

An appeal

- by -

Perfect Partners Inc.
("Perfect Partners" or "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.: 2000/631

DATE OF DECISION: January 10, 2001

DECISION

APPEARANCES:

This is an appeal filed by Roanne Milliken of a Determination against Perfect Partners Inc., dated August 21, 2000. In the Determination the Delegate found that Kathleen Gilbert was an employee of Perfect Partners Inc. and was entitled to wages, vacation pay, interest and reimbursement for the employer's business expenses in the amount of \$11,098.74. Ms. Milliken filed an appeal on the basis that her interests are affected by the Determination. She argues that she is not a director of Perfect Partners Inc., yet as a person registered as a director of that company she has standing to argue that she was not accorded procedural fairness during the Delegate's investigation, and that Ms. Gilbert was an independent contractor, and not an employee. While Ms. Milliken does have standing to make submissions in this process as she was served with the Determination, she was involved in the investigation, and she did not raise any issue with the Delegate concerning whether Ms. Gilbert was an employee of the company. I therefore confirmed the Determination.

FACTS

Kathleen Gilbert was employed by Perfect Partners Inc., in Victoria, as a locations manager for the production of the film Perfect Partners.

In December of 1999, Rosanne Milliken commenced work on the film. A production manager, James Mou, was brought on board as a result of the recommendation of Ms. Milliken. James Mou hired Ms. Gilbert on January 20, 2000 as a location manager, to commence on January 24, 2000. Ms. Gilbert sent invoices for the work that she did on February 11, 2000, March 2, 2000. On March 10, 2000 Ms. Gilbert ceased work because of non-payment of her accounts. On March 28, 2000 she faxed the invoices along with a demand letter to Rosanne Milliken. She did not receive payment from Perfect Partners Inc. for her invoices.

The Delegate found that Ms. Gilbert had advanced \$778.66 of her own money to cover business expenses of the employer and was also entitled to outstanding wages of \$9,600.00, vacation pay of 384.00 and interest in the amount of \$336.08, for a total of \$11,098.74.

Before the Determination was rendered the Delegate apparently had the benefit of receiving a letter from Christopher Crutcher denying any responsibility for involvement in Perfect Partners. The Delegate also had the benefit of a detailed chronology from Ms. Milliken (July 19th, 2000) where she implicates Crutcher as responsible to pay the crew members. Ms. Milliken stated that crew members were engaged in Victoria, and had not been paid. Ms. Milliken did not challenge the claim presented by Ms. Gilbert or the employment status of

Ms. Gilbert in her letter to the Delegate dated July 19th, 2000. Perfect Partners did not submit any records pursuant to a demand made by the Delegate on June 20, 2000.

Ms. Milliken, through counsel advances the proposition that Ms. Milliken was a director, registered with the Companies Registry in name only. It is submitted that she permitted her name to stand as a Director so that the company could obtain federal and provincial tax credits, and that she did not fulfil the functions of a director. It is claimed that the company was incorporated on an urgent basis because funds would not be released by the financial backers of the film, until a corporate bank account was incorporated in the name of the production. It is claimed that at the time that Ms. Milliken lent her name as a director, that the person intended to be a director was away on vacation, and it is claimed that once Ms. Milliken tendered her resignation, that individual declined to act as a director.

This point is disputed by the employee, who claims Milliken took a more active role in the production and was aware of her liability as a director of Perfect Partners Inc.. For the purpose of disposing of this appeal, it is not necessary for me to resolve this issue, and I decline to make a finding on this point.

Milliken advances grounds of appeal which include:

- (a) Ms. Milliken was not advised of the possible consequences of the Determination, or that she had a right to make a submission on her own behalf as a nominal director of the company;
- (b) The Delegate failed to address the issue of whether Ms. Gilbert was an employee or an independent contractor;

The grounds of appeal are cast in the language of procedural fairness, and failure to consider a serious issue.

Ms. Milliken seeks to have the Determination set aside, and the matter remitted for further investigation concerning whether Ms. Gilbert was an employee or an independent contractor.

ISSUES:

Does a person named as a director in the notice of directors filed at the Registrar of Companies have standing to file an appeal and make submissions, where the Company has failed to file an appeal?

Did the Delegate err in failing to advise Ms. Milliken of the possible consequences of the Determination or her right to respond to the complaint on her own behalf?

Did the Delegate err in determining that Ms. Gilbert was an employee?

ANALYSIS

Standing:

Generally, the person named in the Determination is the person who files an appeal. In this case it is alleged, essentially that the company was controlled by Christopher Crutcher. Ms. Milliken alleges that Mr. Crutcher collected money from investors for the film, applied the money for his own purposes, without paying the employees or production costs incurred. This is an appeal of the Determination, filed by Ms. Milliken, which found the company liable to Ms. Gilbert. The company has not filed an appeal of the Determination. The only grounds advanced of a substantive nature for this appeal is that the Delegate erred in failing to consider the issue of whether Ms. Gilbert was an independent contractor. Counsel has, however made argument on the point of procedural fairness and submits that Ms. Milliken ought to have had the opportunity to participate in the investigation by the Delegate. Counsel for Ms. Milliken does not concede that Ms. Milliken is a director of Perfect Partners Inc. and argues that on a functional analysis Ms. Milliken is not a director. She argues that she nevertheless has standing to file an appeal as a person who is affected or potentially affected by the Determination.

Section 112 of the *Act* provides that any person served with a Determination may file an appeal. Ms. Milliken was served with the Determination. In my view, a person who is named on the notice of directors filed with the Registrar of Companies, and who has been served with the Determination, has sufficient standing under s. 112 of the *Act* to file an appeal and make submissions to the Tribunal, if that person chooses to apply to make submissions. A director can be affected by the failure of a company to respond to an appeal. Section 96 of the *Act* provides that a director can be liable for two months wages. In my view, the interests of Ms. Milliken are affected or affected potentially, by the Determination, and therefore she has standing to file an appeal of the Determination and the company's liability to Ms. Gilbert.

The proper employer in this case, however, is Perfect Partners Inc. It is only necessary for the Director to serve the company of the Determination (see section 81). There is no need for the Delegate to give to serve each and every director of an employer that the Director is conducting an investigation.

I note that much of the material provided by Ms. Milliken relates to the issue of whether she can be held liable for the Determination because she is a "nominal director". She submits that she was a director registered on the notice of directors only for the purpose of permitting Perfect Partners to obtain provincial and federal tax credits, and did not fulfill the functions of a Director on a functional analysis. It is unnecessary for me to analyze the facts and argument, and resolve the issue of Ms. Milliken's liability with regard to the Determination in this appeal. The Director has not issued any determination against the Ms. Milliken as a director of Perfect Partners Inc. That is something that might occur in the future if the

company fails to pay the amounts due and owing to Ms. Gilbert, but it is pre-mature to address this issue at this stage of the proceedings. This is a matter which Ms. Milliken can argue at the appropriate time, which is when and if the Director issues a Determination against Ms. Milliken as a director of the company.

Procedural Fairness:

Perfect Partners Inc. was sent a letter by registered mail setting out the allegations of Ms. Gilbert. The letter also contained a demand for employer records. The letter was copied to Ms. Milliken, as a director of the company. The letter clearly set out that this was the opportunity to respond to the complaint and that a failure to respond to the complaint might result in the complaint being determined on the basis of information provided only by the complainant. The letter also set out that the right of appeal to the Employment Standards Tribunal could be adversely affected by the failure to respond.

It is not up to the Director or its Delegate to advise a director of a company of her liability. The letter clearly put the company and the company's directors on notice concerning the claim. The company and Ms. Milliken and her capacity as a director, did not provide records to the Delegate. She did provide a letter narrating her involvement with Perfect Partners Inc.. Ms. Milliken did not raise the employee/independent contractor issue in her written submission. In the Delegate's written submission dated September 18th, 2000, the Delegate affirms that the issue was not raised during the course of an investigation which commenced on May 31, 2000 and ended on August 31, 2000. The fact that Ms., Milliken may have failed to appreciate the consequences, of providing a full submission with documents, is not an issue that goes to the procedural fairness of the investigation. If she did not understand the nature of the demand or the letter which accompanied the demand, she ought to have obtained legal advice at that point in time.

The Delegate in this case made reasonable efforts to give the company and Ms, Milliken an opportunity to respond to the complaint, and therefore fulfilled her duty under s. 77 of the *Act*.

Employee or Independent Contractor:

In her submission to the Tribunal, Ms. Milliken argues that the Delegate erred in not investigating whether Ms. Gilbert was an independent contractor. There was, however, some evidence before the Delegate that Ms. Gilbert was an employee. The Delegate concluded that Ms. Gilbert was employed by Perfect Partners Inc. She did so on the uncontradicted evidence of Ms. Gilbert.

The Delegate commenced the investigation in this matter on May 31, 2000 and the Determination was not issued until August 21, 2000. The Delegate asserts that the independent contractor issue was never raised by the company or by Ms. Milliken during the course of the investigation. There was evidence from which the Delegate could conclude

that Ms. Gilbert was an employee, given the very wide definition of employee in the *Act*. This Tribunal has repeatedly stated that the time to present documents and make submissions is at the time that the matter is investigated by the Delegate: *Re Tri-West Tractor Ltd., BCEST #D 268/96 (Stevenson)*, *Re Kaiser Stables Ltd., BCEST #D058/97 (Longpre)*. The Tribunal functions as a mechanism to correct significant errors that would affect the outcome of the Determination. In my view there was some evidence before the Delegate that Ms. Gilbert was an employee. The company did not dispute that assertion, and Ms. Milliken did not dispute that assertion, during the course of the investigation, and therefore the Delegate was not required to analyze this issue in an exhaustive manner.

ORDER

Pursuant to section 115(a) of the *Act*, the Determination dated August 21, 2000 is confirmed.

PAUL E. LOVE

Paul E. Love
Adjudicator
Employment Standards Tribunal