Employment Standards TRIBUNAL

An appeal

- by -

Hub-City Boat Yard Ltd.
("Hub City" and "the Roses")

- 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: Ian Lawson

FILE No.: 2003A/295

DATE OF DECISION: February 17, 2004

DECISION

SUBMISSIONS

Robert (Scotty) Morrison	on behalf of the Director
David Rose	on behalf of the Roses

OVERVIEW

This appeal has returned to me for decision, following the order made in BC EST #D295/03, which referred the entire matter back to the Director. Three Determinations had been issued by Robert (Scotty) Morrison as a delegate of the Director on July 2, 2003. The first Determination required Hub City to pay wages, vacation pay and interest to Thomas Skilton ("Skilton") in the amount of $6,655.71. The second and third Determinations imposed personal liability on the Roses for two months of the wages found owing to Skilton. The Roses appealed the Determinations.

On October 21, 2003, I allowed the appeal on the basis that breaches of natural justice had occurred, and referred the matter back to the Director pursuant to s. 115(1)(b) of the *Employment Standards Act* ("Act"). The Director's response to the referral-back was filed with the Tribunal on November 24, 2003, and the parties have made further written submissions. The matter now returns to me for decision on the basis of these written submissions.

FACTS

As set out in my referral-back decision, Hub City operated a boat brokerage in Nanaimo. On March 2, 2001, Skilton entered into a written agreement with Hub City regarding commissions on boat sales. The Director's delegate found that Skilton was an employee of Hub City between October 17, 2000 and October 16, 2002 and that wages were owing to Skilton. No payment was made pursuant to the Determination, and as the Roses were listed with the Registrar of Companies as directors or officers of Hub City, two further Determinations were issued, rendering the Roses liable for two months of the wages owing.

The Director's delegate decided to hold a form of hearing to conduct his investigation, called a Complaint Hearing. The hearing was held on May 12, 2003, but no one appeared for Hub City or the Roses. Shortly before the hearing, the delegate received a letter from the Roses, advising that Hub City had ceased operations and a new company called Hub City Boat Yard (2001) Ltd. is carrying on operations at a new address and had been so doing since 2001. The letter acknowledged Skilton had been an employee of the former company, and requested that the Roses be contacted to discuss the matter. As I found in my referral-back decision, the Roses (and Hub City) were not given proper notice of the hearing, and the delegate proceeded with the hearing knowing the Roses wished to be contacted by him. I also held the delegate provided inadequate reasons for his initial Determination, first because no analysis was undertaken as to whether Skilton was an employee, and second because there appeared to be a successorship issue here which the delegate had not considered.

In response to the referral-back, the Director's delegate filed a letter dated November 24, 2004. In that letter, the delegate addresses three concerns he says were raised in my referral-back decision, and I summarize the contents of that letter as follows:

> A. Was the employer served a notice of the adjudication hearing? Was he served properly?
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> The delegate says notice of the Complaint Hearing was sent by registered mail to Hub City at the street address of the new company (Hub City Boat Yard (2001) Ltd.). He points out that the letter from the Roses was addressed to Sharon Garrett, whose name was on the notice of hearing, and so affords proof the Roses were aware of the Complaint Hearing. The delegate further advises that Employment Standards mediator Ian McNeill had contacted the Roses in April, 2003, and following a discussion, Mr. McNeill sent a Notice of Mediation Session to Hub City, but again at the street address of the new company. The delegate advises no one appeared at the Mediation Session.
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> The delegate further states Hub City did not cease operations in 2001, proof of which is found in cheque stubs which were attached as Exhibit 2 to the initial Determination, which stubs bear the name "Hub City Boat Yard Ltd." and indicate cheques were written under that name between January and August, 2002. The delegate submits it is not unusual for operating names of companies to be different from registered names, and that "Hub-City Boat Yard Ltd." is the registered name but the company operates under the name "Hub City Boat Yard Ltd."
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> B. The Roses' Letter
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> The delegate states he only became aware of the Roses' letter on the date of the Complaint Hearing. The delegate reviews this letter, and states Hub City Boat Yard Ltd. did cease operations "at the time the complainant left that company." The delegate states Skilton never worked for Hub City Boat Yard (2001) Ltd. and so "there was no need to inquire into a successor company as the complainant only worked for Hub City Boat Yard Ltd." The delegate asserts again that there was evidence Hub City Boat Yard Ltd. continued to operate in 2002 at the old street address. In response to the Roses' request in the letter that they be contacted "to avoid any confusion," the delegate states the following:
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> > "There was no confusion. The evidence clearly showed; [*sic*] the employer's name (as per cheque stubs, account description forms), and address.
> >
> > "All points raised in the employer's letter were taken into consideration. The company's concerns were dealt with in the determination.
> >
> > "The company knew about the employment standards complaint hearing and chose not to attend. The company was given the opportunity to be heard and chose not to participate."
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> C. The Adequacy of the Reasons
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> The delegate states the following:
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> > "The Tribunal decision questions why neither the successorship issue nor the existence of an employment relationship were addressed. The simple answer is that neither issue was addressed in the corporate determination because Hub-City Boat Yard Ltd. did not raise either as an issue."

The Roses filed a reply to the above, and in further reply, the delegate filed a letter from Ian McNeill dated January 6, 2004, in which the following statement is made:

> "One of the duties I perform in this office is to assess each complaint that is filed to determine how it will be handled. Complaints that involve 'employee vs independent contractor issues' are complex and are dealt with differently than others. Had Mr. Rose indicated to me that he felt these

> complainants were not employees but independent contractors, the complaints would have been assigned as an investigation file. I met with Mr. Rose on March 4, 2003 in that capacity."

ISSUE

Upon this referral-back coming to me for decision, should the Determinations in question be confirmed, varied or cancelled?

ANALYSIS

Section 115(1) of the Act reads as follows:

> 115.(1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
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> (a) confirm, vary or cancel the determination under appeal, or
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> (b) refer the matter back to the director.

The legislature empowered the Tribunal to refer a matter back to the Director in cases where the Determination under appeal could not properly be confirmed, varied or cancelled, and where a reinvestigation or reconsideration is required, with directions (see *Re Zhang*, BC EST #D130/01). The Tribunal's decision will normally identify the errors made in the Determination, and the referral back is normally an opportunity for the Director to remedy those errors and arrive at a correct Determination. A practice has arisen, however, in which the Director makes a report back to the Tribunal instead of a new Determination, and in that report, the Director outlines the results of its reinvestigation or reconsideration. This practice renders the process more efficient, as the Tribunal is placed in a position to confirm, vary or cancel the Determination with the benefit of the Director's reinvestigation and reconsideration, but without the delay and expense involved with the making of a new Determination (with a new right of appeal).

In the present case, however, I am at a loss to understand how the Director has so misapprehended the referral back I ordered in BC EST #295/03. In that decision, I set out the reasons why the Complaint Hearing was a breach of natural justice because the delegate proceeded with it in the knowledge there were two different companies involved and the Roses wished to be contacted by the delegate. Instead of conducting another Complaint Hearing – this time after communicating with the Roses as they requested and after ensuring proper notice is given of the Hearing – the delegate makes a report which attempts to defend the correctness of the Determination I found to have been in error. Instead of conducting a proper investigation into whether Skilton is an employee and whether a successorship issue arises with the new company, the delegate states glibly that no such investigation is necessary because Hub City raised no such issues.

I take no comfort in the delegate's effort to convince me proper notice had been given to Hub City, because it seems the delegate simply mailed the Notice of Complaint Hearing to the old company at the new company's street address. As I found in my referral back decision, the initial Determination had been mailed to the old company at the old street address (but it also appeared to have been sent to the registered office address). The fact someone acknowledged receipt of the Notice of Complaint Hearing at the new company street address does not save a flawed effort to give proper notice of an important hearing. A company must be served at its registered office address; serving Hub City Boat Yard Ltd. at the street address of Hub City Boat Yard (2001) Ltd. is surely inadequate notice. The delegate's failure or

refusal to cure the problem and conduct a Complaint Hearing that does not breach the rules of natural justice is unexplained, and perhaps unexplainable.

Equally unpalatable is the delegate's suggestion he need not conduct a proper investigation into whether Skilton is an employee or an independent contractor, because Hub City apparently did not raise the issue. While it may be true that many Determinations might be made safely without a detailed analysis of the nature of the employment relationship, the delegate must have been alive to the independent contractor issue here upon seeing the written agreements entered into between Hub City and Skilton in March, 2001. The delegate's failure or refusal to investigate this important question after I raised it in the referral-back decision is again unexplained, and perhaps unexplainable. Mr. McNeill's letter sheds some light on how this investigation might have been derailed from the beginning as a result of his initial assessment. Nevertheless, the question whether Skilton was an employee or independent contractor is so fundamental to this case that again, Hub City's silence on the point at its first meeting with investigators affords no excuse for inadequately investigating an obvious issue.

Finally, the Roses' appeal seems to have arisen chiefly because of their personal liability as directors or officers. I expressed concern in the referral-back decision that the Determination may not have been issued against the correct company. The delegate's effort to convince me of the correctness of his initial approach merely deepens my concern. His conclusion that Hub City Boat Yard Ltd. was still operating in 2002 is supported only by the existence of that name on cheque stubs. No investigation other than this rudimentary one seems to have been undertaken, but more importantly, no investigation was undertaken after I expressly raised this concern in the referral-back decision. I am left, therefore, no better prepared to decide the correctness of the Determinations imposing personal liability. I remain concerned whether such liability was necessary at all, if the new company could be held liable as a successor employer.

In short, the Director's flawed and unfairly conducted investigation remains flawed and unfairly conducted, despite my effort to administer a cure. This Tribunal has held that where a Determination is flawed on the major issue, it may be more appropriate to cancel the Determination than to refer to back with directions (see *Re Thomas*, BC EST #D115/03). A second referral back in this case would not only be undignified, but it would be contrary to the fairness and efficiency principles in the Act. This is therefore one of those (hopefully) rare cases in which the flaws in the Determination are incurable and it must be cancelled.

ORDER

Pursuant to section 115(1) of the Act, I order that all three Determinations bearing #46918 made on July 2, 2003 be cancelled.

Ian Lawson
Adjudicator
Employment Standards Tribunal