An Application for Reconsideration

- by -

Gene C. Matchitt
("Matchitt")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2009A/152

DATE OF DECISION: February 2, 2010

DECISION

SUBMISSIONS

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

OVERVIEW

1. This is an application pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of BC EST # D103/09 issued on October 20, 2009.

2. The facts relating to this matter are somewhat unusual. The complainants, Arthur E. Chouinard ("Chouinard") and Cheryl Dewey ("Dewey"), were friends of the respondent (and applicant in these proceedings), Gene C. Matchitt ("Matchitt"). Mr. Matchitt was in poor health and required personal assistance beyond that provided to him by the provincial government. Mr. Chouinard and Ms. Dewey, at Mr. Matchitt's request, provided a variety of personal services to him during the period from April to about mid-October 2008. There was (and still is) a dispute about the terms under which those services were provided. In short, Mr. Matchitt's position is that the services were provided largely out of friendship and were to be compensated, in part, through the provision of free accommodation and by a barter arrangement. The complainants say that they were employed by Mr. Matchitt and entitled to be paid for their services in accordance with the provisions of the *Act*.

3. On November 24, 2008, the complainants filed a joint complaint that was investigated by a delegate of the Director of Employment Standards (the "delegate"). On June 26, 2009, the delegate issued a Determination and accompanying "Reasons for the Determination" ("Reasons") ordering Mr. Matchitt to pay the complainants the total sum of $14,671.02 on account of unpaid wages, vacation pay (section 58) and interest (section 88). In addition, the delegate levied two separate $500 monetary penalties (section 98) against Mr. Matchitt and thus the total amount payable under the Determination was $15,671.02.

4. Mr. Matchitt appealed the Determination to the Tribunal on the basis that the delegate erred in law (section 112(1)(a)) in finding that there was an employment relationship between the parties. Mr. Matchitt also submitted additional evidence in support of the appeal (section 112(1)(c)). The Tribunal Member who adjudicated the appeal (on the basis of the parties' written submissions) held that the new evidence was not admissible since this evidence was available to be provided to the delegate during his investigation and, in any event, was neither credible nor probative (para. 37). Further, the Tribunal Member concluded that there was ample evidence to support the delegate's finding that there was an employment relationship between the parties. In the result, the Determination was confirmed.

5. As noted above, Mr. Matchitt now asks the Tribunal to reconsider the Member's October 20, 2009, decision. This application is being adjudicated based on the parties written submissions. I have reviewed the entire record that was before the Tribunal Member, his reasons for the decision, and the parties' submissions filed with respect to the reconsideration application (Mr. Matchitt, the complainants and the delegate all filed submissions with the Tribunal).

THE APPLICATION FOR RECONSIDERATION

6. Mr. Matchitt's legal counsel filed the application for reconsideration. Mr. Matchitt's counsel alleges the following errors in the Tribunal Member's decision (quoted from Counsel's November 20, 2009 submission):

- "We submit, as we did to the Original Panel, that the finding of an employment relationship on the evidence before the delegate was in error" (page 2);
- "We submit that the Delegate failed to give due consideration to the evidence that the Applicant was suffering from diminished mental capacity [and] because of this, the Applicant was not in a position to contract for services if in fact they were provided." (page 3); and
- "…there was one new piece of evidence which satisfies the Tribunal's requirement that the evidence was not readily available at the time the original Determination was made. The issue of the Applicant's capacity came up as the result of a result [sic] made by the Applicant's daughter that the Delegates [sic] speak to Elsie Wolter, the Care Manager for the Applicant. Ms. Wolter raised first the issue that the support services were a reciprocal arrangement (the free rent arrangement which had been going on for some time), and second, she expressed the opinion that the Applicant was a person with diminished capacity. This was set out a letter [sic] from the Delegate dated April 22, 2009. He asked if there was any further or other evidence which had not been submitted.

  In view of the opinion that was expressed by the Care Manager, there was no need to provide further information. It was only when the Determination was appealed that the Delegate indicated he assumed the Care Manager was referring to physical capacity, not mental capacity. Given the comment by the Care Manager, it would appear incumbent on the Delegate to make an inquiry if indeed he was of the opinion that she was referring only to his physical capacity. In these circumstances, the information we provided from the Care Manager that the Applicant suffered from mental incapacity is "new evidence" that would not be expected to be obtained before, and must be considered by the Tribunal." (pages 4 – 5)

ANALYSIS

7. There are essentially two issues raised by this application. The first concerns the correctness of the delegate's original finding (confirmed by the Tribunal) that the parties were in an employment relationship. The delegate addressed this issue, in some detail, in his Reasons. The delegate examined the statutory definitions of "employer" and "employee", the evidence before him (some of it conflicting) and eventually concluded that there was an employment relationship between the parties. Mr. Matchitt now concedes that the complainants' "yard cleanup" work undertaken between October 1 – 16, 2008 was undertaken in the course of an employment relationship (November 20, 2009, submission, page 2). However, Mr. Matchitt continues to assert that any work undertaken by the complainants during the period from April through September 2008 was not undertaken in the course of an employment relationship.

The Employment Relationship

8. I note that Mr. Matchitt's current position appears to represent a departure from the position he took during the course of the delegate's investigation. The complainants claimed slightly less than $13,000 in unpaid wages in their joint complaint form. Mr. Matchitt's daughter took principal responsibility for representing him during the investigation. The delegate sent an e-mail inquiry to Mr. Matchitt's daughter requesting her father's position and in response, Mr. Matchitt's daughter, Justine Matchitt, sent an e-mail to the delegate dated January 3, 2009, that stated: "Regarding the $12,000. Dad had no problem offering them [i.e., the complainants] $13 200 when they presented them with a bill…But since they gave back the quad and dad

paid there [sic] outstanding bill of $10 000 Dad wont be giving them any thing near the $12 000 [sic]. My father paid there [sic] outstanding bill…"

9. This issue was addressed in the delegate's reasons at page R7. Apparently, Mr. Matchitt purchased an ATV for the complainants' use and the purchase was financed. It was resold by Mr. Matchitt with a significant outstanding balance remaining on, I assume, a chattel mortgage that secured the loan payments. Mr. Matchitt was essentially arguing for a set-off of this latter amount against any wages otherwise due and payable to the complainants. The delegate quite correctly observed that, in the absence of a written assignment of wages, that sort of set-off was not permitted by the *Act*.

10. The "employment relationship" issue was re-argued (on essentially the same facts) before the Tribunal and the delegate's decision was confirmed. This finding is challenged, yet again, on reconsideration. First, reconsideration is not a process for simply re-arguing an issue on the basis that one disagrees with the Tribunal's determination of that issue (see *Director of Employment Standards* (*Milan Holdings Inc.*), BC EST # D313/98). Second, and in any event, I wholly endorse the Tribunal Member's decision to the effect that there was ample evidence upon which the delegate could have reasonably concluded that there was an employment relationship between the parties (see paras. 38 – 46 of the Member's reasons for decision).

Mental Incapacity

11. The assertion that Mr. Matchitt, by reason of his mental state, was not legally capable of entering into an employment contract is more troubling. If it could be shown that there was a *bona fide* issue regarding Mr. Matchitt's mental competence that would almost certainly lead to, at the very least, a referral back for further consideration of the issue. At common law, an individual who is permanently mentally incapacitated cannot enter into any binding contract; any purported contract is null and void. If the mental incapacity was of a transient nature, any contract made during the currency of the temporary incapacity is voidable at the option of the incapacitated party – however, that party must avoid the contract promptly upon regaining mental capacity.

12. I have carefully reviewed the record that was before both the delegate and the Tribunal Member. There is absolutely nothing in the record to corroborate the assertion that Mr. Matchitt was either permanently or temporarily mentally incapacitated when the parties' employment contract was negotiated or during the subsistence of their employment relationship. For example, a report from a qualified medical practitioner might have been submitted but there is no such report in the record. So far as I am aware, there is no court order in place declaring Mr. Matchitt incapable of managing his own affairs under, for example, the *Patients Property Act*.

13. The record includes an October 29, 2008, letter from Mr. Matchitt's community health nurse who states that the complainants provided valuable support services. While the report does, at least by implication, make note of Mr. Matchitt's poor physical health (thus, the need for additional home care support services), the writer, a registered nurse, says absolutely nothing about Mr. Matchitt's mental condition. A second brief handwritten note, dated October 24, 2008, from another registered nurse similarly confirms that the complainants provided needed home support services but says nothing about Mr. Matchitt's mental state. Mr. Matchitt's daughter, in her various communications with the delegate, never once asserted that her father was mentally incapacitated. The only reference I can find in the record is a hearsay statement contained in the delegate's letter to both Mr. Matchitt and his daughter, dated April 22, 2009, in which he states that Mr. Matchitt's care manager described Mr. Matchitt as being of "diminished capacity". This statement falls well short of raising even a *prima facie* case of mental incompetence.

14. Perhaps most telling of all, I note that the Appellant's legal counsel, in his October 1, 2009, submission to the Tribunal, makes several statements that are completely at odds with the notion of Mr. Matchitt lacking legal competence. For example, counsel repeatedly refers to having taken instructions from Mr. Matchitt regarding factual matters in dispute between the parties. If, in fact, Mr. Matchitt is legally incompetent, then I have to query why his legal counsel would be taking instructions from him.

15. In the absence of any credible evidence to support the assertion that Mr. Matchitt had no legal capacity to enter into an employment contract with the complainants, I see no need to address this issue further on its merits.

ORDER

16. The application to reconsider the Tribunal's decision in this matter is refused. It follows that pursuant to section 116(1)(b) of the *Act*, BC EST # D103/09, issued by Member Stevenson on October 20, 2009, is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal