Employment Standards TRIBUNAL

An appeal

- by -

Andron Holdings Limited
("Andron")

- 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.: 2016A/81

DATE OF DECISION: November 22, 2016

DECISION

SUBMISSIONS

Kevin Simonett	counsel for Andron Holdings Limited
T.E. Jazmynn Post	on her own behalf and on behalf of Lyndon Tillett
Micah Carmody	on behalf of the Director of Employment Standards

OVERVIEW

1. On May 17, 2016, and following a complaint hearing conducted on October 30 and November 6, 2015, a delegate of the Director of Employment Standards (the "delegate") issued a Determination under section 79 of the *Employment Standards Act* (the "*Act*") pursuant to which the current appellant, Andron Holdings Limited ("Andron"), was ordered to pay its former employees, T.E. Jazmynn Post ("Post") and Lyndon Tillett ("Tillett"), the total sum of $7,895.11 on account of unpaid wages and section 88 interest. The hearing was conducted by way of teleconference, a fact that is a central aspect of Andron's present challenge to the Determination.

2. Further, and also by way of the Determination, the delegate levied four separate $500 monetary penalties against Andron based on the latter firm's contraventions of sections 16 (failure to pay at least minimum wage), 17 (failure to pay wages at least semimonthly), 18 (failure to pay wages on termination) and 46 (failure to pay statutory holiday pay) of the *Act*. Thus, the total amount payable by Andron under the Determination is $9,895.11.

3. Andron appeals the Determination on the grounds that the delegate erred in law and failed to observe the principles of natural justice in making the Determination (subsections 112(1)(a) and (b) of the *Act*). More particularly, Andron says that the delegate erred in law in finding that there was an employment relationship between the parties and that Mr. Tillett was dismissed without just cause. Andron also says that the delegate's findings regarding Ms. Post's and Mr. Tillett's working hours constitutes an error of law. Andron further maintains that the form of hearing – in this case a teleconference hearing – amounted to a breach of the principles of natural justice.

4. In adjudicating this appeal I have reviewed the original Determination, the delegate's written reasons, the subsection 112(5) record that was before the delegate, and the parties' written submissions. In this latter regard, I have submissions from legal counsel for Andron, from Ms. Post (on her own and Mr. Tillett's behalf) and from the delegate. Although afforded an opportunity to do so, Andron's legal counsel did not file a submission by way of reply to Ms. Post's and/or the delegate's submission.

THE DETERMINATION

5. As detailed in the delegate's "Reasons for the Determination" (the "delegate's reasons"), which are dated – presumably in error – April 28, 2016 (*i.e.*, nearly three weeks *prior* to the date of the Determination), Andron operates a 14-cabin motel operation on Cormorant Island (accessible by ferry from Port McNeil) under the name "Alert Bay Resort and Marine Charters". In May 2014, the resort manager submitted his resignation and in June 2014 Andron hired both Ms. Post and Mr. Tillett to work at the resort. Ms. Post commenced her duties on July 15, 2014, and Mr. Tillett on about August 29, 2014. "The Complainants lived in [the resort's]

main house, which housed the office and a bathroom on the main floor, a bedroom upstairs, and a suite occupied by a long-term tenant downstairs" (delegate's reasons, page R3).

6. On November 21, 2014, the parties executed a 1½ page "Management Services Agreement". Among other things, the agreement provided for "contractor compensation" including accommodation, a company vehicle and payments based on "gross business sales". As recounted in the delegate's reasons (page R4):

> The MSA dos not mention…a baseline monthly or annual salary. A number of emails were exchanged in the week before the parties signed the MSA. On November 14, 2014, Mr. Williams [Ronald Williams, one of Andron's two principals, the other being Andrea Williams] explained that the Complainants had received and would continue to receive an advance of $2,500.00 monthly or $30,000.00 annually, "which is also the minimum payment until revenue exceeds $300,000.00 where upon [*sic*] it is adjusted upwards." At no point during the Complainants' tenure did [the resort's] revenue approach $300,000.00 annually, and the Complainants do not assert entitlement to any revenue sharing or bonuses.

7. The delegate addressed several issues in his reasons including: i) whether there was an employment relationship between the parties; ii) if so, were one or both of Ms. Post and Mr. Tillett "managers" as defined in subsection 1(1) of the *Employment Standards Regulation* (the "*Regulation*"), and thus excluded from Parts 4 and 5 of the *Act* (see subsection 34(f) and section 36 of the *Regulation*); iii) what wages, if any, were owed to Mr. Post and Mr. Tillett; and iv) were they entitled to compensation for length of service (see section 63)?

8. The delegate determined that both Ms. Post and Mr. Tillett were "employees" as defined in section 1 of the *Act* (at page R19):

> …it is evident that the business – a 14-cabin resort – belonged to Andron. The Complainants worked under Andron's control and direction, used Andron's tools and supplies, were an integral part of the business and were engaged for their personal services. As such, I find that the Complainants were employees of Andron for the purposes of the Act.

9. With respect to the question of whether one or both of Ms. Post and Mr. Tillett was a "manager" as defined in the *Regulation*, the delegate determined that Ms. Post was a manager but that Mr. Tillett was not (pages R20 – R21):

> In summary, Ms. Post was accountable for Andron's overall objective of improving the profitability of Alert Bay Resort, and for supervising its staff and managing its day-to-day operations. That responsibility was principal to her employment; clerical work such as checking guests in and out was secondary. Accordingly, I find that Ms. Post was a manager as defined in the Regulation, and is excluded from the hours of work, overtime and statutory holiday provisions of the Act.
>
> Mr. Tillett's work was primarily blue collar in nature: cleaning and maintaining the grounds, assisting contractors, and taking trips into town for supplies. He did not set room rates or hire or fire staff. He took direction from Ms. Post. I find he was not a manager as defined in the Regulation.

10. With respect to the work schedules of both Ms. Post and Mr. Tillett, the delegate held (at page R23):

> …I find that until Mr. Tillett's arrival on August 29, 2014, Ms. Post worked, on average, nine hours per day and seven days per week. Thereafter, I find she worked, on average, six hours per day, and seven days per week. I find that Mr. Tillett worked, on average, six hours per day and seven days per week. While these findings are approximations, that is unfortunately all the evidence permits.

11. The delegate found that neither Ms. Post's nor Mr. Tillett's agreed wage rates provided for payment at least equivalent to the minimum wage and, accordingly, made an unpaid wage award for each of them based on the

applicable minimum wage (being $10.25 per hour during the entirety of their employment). The delegate ordered Andron to pay Ms. Post a total of $3,678.63 on account of regular wages, vacation pay and section 88 interest and to pay Mr. Tillett a total sum of $4,216.48 on account of unpaid regular wages, section 36 premium pay, statutory holiday pay (sections 45 and 46), compensation for length of service and section 88 interest.

12. Finally, and with respect to section 63 compensation for length of service, the delegate determined that Ms. Post was not entitled to any section 63 compensation because she was dismissed for just cause (see subsection 63(3)(c) of the *Act*) but that Mr. Tillett was dismissed without just cause and therefore entitled to one week's wages under subsection 63(1) of the *Act* ($369.00)

ANDRON'S REASONS FOR APPEAL

13. Andron says that the delegate erred in law and failed to observe the principles of natural justice in making the Determination. The alleged errors of law may be summarized as follows:

- the delegate erred in determining the average and total number of hours each complainant worked during the course of his or her employment. With respect to this argument, Andron's counsel submits: "The Delegate notes that the Complainants did not call witnesses or provide any corroborating evidence of their estimates [and] the Delegate made an error in law in accepting the self-serving statements of the Complainants in estimating the hours worked";
- the delegate erred in law in finding that there was an employment relationship between the parties;
- the delegate erred in determining that Mr. Tillett was dismissed without just cause; and
- "The Delegate erred in law by considering improper factors and evidence by not considering the vexatious litigant claim of [Andron]". [*sic*]

14. Andron says that the delegate failed to observe the principles of natural justice in making the Determination by "refusing to allow an in person hearing on a matter that would be determined substantially by credibility" particularly when Andron's representatives, Mr. and Ms. Williams, were "not aware that the Complainants would be sharing the same phone for the hearing and stated concern about collusion of their evidence".

THE POSITION OF THE RESPONDENTS

15. Ms. Post, in a joint submission filed on her own and Mr. Tillett's behalf, identified a number of facts and circumstances in an effort to refute Andron's position that the delegate's estimate of their working hours was much too generous. Although Ms. Post did not expressly deny that she and Mr. Tillett were in the same room while each testified (by teleconference), she makes the point that "Mrs. Williams could of easily been in the same room while Mr. Williams was speaking, coaching each other" [*sic*]. She also refutes Andron's position that there was no employment relationship and insofar as the termination of that employment relationship is concerned, Ms. Post maintains "Mr. Williams arrived one day and simply told us to get out".

16. The delegate responded to each of Andron's grounds of appeal, in many instances by simply referring to the relevant pages of his reasons, and ultimately submitted that the Determination should be confirmed.

FINDINGS AND ANALYSIS

17. I propose to first address Andron's "error of law" arguments following which I will turn to the "natural justice" issue.

Alleged Errors of Law

18. If Ms. Post and Mr. Tillett were not "employees" as defined in the *Act*, the delegate was obliged to dismiss their complaints. This was an issue raised by Andron at the complaint hearing and Andron does not appear to have presented much in the way of evidence to support its position that Ms. Post and Mr. Tillett were not employees. Having reviewed the delegate's reasons, it appears that Andron made the following points regarding the "employee" issue, at least as it concerned Ms. Post:

- "Andron's intent from the outset was to contract with Ms. Post and not to hire her as an employee" (page R11);
- "If Ms. Post were an employee, Mr. Williams would have monitored her performance more carefully. He took a hands-off approach initially and it was only when he discovered that Ms. Post was unable to perform her duties that he had to take a more active role" (page R14);
- "Although Andron provided some of the tools Ms. Post and Mr. Tillett required, it was Ms. Post's expertise and experience that was the main 'tool' for the job…She had a high degree of responsibility and autonomy [and] she had the potential for great profit through the profit-sharing terms outlined in the [Management Services Agreement]" (page R14);
- "Ms. Post viewed herself as the boss of Alert Bay Resort" (page R14);
- "Ms. Post did not require Mr. Williams' approval to hire and fire staff – he only asked to be kept informed of staffing changes so his accountant could ensure they received their pay on time" (page R14).

19. So far as I can discern, Andron did not seemingly make any serious argument that Mr. Tillett was not an employee. I note that his duties were fundamentally labouring in nature – such as cutting the grass and tending to the gardens using Andron's equipment – tasks that typically might be undertaken by a resort employee and that he was paid $750 every two weeks by way of electronic transfer to his bank account. Under the terms of the Management Services Agreement, both Ms. Post and Mr. Tillett were subject to an initial 6-month "probationary period". Ms. Post and Mr. Tillett received a monthly salary plus accommodation.

20. Mr. Williams, on Andron's behalf, testified "that at most, the day-to-day management of Alert Bay Resort could have a 'six-hour operation'" (page R11) and that "the Complainants were 'managers, co-managers or property managers' [and] he did not agree that they were 'caretakers'…Mr. Williams would not answer whether Andron paid Ms. Williams a monthly salary of $3,000.00 because it was irrelevant in that it would not affect the calculation of revenue from Alert Bay Resort" (page R15).

21. As the delegate noted in his reasons, Ms. Post has a degree of independence in her work (as do many senior managers) but, ultimately, she was subject to Andron's direction and control and her position was fully integral to the resort's operations. While there were aspects of Ms. Post's duties that suggested she had a measure of autonomy, I am unable to accept that the delegate fundamentally erred in law in finding that Ms. Post was an employee as defined in section 1 of the *Act*. Indeed, in a letter dated February 9, 2015, to Ms. Post and Mr. Tillett, Andron referred to the two of them as "Contract Managers" and as "Management

Contractors under the supervision and overall direction of Andron". In an earlier e-mail dated August 30, 2014, Ms. Post suggested that she and Mr. Tillett required a "minimum of $2500 per month salary plus whatever other items we agree on" and Mr. Williams, for Andron, replied the same day stating: "I agree the contract minimum base amount is $2,500.00 per month". In my view, and during the course of her tenure with Andron, there was no significant difference between her duties and those one might expect of any other manager of a similar resort (see especially the duties set out for Ms. Post at page 73 of the record). Andron does not argue that Mr. Tillett was anything other than an employee, as its arguments on appeal relate solely to Ms. Post's status.

22. Whether an individual is an employee or independent contractor is a question of mixed fact and law obliging the decision maker to apply a particular legal standard to a factual matrix. I am unable to conclude that the delegate erred in applying the proper legal test for determining employee status. Similarly, I am unable able to say that he misapplied the applicable test to the facts of this case such that he made a palpable and overriding error (see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235).

23. Having found that both Ms. Post and Mr. Tillett were "employees", the delegate then turned his mind to their unpaid wage claim and ultimately determined that both had legitimate unpaid wage claims. The delegate frankly acknowledged that the evidence, from both Andron and the complainants, was problematic and that ultimately, his conclusions as to the wages owed to the complainants were "approximations, that is unfortunately all the evidence permits" (page R23).

24. Andron's position is that the delegate erred in law in determining each of Ms. Post's and Mr. Tillett's hours of work for purposes of calculating their unpaid wage entitlement. To recap, the delegate found that Ms. Post "worked, on average, nine hours per day and seven days per week" prior to Mr. Tillett's arrival at the resort and "thereafter…worked, on average, six hours per day, and seven days per week" (page R23). The delegate found "that Mr. Tillett worked, on average, six hours per day and seven days per week" (page R23). Andron says that the complainants did not call any corroborating witnesses with respect to their working hours and further says that the delegate erred in accepting their "self-serving" statements.

25. It is important to note that the delegate did not simply accept the complainants' evidence as to their typical working hours. Ms. Post, for her part, claimed "she worked, on average, 12 hours per day, seven days per week" (page R21) while Mr. Tillett claimed to have worked "eight hours per day, seven days per week". Mr. Williams, for Andron, testified "that at most, the day-to-day management of Alert Bay Resort could have been a 'six-hour operation'" (page R11). Apart from this conflict in the parties' evidence, the delegate's task was further complicated by the fact that Andron failed to keep proper time records (as it was required to do under section 28 of the *Act* (and it is not clear to me why Andron was not penalized for this contravention – it certainly could have been). In addition, neither Ms. Post nor Mr. Tillett kept time records – although they were not obliged to do so under the *Act*.

26. The delegate noted that the complainants were obliged to be available essentially "24-7-365" (page R21) but that merely being on call is not tantamount to working. The delegate also noted that the resort "had a steady flow of guests" throughout the year (page R22) but that the complainants did not call corroborating witnesses such as housekeeping staff to verify their working hours (page R23). The delegate also took into account other factors in weighing the evidence regarding the complainants' working hours (see page R23). While the complainants' evidence as to their working hours may have been "self-serving", one could equally say that Mr. Williams' testimony regarding their working hours (which was not supported by any corroborating documents) was equally "self-serving".

27. Although a finding of fact may constitute an error of law, that is only the case if the finding is wholly unsupported by a proper evidentiary foundation (i.e., the finding amounts to a palpable and overriding error). The evidence before the delegate was conflicting and the delegate carefully weighed the evidence taking into account other relevant factors and, on balance, I cannot conclude that his findings as to the complainants' working hours constituted an error of law.

28. The delegate concluded that Ms. Post was dismissed with just cause but that Mr. Tillett was dismissed without just cause. Thus, Mr. Tillett, but not Ms. Post, was entitled to compensation for length of service. Andron says that the delegate erred in law with respect to this latter finding and submits that the delegate "considered improper factors and evidence in concluding that…Lyndon Tillett was dismissed without cause". The only particulars Andron provided in support of its submission on this score are as follows:

> The Delegate assumes that Mr. Tillett was dismissed without cause. There is no evidence that Mr. Tillett was dismissed. Mr. Tillett provides no testimony on the issue. His wife, business partner and co-complainant had just been fired with cause due to her erratic and damaging behaviour. The most reasonable explanation as to why he did not continue was that he left the premises with Ms. Post after her threats of February 15, 2015, at R13.

29. As noted above, the delegate determined that Ms. Post was dismissed but that Andron had just cause to do so. The delegate similarly found that Mr. Tillett was dismissed, but without cause. Andron appears to be suggesting that Mr. Tillett voluntarily resigned. However, Andron's e-mail dated February 24, 2015, to Mr. Tillett states that his contract was "terminated" February 16, 2015, and that "our business relationship is over". The delegate had evidence before him from Ms. Post that strongly suggested Mr. Williams personally terminated their employment on February 16, 2015 (see page R8).

30. Compensation for length of service is a form of deferred wages presumptively payable to an employee when the employment relationship ends. Among other circumstances, compensation is not payable if the employee "retires from employment" (subsection 63(3)(c) of the *Act*). Although Andron maintains that Mr. Tillett "quit", it has not provided any evidence to support such an assertion – which would entail subjective evidence of an intention to quit coupled with objective evidence that the employee actually quit (see, for example, *Wilson Place Management Ltd.*, BC EST # D047/96, and *Philp*, BC EST # D058/04). I find that there is no merit whatsoever to Andron's argument that Mr. Tillett was not entitled to section 63 compensation because he "quit".

31. Finally, and with respect to the delegate's alleged errors of law, Andron says that the delegate erred "by not considering the vexatious litigant claim of the Appellant" and that it "provided numerous examples of Ms. Post in describing her as a vexatious litigant" but that "this issue was not considered in any manner by the Delegate".

32. Subsection 76(3)(c) of the *Act* states: "The director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if…(c) the complaint is frivolous, vexatious or trivial or is not made in good faith". Clearly, this was a highly contentious dispute and the delegate did find that Ms. Post engaged in "unreasonable and disproportionate" and "highly contemptuous" conduct (page R26) following her not being paid and this behaviour was the basis for the delegate's finding that Andron had just cause for dismissing Ms. Post. Further, the delegate noted that Ms. Post displayed enmity toward Mr. Williams and this behaviour, at least in part, lead the delegate to discount Ms. Post's evidence as to her working hours. Thus, the delegate did take into account Ms. Post's behaviour in making certain findings.

33. However, I am unable to find anything in the record before me to suggest that Ms. Post's complaint was frivolous, vexatious, trivial or not made in good faith. Ms. Post claimed she was owed wages and the delegate ultimately found that to be the case. Thus, I am hard-pressed to see how this complaint meets the requirements of subsection 76(3)(c). Andron's legal counsel has not provided any particulars to support its position that (presumably) Ms. Post's complaint should have been dismissed outright because she was a "vexatious litigant". There is nothing before me to indicate that any court of competent jurisdiction has ever issued a declaration that Ms. Post is a vexatious litigant (see section 18 of the *Supreme Court Act* and section 29 of the *Court of Appeal Act*).

Failure to Observe the Principles of Natural Justice

34. Andron says that the delegate failed to observe the principles of natural justice by refusing to allow an in-person hearing. The complaint hearing was conducted via a teleconference. At the outset of the hearing, Andron applied for an in-person hearing. This application was refused and I endorse the delegate's reasons in that regard (see page R4). In particular, Andron says that an in-person hearing was necessary to prevent the two complainants from "colluding" especially in a dispute where the parties' credibility was central to the outcome.

35. Andron's submission on this point is as follows:

> The delegate breached the principles of natural justice in refusing to allow an in person hearing on a matter that would be determined substantially by credibility. The Appellant was not aware that the Complainants would be sharing the same phone for the hearing and stated concern about collusion of their evidence. In order to determine issues of credibility, specifically where there are concerns of collusion of testimony, it goes against the principles of natural justice to have a phone hearing instead of an in person hearing…
>
> Credibility was a central issue in the dispute between the parties. The Delegate's finding with respect to credibility had a significant effect on the Determination. The Delegate breached the principles of natural justice in allowing the hearing to proceed when it became clear that the Complainants would be in the same room, sharing the same phone…
>
> The Delegate did not ensure procedural fairness concerning the issue of collusion between the Complainants. The ability to cross-examine each of the Complainants without the other Complainant present is paramount to exposing flaws and fabrications of testimony.
>
> The Complainants assured the Delegate they would each depart the room during the testimony of the other, but there was no way of assuring this. The Appellant states that there were instances where there were unusually long delays in the Complainants' testimony. Being a teleconference hearing, there was no way of knowing if this was due to collusion, although the appearance of collusion is inescapable.

36. As noted above, I entirely agree with the delegate's reasons for refusing Andron's application to adjourn the teleconference hearing so that an in person hearing could be reconvened at a later date. Andron had ample express notice (more than two months) that the hearing would be proceeding by teleconference, and yet it only objected at the outset of the hearing. I note that Andron was represented at the hearing by both Mr. and Ms. Williams and, I suppose, it could be equally said that Mr. Williams had an opportunity to "collude" with Ms. Williams while testifying. Section 36 of the *Administrative Tribunals Act* specifically states that a tribunal "may hold any combination of written, electronic and oral hearings", however, this provision does not specifically apply to the Director's delegates when they are conducting an oral hearing. That said, I am not

persuaded that the mere holding of a teleconference hearing, without more, constitutes a breach of the principles of natural justice.

37. Andron's point, of course, is somewhat more nuanced in that it says this particular teleconference hearing afforded the complainants an opportunity to "collude". I should note that there is no evidence before me of any "collusion". Andron was given the opportunity to cross-examine each complainant and thereby test their credibility. The delegate, as recounted in his submission (which was not rebutted by Andron), went to great lengths to impress upon Ms. Post and Mr. Tillett that they should not be in the same room, or on the line, when each testified, and he also noted that he did not recall there being any "unusually long delays" during the complainants' testimony.

38. In *Chang and Vuong*, BC EST # D082/16, Tribunal Member Roberts observed (para. 30):

> I am unable to conclude that the delegate denied the Employers natural justice by holding a hearing by teleconference. While there are clearly disadvantages to this form of hearing, including the difficulty of determining credibility (which in this case would be compounded by the fact that at least some of the evidence was further affected by having it interpreted), the disadvantages must be weighed against other factors, including the cost of providing videoconferencing facilities, the time zones of the parties and the ease by which the parties were able to participate, all of which are identified as the purposes of the *Act*…

I endorse those comments. Clearly, credibility was an issue but Andron's representative was afforded an opportunity to cross-examine the complainants and the delegate's ultimate decision did, in fact, reflect certain adverse credibility findings against Ms. Post. Given the delegate's determined effort to ensure that the complainants would testify in the absence of each other – and the absence of any evidence that this admonition was not followed – the suggestion of "collusion" strikes me as being purely speculative.

39. The teleconference hearing may not be the ideal forum in some instances; however, in this instance, I am not satisfied that Andron was denied natural justice by reason of the fact that this hearing proceeded via teleconference.

ORDER

40. Pursuant to subsection 115(1)(a) of the *Act*, the Determination is confirmed as issued in the amount of $9,895.11 together with additional interest that has accrued, under section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal