

An appeal

- by -

Caroline Kehoe, a Director of I.G. Publications (Banff) Ltd. carrying on business as
Visitor's Choice

- of a Determination issued by -

The Director of Employment Standards

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

PANEL: James F. Maxwell

FILE NO.: 2018A/54

DATE OF DECISION: November 5, 2018

DECISION

SUBMISSIONS

Elaine McPherson	on behalf of Caroline Kehoe, a Director of I.G. Publications (Banff) Ltd. carrying on business as Visitor's Choice
Andrew Smith	on his own behalf
Linda Tesser	on her own behalf
Dan Armstrong	on behalf of the Director of Employment Standards

OVERVIEW

1. On April 9, 2018, a delegate of the Director of Employment Standards (the "Director") issued a determination (the "Corporate Determination") pursuant to section 79 of the *Employment Standards Act* (the "ESA") in which I.G. Publications (Banff) Ltd, carrying on business as Visitor's Choice ("I.G. Publications") was ordered to pay Pamela Finch, Andrew Smith, and Linda Tesser (collectively, the "Complainants") the aggregate sum of \$39,112.86, representing unpaid annual vacation pay, compensation for length of service, and accrued interest. I.G. Publications was also ordered to pay \$1,000.00 in administrative penalties.
2. On April 16, 2018, the Director issued a determination (the "Director's Determination") pursuant to section 79 of the *Employment Standards Act* (the "ESA") in which Caroline Kehoe, a Director of I.G. Publications (Banff) Ltd, carrying on business as Visitor's Choice, (the "Appellant") was ordered to pay the Complainants the aggregate sum of \$32,604.15, representing the corporate officer's liability for unpaid wages, together with accrued interest.
3. On May 30, 2018, the Appellant filed an appeal of the Director's Determination.
4. The deadline for the filing of an appeal of the Director's Determination was May 24, 2018. In light of the fact that the appeal was filed late, the Appellant also seeks an extension of time under section 109(1)(b) of the *ESA*.
5. In its appeal, the Appellant requests that the Tribunal vary the Director's Determination, or refer the Director's Determination back to the Director. The grounds upon which the Appellant relies are that the Director allegedly erred in law in making the Director's Determination.
6. This Decision is based upon my review of the Director's Determination, the Appellant's submissions filed with the appeal, the Director's Record received from the Director's delegate on July 6, 2018, and the submissions of the Director's delegate and the Complainants.

ISSUES

7. The issues that fall to be considered in this Appeal are as follows:
 - i) Is the appellant entitled to an extension to the time for filing an appeal of the Director's Determination?
 - ii) If so, did the Director err in law in making the Director's Determination?

FACTS

8. I.G. Publications is an Alberta company, extra-provincially registered in British Columbia. I.G. Publications operated a business on Vancouver Island publishing travel guides.
9. In the Corporate Determination, the Director concluded that the Complainants were employees of I.G. Publications. The Director found I.G. Publications had failed to provide notice of termination of employment, compensation for length of service, or vacation pay to the Complainants. By failing to do so, I.G. Publications had breached the relevant provisions of the *ESA*. The Director found I.G. Publications liable to pay the sum of \$39,112.86 to the Complainants for compensation for length of service, vacation pay, and accrued interest. The Director also imposed administrative penalties of \$1,000.00.
10. On May 30, 2018, I.G. Publications appealed the Corporate Determination to this Tribunal. That appeal has been granted, in part (see *Re: I.G. Publications (Banff) Ltd.*, 2018 Bcest 104). The variation of the Corporate Determination affects only the amount for which I.G. Publications is liable.
11. Because the Director had found that I.G. Publications was liable for unpaid wages, and because I.G. Publications had ceased doing business, the Director sought to impose liability for the unpaid sum upon a director or officer of the company. The Director examined a search of the Alberta Corporate Registry with respect to I.G. Publications. The Director found that a Change Director/Shareholder had been filed with the Registry on January 19, 2017. While the Registry record did not indicate the identity of the new director or shareholder at that time, the Registry record did indicate that as at January 9, 2018, the sole director and shareholder of I.G. Publications was Caroline Kehoe. The Director concluded, by implication, that Caroline Kehoe had become a director in January 2017.
12. The Director then issued the Director's Determination, imposing liability upon Caroline Kehoe for unpaid wages earned by the Complainants. It is from the Director's Determination that the Appellant now appeals.

THE APPEAL

13. The Appellant appeals on the ground that the Director allegedly made errors of law in the Director's Determination. The specifics of the Appellant's allegations are as follows:
 - i) The Director erred in concluding that the Complainants were employees, and not independent contractors;

- ii) In the alternative, the Director made errors in determining the amount owing by the Appellant.

14. The Appellant also advanced a number of arguments that are clearly outside of the jurisdiction of this Tribunal, and which will not be considered here. These arguments include:

- i) That Finch has wrongfully withheld equipment and information belonging to the Appellant, and has published information harmful to the Appellant's business; and
- ii) That Smith has wrongfully competed with the Appellant following termination, and has wrongfully published information harmful to the Appellant's business.

ANALYSIS

A. Request for an Extension

Is the appellant entitled to an extension to the time for filing an appeal of the Director's Determination?

15. The Appellant filed the appeal on May 30, 2018, after the deadline for doing so. The Appellant has requested an extension to the deadline for filing, citing as a reason for the delay in filing that the Appellant's son had been hospitalized for emergency surgery on May 15 and May 22, 2018.

16. In *Re: Niemisto* (BC EST # D099/96), the Tribunal identified a list of criteria that should be considered when an applicant seeks an extension to the deadline for filing an appeal. The criteria identified in *Re: Niemisto* include that:

- i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
- iii) the respondent party (*i.e.*, the employer or employee), as well the Director, must have been made aware of this intention;
- iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
- v) there is a strong *prima facie* case in favour of the appellant.

17. The Tribunal, in *Re: Dustin Harrison, a director or officer of DNT Enterprises Ltd.*, BC EST # D094/15, held that the Tribunal can consider other criteria than those listed, and the *Niemisto* criteria need not all be satisfied for an extension to be granted:

It should be noted that the criteria in *Re: Niemisto* are neither exhaustive nor conjunctive; that is, the Tribunal may consider other unique criteria and it is not necessary that all the criteria favour the applicant before granting an extension of time to appeal (see *Re: Patara Holdings Ltd. c.o.b. Best Western Canadian Lodge*, BC EST # D010/08, reconsideration dismissed, BC EST # RD053/08).

18. The Appellant provided no evidence in support of the allegation that the Appellant's son had been hospitalized. The Appellant gave no explanation as to why the Appellant's son's hospitalization

prevented the Appellant from filing the appeal in a timely manner. In the absence of more, I am unable to find that the Appellant's explanation for the delay in filing is reasonable and credible.

19. The Appellant has provided no evidence that there had been any prior intention to appeal the Director's Determination. There is no evidence before me that a prior intention to appeal was brought to the attention of the Director or the Complainants.

20. The Director has expressed no objection to an extension to the deadline for filing the appeal. While two of the Complainants have expressed opposition to an extension, there is no evidence before me that the Complainants will be unduly prejudiced if an extension is granted.

21. I turn now to the question of whether the appeal establishes a *prima facie* case in favour of the Appellant. The Appellant alleges that the Director erred in law in making the Director's Determination. The Appellant alleges that the Director erred in concluding that the Complainants were employees, rather than independent contractors, and that the Director incorrectly calculated the amount owing by the Appellant in respect of unpaid wages.

22. This Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

- i) a misinterpretation or misapplication of a section of the applicable legislation;
- ii) a misapplication of an applicable principle of general law;
- iii) acting without any evidence;
- iv) acting on a view of the facts which could not reasonably be entertained; and
- v) adopting a method of assessment which is wrong in principle.

23. In *Re: C.G. Motorsports Inc.*, BC EST # RD110/12, at para. 28, the Tribunal accepted that it is necessary to undertake some examination of the merits of an appeal in order to determine whether there is a strong *prima facie* case in favour of the Appellant:

... to the extent necessary to determine whether there is a "strong *prima facie* case" the Tribunal will examine the merits of the appeal. ... An examination of the relative strength of an appeal considered against established principles necessarily requires some conclusions to be made about the merits.

24. For the purposes of assessing whether there is a *prima facie* case in support of this appeal, I will examine each of these grounds of appeal in turn.

i) Did the Director err in law in concluding that the Complainants were employees, rather than independent contractors?

25. The Appellant argues that the Director erred in law by concluding that the Complainants were employees, not independent contractors. The Appellant argues that since the Complainants were paid by way of invoices which included GST and which cited the Complainants' business numbers, because the Appellant issued T4As to the Complainants, and because the Complainants were at liberty to engage

in work for other companies, it was wrong to conclude that the Complainants were employees of the Appellant company. The Appellant contends that the Director's conclusion was an error in law.

26. The question of whether a person is an employee or an independent contractor is determined, first, by reference to the statutory definitions of "employee", "employer", and "work" set out in the *ESA*. Further guidance can be had by reference to the relevant common law tests for employment. The application of these tests was discussed by this Tribunal in *Re: Kimberley Dawn Kopchuk*, BC EST # D049/05 (Reconsideration denied BC EST #RD114/05):

... the overriding test is found in the statutory definitions: that is, whether the complainant "performed work normally performed by an employee" or "performed work for another" (*Web Reflex Internet Inc.*, BC EST #D026/05). Despite the limitations of the common law tests, the factors identified in them may also provide a useful framework for analyzing the issue. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, in the context of the issue of vicarious liability, the Supreme Court of Canada rejected the notion that there is a single, conclusive test that can universally be applied to determine whether a person is an employee or an independent contractor. Instead, the Court held, at paras. 47-48:

The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her own tasks.

It bears repeating that the above factors constitute a non-exhaustive list and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

27. In the Corporate Determination, the Director examined the evidence as to the nature of the services performed by the Complainants, and the nature of the relationship between the Complainants and the Appellant company, in the context of the relevant statutory definitions of the *ESA*. The Director examined the facts as to the services performed by the Complainants, in the context of the definitions of "employee", "employer", and "work", as set out in the *ESA*. The Director recognized that the provisions of the *ESA* are paramount in determining the nature of the relationship, but nevertheless went on to consider the common law tests of employment to the facts of this case. The Director examined factors such as chance of profit and risk of loss, degree to which the work is integral to the business, whether the worker has other clients, and whether the work is to be performed during a time-limited period. Based upon all of these considerations, the Director concluded that each of the Complainants performed work for I.G. Publications, and that the nature of the relationship was that of employer/employee.
28. I am satisfied that the Director fully examined the evidence and correctly applied the relevant statutory and common law tests to the facts of this case. I am satisfied that the Director did not err in the application of the law, and correctly concluded that the Complainants were employees.

ii) Did the Director err in law calculating the amount owing by the Appellant with respect to unpaid wages?

29. The Director cited section 96 of the *ESA* for the proposition that the Appellant is personally liable for a sum of up to a maximum of two months wages, where a corporation has failed to pay wages earned by an employee:

96 (1) A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months' unpaid wages for each employee.

30. The Director calculated an amount owing by the Appellant based upon the Director's assessment of 2 months' wages earned by each of the Complainants. This methodology is consistent with the approach of the Tribunal in *Re: Tracey Docherty*, BC EST # D248/98, which held that:

In my view, section 96 creates an unpaid wage liability "ceiling" based on an employee's monthly wage. Accordingly, if an employee's "regular wage" (see section 1) was \$2,000 per month, the unpaid wage liability of a director or officer for that employee would be the lesser of \$4,000 (*i.e.*, 2 x \$2,000 per month) or the actual amount of the employee's unpaid wages.

...a corporate officer or director may be held personally liable for employees' unpaid wages, but such liability cannot exceed the equivalent of two months' wages per employee.

31. The amount calculated by the Director as owing by the Appellant does not exceed 2 months' wages for each of the Complainants. The Director did not err in the amount that he assessed as owing by the Appellant in respect of unpaid wages.

32. I find that the Director did not err in law, either in finding that the Complainants were employees, or in calculating the amount owing by the Appellant in respect of unpaid wages. I find that there is not a *prima facie* case in favour of the Appellant.

33. The Appellant has failed to satisfy the *Niemisto* criteria for the granting of an extension to the deadline for filing an appeal. For this reason, the Appellant's request for an extension to the deadline for filing the appeal is denied.

ORDER

- ^{34.} Pursuant to section 115 of the *ESA*, I confirm the Director's Determination issued April 16, 2018, and I dismiss this appeal pursuant to section 114(1)(b) and section 114(1)(f) of the *ESA*.

James F. Maxwell
Member
Employment Standards Tribunal