Citation: Raven Point Retreats Ltd.
and Raven Point Landing Ltd. (Re)
2024 BCEST 111

EMPLOYMENT STANDARDS TRIBUNAL

An appeal
pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

Raven Point Retreats Ltd. and Raven Point Landing Ltd.

- of a Determination issued by -

The Director of Employment Standards

PANEL:	Brandon Mewhort
SUBMISSIONS:	George Douvelos, legal counsel for Raven Point Retreats Ltd. and Raven Point Landing Ltd. Michael Hollander, on his own behalf Dawn Sissons, delegate of the Director of Employment Standards
FILE NUMBER:	2024/057
DATE OF DECISION:	November 6, 2024

DECISION

OVERVIEW

1. This is an appeal by Raven Point Retreats Ltd. and Raven Point Landing Ltd. carrying on business as Raven Point Inn and Raven Point (collectively , "Appellant") of a determination issued by a delegate ("Delegate") of the Director of Employment Standards ("Director"), dated April 23, 2024 ("Determination"). The appeal is filed pursuant to section 112(1) of the *Employment Standards Act* (*ESA*).

2. In the Determination, the Delegate found that Michael Hollander ("Respondent") was an employee of the Appellant before he was terminated as opposed to an independent contractor. The Delegate awarded the Respondent compensation for outstanding wages, vacation pay, and interest. The Delegate also imposed four administrative penalties on the Appellant for contraventions of the *ESA*, each in the amount of $500.

3. The Appellant submits the Delegate erred in law in determining that the Respondent was an employee for the purposes of the *ESA* rather than an independent contractor.

4. For the reasons given below, I dismiss the appeal and order that the Determination be confirmed pursuant to section 115(1)(a) of the *ESA*.

ISSUE

5. The issue to be addressed is whether the Delegate erred in determining the Respondent was an employee of the Appellant for the purposes of the *ESA*.

BACKGROUND FACTS

6. The Appellant operates a marina and inn in Vancouver where the Respondent worked as general manager from October 1, 2021, to October 4, 2022, when he was terminated. The Respondent filed a complaint on October 26, 2022, alleging that the Appellant contravened the *ESA* by failing to pay his wages.

7. The first issue dealt with in the Determination was whether the Respondent was an employee or an independent contractor. The Delegate considered the relevant definitions in section 1 of the *ESA*, as well as the purposes of the *ESA*. The Delegate also noted that any agreement to waive the requirements of the *ESA* is not enforceable and has no effect.

8. The Delegate then discussed factors that can be considered in determining whether a person is an employee for the purposes of the *ESA*, such as: the level of control exercised over the worker; the level of autonomy the worker had over their work; how the worker's pay is set; whether there is an opportunity for profit or loss in the performance of the tasks; whether the worker was in business for themselves; and whether the worker is providing similar services to other parties.

9. The Delegate determined the Respondent met the definition of "employee" under section 1 of the *ESA* for the work he performed as general manager for the Appellant. The Delegate's reasons for that finding were as follows (at pages R4 and R5 of the Determination):

> The Corporate Director Resolutions dated October 4, 2021 (the "Resolution"), appointed Mr. Hollander as the General Manager for the Respondent. The Resolution set out the authority Mr. Hollander had as the General Manager of the Respondent as well as his general duties. The duties included but were not limited to hiring staff, entering into leases, managing the properties and day-to-day affairs of the Respondent. The duties outlined in the Resolution show that Mr. Hollander was not performing a single job or task for the Respondent for which he was billing. Rather Mr. Hollander performed a multitude of tasks on an ongoing basis from October 1, 2021 to October 4, 2022 in exchange for a monthly salary. Based on this information, I do not find that Mr. Hollander was in the business of providing "general manager" duties to businesses. No evidence was provided to show that Mr. Hollander was providing similar services to other businesses, so I accept Mr. Hollander's assertion that he was not performing work for anyone else while working for the Respondent. Given the numerous tasks set out in the Resolution I also find it unlikely that Mr. Hollander would have time to perform work for anyone else.
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> Based on the description of duties provided in the Resolution I find that the work Mr. Hollander was performing for the Respondent was integral to the business as he was responsible for the day-to-day affairs of the business. I also find that the Respondent had control and direction over the work performed by Mr. Hollander as the Resolution clearly outlines the numerous duties the Respondent required Mr. Hollander to perform. The Resolution also shows that Mr. Hollander required the directors' approval for decisions such as the rates and benefits set for employees and expenses exceeding a budgeted amount. Accordingly, I find that the Respondent meets the definition of an 'employer' under the Act as it had control and direction over Mr. Hollander.
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> I accept Mr. Hollander's statement that he worked 6-12 hours per day, seven days per week and that while he may not have been working all those hours that he had to be on call and available for any employee, facility, marina patron, inn guest, supplier and director issues, as it was not disputed by the Respondent and is supported by the duties outlined in the Resolution. This statement shows that while Mr. Hollander had some autonomy over his hours he was also on call, which limited his ability to control his hours for profit or loss. If he worked more hours he earned less since he was paid a monthly salary not an hourly rate, however he could only control this to a certain extent since he was on call to address the various issues that may occur.

10. The second issue dealt with in the Determination was whether the Director has jurisdiction to determine this matter due to the Respondent pursuing wages through other proceedings, namely small claims court. The Delegate found that the small claims court proceeding did not address the alleged unpaid wages for work performed by the Respondent for his general manager duties. Rather, that proceeding concerned separate accounting services the Respondent provided to the Appellant that were not the subject of the Respondent's complaint. This finding has not been appealed by the Appellant.

11. The third issue dealt with in the Determination was whether Raven Point Retreats Ltd. and Raven Point Landing Ltd. are associated employers pursuant to section 95 of the *ESA* with respect to the Respondent's employment. Having noted that it was not disputed, the Delegate determined that Raven Point Retreats Ltd. and Raven Point Landing Ltd. should be considered one associated employer. This finding has also not been appealed by the Appellant.

12. The fourth and last issue dealt with in the Determination was whether the Respondent was owed wages and, if so, how much. The Delegate determined that the Respondent was a "manager" as defined in the *Employment Standards Regulation*, and he was therefore exempt from Part 4 and Part 5 of the *ESA*. The Delegate then discussed the Respondent's regular wage rate and determined he was owed regular wages and vacation pay by the Appellant. The amount owed to the Respondent has not been appealed by the Appellant (assuming the Respondent was an employee, which the Appellant disputes).

13. The Delegate then determined the Appellant was liable for four administrative penalties, each in the amount of $500, for breaches of sections 17, 18, 28 and 58 of the *ESA*.

ARGUMENTS

14. The Appellant argues the Delegate erred in law by finding the Respondent was an employee of the Appellant. The Appellant refers to several factors that it says supports its position, including with some references to the investigation record – e.g., the Appellant says:

    a. the Respondent invoiced the Appellant for his work under an "Agreement for Services Provided" and charged GST;

    b. the "Agreement for Services Provided" makes clear the Respondent was a contractor, not an employee;

    c. there were no source deductions deducted from the Respondent's pay or paid by the Appellant to the Canada Revenue Agency;

    d. the Respondent did not maintain timesheets; and

    e. the Respondent did not sign nor was he provided with a Record of Employment by the Appellant.

15. The Director argues the Delegate provided a reasoned analysis for why she found the Respondent was an employee and that there was no error of law. The Director says the appeal is without merit and the Appellant is essentially rearguing the points made to the Delegate prior to the Determination being issued.

16. The Respondent argues the Delegate did not make an error of law, and he provides reasons to support the Delegate's finding that he was an employee. For example, the Respondent worked full-time for the Appellant, and he was required to be on-site.

17. The Appellant did not submit typical reply argument. Instead, it resubmitted the "Agreement for Services Provided" and a shareholders agreement, both of which are already included in the section 112(5) record. The Appellant also submitted four letters – two from employees of the Appellant and two from directors of the Appellant companies. The letters essentially make arguments supporting

the Appellant's position (many of which have already been made) and describe interactions with the Respondent (although many of those interactions have nothing to do with whether the Respondent was an employee or independent contractor).

ANALYSIS

18. The Appellant alleges the Delegate made an error of law in finding the Respondent was an employee for the purposes of the *ESA*. However, the question of whether a person is an "employee," as that term in defined in the *ESA*, is a question of mixed fact and law, which is given deference by this Tribunal: see *Star Limousine Service Ltd. (Re)*, 2024 BCEST 67 at para 31, *3 Sees Holdings Ltd.*, BC EST # D041/13 at paras 26 to 28 ("*3 Sees*"), and *Michael L. Hook (Re)*, 2019 BCEST 120 at para 31. As this Tribunal stated in *3 Sees* at para 28:

> The fact that the dispute is over a question of mixed law and fact counsels deference. Appellate bodies should be reluctant to venture into a re-examination of the conclusions of a decision-maker on questions of mixed law and fact (see *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, *supra*).

19. As this Tribunal has previously stated, a decision-maker's finding on a question of mixed fact and law should not be set aside on appeal unless it is tainted by a "palpable and overriding error": *Cultus Lake Waterpark Ltd. (Re)*, 2023 BCEST 54 at para 21, citing *Housen v Nikolaisen*, 2002 SCC 33.

20. In this case, I find the Delegate's determination that the Respondent was an "employee," as defined in section 1 of the *ESA*, to be reasonable and supported by evidence that was before her – e.g., evidence regarding the Respondent's duties, his hours worked, how he was paid, the fact he was always on call and available for work, the level of control the Appellant had over the Respondent's work, and how integral the Respondent's work was for the Appellant's business. The Delegate also considered the lack of evidence about the Respondent providing services to other businesses. In my view, given the evidence before her, it cannot be said that the Delegate made a "palpable and overriding error" in determining the Respondent was an "employee," so I dismiss that ground of appeal.

21. I will also briefly address the four letters submitted by the Appellant. It is not clear whether the Appellant submitted them as reply argument or as fresh evidence. If they were submitted as fresh evidence, they do not meet the test for fresh evidence set out in *Davies et al.*, BC EST # D171/03. That is because, on their face, there is no indication that the information contained in them could not have been provided during the investigation of the complaint. The Appellant also did not provide any explanation for why any new information contained in the letters could not have been submitted during the investigation. Accordingly, if the Appellant submitted the letters as fresh evidence, I dismiss that ground of appeal.

CONCLUSION

22. The Appellant has the burden to demonstrate a basis for the Tribunal to interfere with a determination (see *Tejinder Dhaliwal (Re)*, 2021 BCEST 34 at para 13) and, in my view, the Appellant has failed to meet that burden in this case for the reasons discussed above. I therefore dismiss the appeal.

ORDER

23. I order that the Determination be confirmed pursuant to section 115(1)(a) of the *ESA*.

/S/ Brandon Mewhort

Brandon Mewhort
Member
Employment Standards Tribunal