSUES ON APPEAL AND THE PARTIES' SUBMISSIONS

20. Barker appeals the Determination on the ground that the delegate erred in law. In general, Barker says that the delegate erred in finding that Mr. Daum worked every single weekday during the 6-month wage recovery period (including statutory holidays). Barker also says the penalty relating to the section 46 of *Regulation* contravention (failing to produce employment records) should be cancelled because the penalty "ignores the extension of that deadline in an Amended Demand for Records [and that] I did meet the extended deadline to provide records."
21. Mr. Daum, who has not appealed the Determination, wishes to challenge certain of the delegate's findings of fact. In particular, Mr. Daum says that the delegate was biased and that his decision "is not in accordance with...evidence...given under oath". He maintains he worked "many hours in excess of 40 hours". He also says that he should have been awarded compensation for length of service because he "should not to have been considered to quite" [*sic*]. For the most part, Mr. Daum's submission is a 1 ½ page *ad hominem* diatribe against both the delegate and Mr. Barker and well as the entire legal profession.
22. The delegate, in general terms, says that the Determination should be confirmed and that he appropriately weighed all of the evidence before him. With respect to the "employment records" penalty, the delegate concedes that records were produced by the extended deadline but the penalty reflects the fact that Barker

failed to produce the actual records that were the subject of the demand. By way of reply to this latter point, Barker says that it did not keep any payroll records relating to Mr. Daum because Barker did not consider Daum to be an employee. Barker says that it did produce “all relevant documents” but “could not produce records that did not exist”.

THE FACTS AND ANALYSIS

23. I shall first address Mr. Daum’s position that the Determination should be varied in his favour. If Mr. Daum believed that the delegate erred in law, or that either of the other two statutory grounds justified a variance of the Determination, Mr. Daum should have appealed the Determination. The time for doing so expired quite some time ago (on October 8, 2015) and he has not filed an application to extend the appeal period. Accordingly, I summarily reject Mr. Daum’s position that the Determination should be varied in his favour.
24. Mr. Barker submits – and the delegate appears to concede this to be so – that there is absolutely no evidence that he ever required Mr. Daum to report to the firm’s offices on weekdays or on statutory holidays. This is a highly unusual case in that Mr. Daum was predominantly working at Barker’s offices on his own litigation matters and this is clearly reflected in the delegate’s award of only minimum daily pay, suggesting that the delegate determined Mr. Daum did not even work 2 hours each day for Barker. Indeed, the delegate specifically found “that for the vast majority of the time Mr. Daum occupied [Barker’s] offices, he was working for his own purposes, on his own cases” (page R12).
25. Mr. Daum’s evidence as to his working hours was wholly rejected by the delegate as lacking credibility. There were no records as to Mr. Daum’s daily hours. The delegate found that Mr. Daum worked for Barker on an *ad hoc* basis and that “Mr. Daum did not dispute Mr. Barker’s evidence that these tasks were performed occasionally rather than routinely” (page R12). The delegate concluded that Mr. Daum worked “on *most* weekdays” (page R12) and yet the award was based on Mr. Daum working *every single weekday* during the wage recovery period. This inconsistency in the delegate’s findings is troubling and is not otherwise explained.
26. Subsection 34(1) of the *Act* states: “Subject to subsections (2) and (3), if as required by an employer an employee reports for work on any day, the employer must pay the employee for a minimum of 2 hours at the regular wage whether or not the employee starts work, unless the employee is unfit to work or fails to comply with Part 3 of the *Workers Compensation Act*, or a regulation under that Part.” (my underlining). The delegate found that Mr. Daum attended Barker’s office principally to work on his own legal matters and that the tasks he performed for Barker were performed only “occasionally” and “sporadically”. The delegate also found that some of the tasks performed were undertaken not in the context of an employment relationship but, rather, because the two men “were friends”.
27. There is nothing in the evidence to suggest that Barker “required” Mr. Daum to report to work each and every weekday (including statutory holidays) during the wage recovery period; Mr. Daum did so voluntarily and in pursuit of his own interests. Mr. Daum benefitted from the use of office space and equipment that was, essentially, provided to him gratuitously or, perhaps, under some sort of barter arrangement. This is not to suggest that Mr. Daum is not entitled to be paid for the work he actually performed for Barker; however, he is not entitled to have his wage entitlement calculated under subsection 34(1) in the absence of a finding – which is wholly absent here – that Barker “required” Mr. Barker to report to his law offices each day. The evidence before the delegate was to the exact opposite effect.
28. Quite apart from the delegate’s error in applying subsection 34(1), I am concerned that the delegate appears to have wholly discounted evidence, seemingly wholly uncontroverted, that Mr. Barker made some cash payments to Mr. Daum. Employers are permitted to pay wages in cash – see section 20(a) – and the delegate

should not have fully discounted evidence of cash payments solely because there were no records. If the uncontroverted evidence was that there *were* cash payments, the delegate should have expressly turned his mind to that issue and then make an appropriate finding based on a reasonable evaluation of the evidence at hand. The delegate's findings on this point are, in my estimation, very unclear.

29. The only evidence that Mr. Daum worked on all statutory holidays emanated from Mr. Daum himself. And yet, the delegate also found that Mr. Daum's evidence as to his working hours was wildly exaggerated. Indeed, in his evidence before Registrar Nielsen (and this evidence was accepted by the delegate as forming part of the hearing record – see page R4), Mr. Daum first conceded that Mr. Barker *never* required him to work on any statutory holidays. He then changed his evidence to say that he was told to work “a couple of them” but said he could not recall which statutory holidays, in particular, he was directed to work. Finally, he returned to his initial position that he was only claiming statutory holiday pay, not because he worked on the days in question, but because it “depends on how many days you worked in a month, you get paid for the holiday time and a half” and that he understood he was entitled to premium pay “even if you didn't work that day”. The delegate did not, in any fashion, address this obvious conflict in the evidence.
30. Further, the delegate also noted that “Mr. Barker provided no evidence that Mr. Daum did not work on statutory holidays” (page R13). The delegate seemingly placed an evidentiary burden on Barker to show that Mr. Daum did not work on statutory holidays rather than, as he should have done, placing the evidentiary burden on Mr. Daum to prove, on a balance of probabilities, that he actually worked on the claimed statutory holidays as directed (either expressly or by reasonable implication) and scheduled by Barker.
31. In my view, several of the delegate's findings are unreasonable and stand in marked contrast to the actual evidence that was before him. In several instances, the delegate simply made findings without providing an analysis of the evidence that would allow him to make such a finding. I am satisfied that the delegate's findings, in several critical areas as discussed above, constitute errors of law.
32. I am unable, given the state of the record before me, to determine when, and for how long, Mr. Daum worked for Barker during the wage recovery period. The Tribunal does not have the statutory authority to conduct *de novo* evidentiary hearings in order to make findings of fact in relation to, for example, the number of hours an employee worked within a specified period. In the circumstances, I am of the view that the most appropriate order is one cancelling the Determination and referring the entire back to the Director of Employment Standards to be reheard.

ORDER

33. Pursuant to subsections 115(1)(a) and (b) of the *Act*, the Determination is cancelled and Mr. Daum's unpaid wage complaint is referred back to the Director for a new hearing.
34. I do not accept Mr. Daum's assertion that the delegate was biased. There is simply no credible evidence before me that such was the case. Nevertheless, given that the delegate made critical adverse credibility findings against Mr. Daum, coupled with the fact that this dispute largely, if not entirely, depends on assessing the relative credibility of two parties who have diametrically opposing views as to the actual circumstances, the new hearing shall be conducted before a different delegate.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal