An Application for Reconsideration

and

an Application for Suspension

- by -

634245 B.C. Ltd.
(the "Applicant")

- 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 Nos.: 2014A/128 & 2014A/136

DATE OF DECISION: October 22, 2014

DECISION

SUBMISSIONS

Christian Saxvik — on behalf of 634245 B.C. Ltd.

INTRODUCTION

1. I have before me an application filed by 634245 B.C. Ltd. (the "Applicant") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of BC EST # D077/14 issued by Tribunal Member Stevenson on August 28, 2014 (the "Appeal Decision"). The reconsideration application is Tribunal File Number 2014A/128. In addition, the Applicant has applied under section 113 of the *Act* to have the Determination and the Appeal Decision suspended (without deposit of any money) pending the outcome of the reconsideration application (Tribunal File Number 2014A/136). It should be noted that under section 113, the Tribunal can only suspend a determination; section 113 does not empower the Tribunal to suspend a decision issued by the Tribunal.

2. By way of the Appeal Decision, Tribunal Member Stevenson confirmed a Determination issued on May 30, 2014, ordering the Applicant to pay its former employee, Ms. Nikki Harper ("Harper"), the amount of $5,187.73 on account of unpaid wages and section 88 interest. The Determination also included a $500 monetary penalty levied against the Applicant based on the latter's contravention of section 18 of the *Act*.

3. The Applicant says that Tribunal Member Stevenson erred in law in confirming: firstly, that Ms. Harper was an "employee" as defined in section 1 of the *Act* and not an "independent contractor" (and thus not entitled to the benefit of the wage protection provisions of the *Act*) and, secondly, that she had a valid unpaid wage claim.

4. At this juncture I am assessing whether the reconsideration application passes the first of the two-stage test set out in *Director of Employment Standards (Milan Holdings Inc.)*, BC EST # D313/98. At the first stage, the Tribunal considers whether the application raises a sufficiently serious question justifying a more fulsome review of the application on its merits (the second stage). If the application passes the first stage, the respondent parties will be notified and requested to file submissions relating to the merits of the application; if it does not pass the first stage, it will be summarily dismissed.

BACKGROUND FACTS

5. The Applicant is a property management firm. Ms. Harper worked for the company from August 28 to October 23, 2013, providing various "caretaker" services at a townhouse complex in Quesnel. Among other duties, Ms. Harper collected and remitted rent payments, provided cleaning services, and arranged for repairs to be undertaken. Her rate of pay, fixed by a written contract between the parties, was $20 per hour. On November 1, 2013, Ms. Harper filed a complaint in which she alleged that she had not been paid any wages for her work. This latter fact is not disputed although the Applicant has taken the position throughout these proceedings that it does not owe her any wages since she engaged in a form of "self-help" remedy by appropriating rent monies to her own account.

6. Ms. Harper's complaint was the subject of a hearing before a delegate of the Director of Employment Standards (the "delegate") on April 3, 2014, and he issued the Determination and his accompanying "Reasons for the Determination" (the "delegate's reasons") on May 30, 2014. The delegate concluded, first, that

Ms. Harper was an "employee" rather than an "independent contractor" and, second, that she had a valid claim under the *Act* for 165 hours worked in September 2013 and a further 80 hours worked in October 2013 all at the contractual $20 hourly wage. Her unpaid wage claim totalled $5,187.73 including 4% vacation pay and interest.

7. The Applicant appealed the Determination to the Tribunal asserting that the delegate erred in law both in finding that Ms. Harper was an "employee" and in finding that she had a valid unpaid wage claim. As noted above, Tribunal Member Stevenson dismissed the appeal and confirmed the Determination.

8. The Applicant now seeks to have the Appeal Decision reconsidered on the grounds that Ms. Harper "had a contract for services, not a contract of services" and that Tribunal Member Stevenson erred in dismissing its argument that Ms. Harper had already been paid in full for her work.

FINDINGS

9. Both of the Applicant's arguments were raised and rejected by the delegate and by Tribunal Member Stevenson; the Applicant now advances essentially the identical position for a third time. Although the Applicant's application is timely, the application, at its core, simply asks the Tribunal to re-weigh evidence that was before the delegate and Tribunal Member Stevenson and reach a different conclusion. In my view, there is no substance to the argument that either the delegate or Tribunal Member Stevenson made a fundamental error of law.

10. Whether a person is an employee or an independent contract requires both an analysis of the person's duties and the circumstances surrounding their actual working situation and an application of those facts to the legal standards fixed by the *Act*. The delegate noted that the statutory definition of an "employee" is arguably wider than the common law tests and that, given the nature of Ms. Harper's duties and the circumstances under which she carried out those duties, she could be fairly characterized as an "employee" (see delegate's reasons, pages R6-R7). Tribunal Member Stevenson concluded (paras. 35-36) that the delegate did not err in fact or law in reaching that conclusion. I fully endorse the Tribunal Member's analysis of the issue before him. Indeed, in my view, the conclusion that Ms. Harper was an "employee" as defined by the *Act*, and not an independent contractor, was the only reasonable conclusion one could reach given the evidence before the delegate about her duties and responsibilities and the manner in which she carried them out. Brief as it was, the parties' written agreement provided that Ms. Harper "will work under the direction of [the Applicant]", that she would receive and deposit monies and maintain tenants' records on the Applicant's behalf, and that she would be paid $20 per hour for her work, all of which suggests an employment, not a contractor, relationship.

11. The Applicant says that the effect of the decision relating to Ms. Harper is to create a situation whereby "any worker" who files a complaint under the *Act* "will be considered an employee" and "that an *employer* will never be successful in obtaining a ruling that the worker was in a contract for services once this process is initiated" (my *italics*). Apart from the fact that if one is an "employer" it stands to reason that its workers are "employees", it should be noted that the determination of a person's status depends on the nature of the worker's duties and the circumstances under which they are performed. The Tribunal has found, in several cases, that a person is not an employee but only where the evidence shows, for example, that the person was operating their own business (see, e.g., *Godding v. Employment Standards Branch*, 2003 BCSC 193) or held some other status such as a partner (see e.g., *Dunn*, BC EST # D466/00). In the instant case, there was simply no credible evidence that Ms. Harper was operating her own independent business.

12. The second point the Applicant advances relates to the wage payment order. The Applicant says "it is an undisputable fact" that its tenants paid monies to Ms. Harper and it then asserts that Ms. Harper was, in effect, "paid in cash" through her misappropriation of rent monies. The record before me shows that the Applicant has apparently filed a complaint with the Quesnel RCMP alleging that Ms. Harper "has stolen $10,825 from our company". There is no credible proof in the record before me that Ms. Harper has stolen any monies, let alone the nearly $11,000 she is alleged to have taken. In the fullness of time, the RCMP will investigate this matter and, if justified, criminal charges will be filed. However, a proceeding under the *Act* is not the proper forum to determine whether Ms. Harper is a "thief". The simple uncontroverted fact is that the Applicant *conceded* before the delegate that it never directly paid Ms. Harper for her work. The delegate found, after reviewing the evidence before him, that she worked 245 hours without payment and thus was entitled to a wage payment order.

13. Quite apart from the potential criminal proceedings, if the Applicant believes that Ms. Harper has misappropriated funds, it can file a civil claim against her (presumably, in the Small Claims Court given the alleged amount involved). However, there is no provision in the *Act* that enables an employer to file a "complaint" against an employee in order to recover monies it says an employee has misappropriated.

14. Finally, and simply for the sake of completeness, I note that the Applicant's argument on this latter issue is "corroborated" by a series of forms, apparently signed by certain of its tenants, to the effect that these tenants paid "cash" or gave a "check" (and, mostly, the former) to Ms. Harper. The Applicant maintains that these funds have never been properly accounted for. This "evidence" is not highly probative and, in any event, was not presented to the delegate at the complaint hearing and is inadmissible "new evidence" in an appeal to the Tribunal by reason of subsection 112(1)(c).

15. In my view, this application does not pass the first stage of the *Milan Holdings* test and, accordingly, must be summarily dismissed.

16. In light of my decision regarding the reconsideration application, the Applicant's suspension application is dismissed because it is now moot.

ORDER

17. The Applicant's section 116 application to have the Appeal Decision reconsidered is refused. The Applicant's section 113 suspension application is dismissed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal