



An appeal

- by -

518238 B.C. Ltd. operating as Central Canada Contact Lenses Inc.
("employer")

- 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

ADJUDICATOR: Paul E. Love

FILE No.: 2000/639

DATE OF DECISION: January 23, 2001

DECISION

OVERVIEW

This is an appeal filed by Uno Leis, a director of 518238 B.C. Ltd., and an officer of Central Canada Contact Lenses Inc. (“Central Canada”) of a Determination dated August 23, 2000. The Delegate found that Michael Hurd was an employee of 518238 B.C. Ltd., which carried on an optical business in Nanaimo, for Central Canada, an Ontario company. 518238 B.C. Ltd. did not participate in the Delegate’s investigation of this matter, and the Trustee in Bankruptcy of Central Canada had little or no payroll records concerning Mr. Hurd. In a written submission Mr. Leis claims that the Director does not have jurisdiction to investigate the complaint as Mr. Hurd was employed by an Ontario Company. Mr. Leis also claims that Mr. Hurd was employed by Central Canada and not by 518238 B.C. Ltd. I confirmed the Determination, as the appellant did not establish any error in the Determination with regard to jurisdiction or identity of the employer. This matter was decided upon written submissions, without a hearing.

FACTS

Mr. Hurd worked as an optical technician in Nanaimo between May 1, 1996 to June 5, 2000 as a technician at the rate of \$15.14 per hour. He was hired by Uno Lies, a director of 518238 B.C. Ltd. Mr. Hurd was to be paid \$30,000 per year plus a commission of 10 % of net sales. This was later adjusted to 5 %. He was not paid his commission during 1998. He was paid a portion of the commission in 1999 and he was not paid any commission in 2000. Mr. Hurd was not permitted by the employer to take vacations and was not paid vacation pay. He was the only employee in the Nanaimo office.

I note that Uno Leis, is also the President of Central Canada Contact Lenses Inc. (“Central Canada”), and Central Canada has an office in Ontario. Central Canada is not registered in the province of British Columbia as an extra-provincial company.

Mr. Hurd terminated his employment because of a pending bankruptcy of Central Canada and because of a failure by the employer to pay vacation pay or commissions during his four years of employment. The Delegate noted that there was considerable evidence that Mr. Hurd lost his job because of the bankruptcy or receivership of the parent company, Central Canada.

The Determination in this matter was made against 518238 B.C. Ltd. The company search printout for 518238 B.C. Ltd. indicates that the directors of the company were Michael Hurd, Uno Leis, Michael Stoker. The officers of 518238 B.C. Ltd. were Uno Leis (president) and Michael Stoker (secretary). The company was incorporated on April 25, 1996, before Mr. Hurd commenced working in Nanaimo.

It is apparent, from a letter dated November 1, 1996 on the letterhead of Central Canada, that Uno Leis, president of Central Canada, gave instructions to Bradley Newby of Baker Newby (a lawyer) that Mr. Hurd was to be the B.C. resident director of a numbered subsidiary of 518238 Ltd.

The Delegate determined that Mr. Hurd was entitled to the sum of \$ 8,575.26 in wages for unpaid commission, annual vacation pay, and compensation for length of service. It is unnecessary for me to review in this Decision the particulars of the calculation of the wages, as the amount owing to Mr. Hurd was not raised as an issue in this appeal.

Employer's Argument:

A written submission was filed in this matter by Uno Leis, a director of 518238 B.C. Ltd. I take this to be the submission of 518238 B.C. Ltd. for the purposes of this appeal. 518238 B.C. Ltd. submits that Mr. Hurd was hired by Central Canada Contact Lenses Inc. 518238 B.C. Ltd. submits that Central Canada renewed contracts with Mr. Hurd and Central Canada. 518238 B.C. Ltd. submits that 51823 B.C. Ltd., was not created for the purpose, nor did it do business on behalf of Central Canada. 518238 B.C. Ltd. further submits that Uno Leis was not a director of Central Canada, and that there were "several shareholders" of Central Canada. 518238 B.C. Ltd. submits that, Michael Stoker, was the only director of Central Canada. In the written submission Uno Leis requests to be released of any possible personal liability from the claims of Michael Hurd.

518238 B.C. Ltd. submits that the Director has no jurisdiction, and that jurisdiction rests in Ontario.

The Delegate was unable to obtain any documents from the Trustee in bankruptcy or from 518238 B.C. Ltd. The Delegate determined this matter on the basis of evidence supplied by the complainant.

ISSUES:

Does the Director have jurisdiction to investigate the complaint of Michael Hurd, or is the complaint a matter of Ontario jurisdiction?

Did the Delegate err in finding that 518238 B.C. Ltd., operating as Central Canada Contact Lenses Inc. was the employer of Michael Hurd?

ANALYSIS

In an appeal under the *Employment Standards Act* (the "Act") the burden rests with the appellant, in this case the employer, to demonstrate an error in the determination such that I should vary or cancel the determination.

Mr. Hurd was employed and worked in the province of British Columbia. There is no evidence that Mr. Hurd worked outside of British Columbia. The Company Central Canada Contact Lenses Inc. is not registered in British Columbia as an extra-provincial company. It had no status to do business within this Province. This, however, does not mean that the employee must file his complaint in the province of Ontario, and have the matter determined according to Ontario law. Section 3 of the *Act* provides that the *Act* applies to “all employees”. The Director therefore has jurisdiction to investigate his complaint, and make a Determination.

Identity of the Employer:

I am satisfied on the basis of the evidence before me that Mr. Leis was an officer of Central Canada, and that he participated in giving instructions to incorporate 518238 B.C. Ltd. He is also a director of 518238 B.C. Ltd. The company, 518238 B.C. Ltd., was a legal entity at the time that Mr. Hurd commenced working as an optical technician. If, as is pointed out by Mr. Leis that 518238 B.C. Ltd. did not contract with Mr. Hurd, did not pay Mr. Hurd, did not register with WCB or GST or CPP, this does not mean that Mr. Hurd was not employed by 518238 B.C. Ltd. There is clearly an interlocking directorship between 518238 B.C. Ltd., and Central Canada such that these companies were associated employers within the meaning of s. 95 of the *Act*, and therefore the Delegate was entitled to treat these entities as one person for the purpose of the *Act*.

Section 95 of the *Act* reads as follows:

If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,

- (a) the director may treat the corporations, individuals, firms, syndicates or association or any combination of them, as one person for the purposes of this *Act*, and
- (b) if so, they are jointly and separately liable for payment of the amount stated in a determination or in an order of the tribunal, and this *Act* applies to the recovery of than amount form any or all of them

The evidence in this case is that 518238 B.C. Ltd. carried out an optical business in Nanaimo for Central Canada, and that Central Canada carried out an optical business in Ontario. There is interlocking control of the two companies who carried on business. There is also an employment standards purpose here, which is to ensure that an employee is not deprived of his minimum rights under the *Act*: *Invicta Security Systems Corp, BCEST #D249/96*.

I note that the submission made by Mr. Leis, dated September 15, 2000, does not contain any documentary evidence supporting his submission. The company did not produce any documentation to the Delegate during the course of the investigation. A party who fails to co-operate in an investigation, and attempts to raise an issue on appeal which should have been raised by the Delegate is in a difficult position. The purpose of a hearing before the Tribunal is to correct errors made by the Delegate. An appellant cannot lie in the weeds and make a submission to the Tribunal on a point which it did not raise with the Delegate: *Tri-West Tractor Ltd., BCEST #D268/96, Re Kaiser Stables Ltd., BCEST #D058/97*. There is no evidence in this case that supports any allegation that the Delegate erred in this matter.

ORDER

Pursuant to section 115(a) of the *Act*, the Determination dated August 23, 2000 is confirmed.

PAUL E. LOVE

Paul E. Love
Adjudicator
Employment Standards Tribunal