

Appeals

- by -

Checker Flag Automotive Inc. carrying on business as Budget Brake and Muffler
("Checker Flag")

- and -

Peter Leventakis a Director and Officer of Checker Flag Automotive Inc.
carrying on business as Budget Brake and Muffler
("Leventakis")

- of Determinations 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 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE Nos.: 2010A/169 and 2011A/3

DATE OF DECISION: March 9, 2011

DECISION

SUBMISSIONS

Peter Leventakis	on behalf of Checker Flag Automotive Inc. carrying on business as Budget Brake and Muffler and on his own behalf as Director and Officer of Checker Flag Automotive Inc. carrying on business as Budget Brake and Muffler
Tao Jiang	on his own behalf
Chantal Martel	on behalf of the Director of Employment Standards

INTRODUCTION

1. I have before me two appeals filed pursuant to subsections 112(1)(a) and (b) of the *Employment Standards Act* (the “*Act*”). The two appeals were filed by, respectively, Checker Flag Automotive Inc. carrying on business as Budget Brake and Muffler (“Checker Flag”) and Peter Leventakis a Director and Officer of Checker Flag Automotive Inc. carrying on business as Budget Brake and Muffler (“Leventakis”) and concern separate determinations issued by a delegate of the Director of Employment Standards (the “delegate”) on October 5, 2010.
2. The determination issued against Checker Flag (the “Corporate Determination”) ordered it to pay its former employee, Tao Jiang (“Jiang”), the sum of \$2,595.88 on account of unpaid wages and section 88 interest. By way of the Corporate Determination, Checker Flag was also ordered to pay an additional sum of \$1,000 on account of two monetary penalties (see section 98). Thus, the total amount payable under the Corporate Determination is \$3,595.88.
3. The second determination (the “Section 96 Determination”) was issued against Mr. Leventakis pursuant to section 96 of the *Act* on the basis that he was a Checker Flag director and officer when Mr. Jiang’s unpaid wage claim crystallized. The Section 96 Determination is in the amount of \$2,595.88.
4. The two determinations are being appealed on the grounds that the delegate erred in law (section 112(1)(a)) and failed to observe the principles of natural justice in making the determinations (section 112(1)(b)). I am adjudicating these appeals based on the parties’ written submissions. I have before me submissions from all parties, the determinations and, in each case, accompanying “Reasons for the Determination” (the “delegate’s reasons”) as well as the section 112(5) “record” that was before the delegate.

THE DETERMINATIONS

5. According to the information set out in the delegate’s reasons appended to the Corporate Determination, Checker Flag operated a “Budget Brake and Muffler” business on Royal Oak Avenue in Burnaby and Mr. Jiang was employed as an apprentice mechanic from April 6 to July 15, 2009. Mr. Jiang, by way of his complaint filed August 10, 2009, alleged that he was terminated without just cause on July 15, 2009, and was owed regular wages, statutory holiday pay, vacation pay and compensation for length of service.

6. The Employment Standards Branch contacted Checker Flag by fax with a view to having the matter resolved through mediation or, alternatively, to obtain that firm's position regarding the claim. Mr. Leventakis apparently responded by way of brief telephone message in which he indicated that the firm "had gone broke" but no other details were provided. A search conducted on November 16, 2009 indicated there was no record of any formal bankruptcy or other insolvency proceeding involving Checker Flag.
7. In due course, the complaint was scheduled for a hearing and a hearing notice and other documents were forwarded to Checker Flag by registered mail but were returned "unclaimed". The hearing proceeded, as scheduled, on April 29, 2010 but it was delayed by about 30 minutes during which time unsuccessful efforts were made to contact a Checker Flag representative (the telephone number on file was apparently no longer in service).
8. Mr. Jiang provided oral testimony at the complaint hearing and also provided several corroborating documents such as wage statements, his apprenticeship training report and a record of his hours worked. The delegate held (reasons, pages R4 – R5) that Mr. Jiang was owed regular wages, statutory holiday pay for July 1, 2009, 4% vacation pay and 1 week's wages as compensation for length of service. These claims totalled \$2,595.88 including section 88 interest. The delegate also levied two \$500 monetary penalties based on the employer's failure to pay wages and to provide employment records as demanded.
9. The Section 96 Determination was issued concurrently with the Corporate Determination and was apparently issued "due to [Checker Flag's] financial status". The delegate's reasons appended to the Section 96 Determination indicate that a corporate registry search was conducted on August 17, 2009. The delegate determined that:
 - Checker Flag was incorporated on April 27, 2001;
 - Peter Leventakis was recorded as a director and officer since the date of incorporation; and
 - Mr. Jiang's unpaid wage claim fell below the 2-month liability limit set out in section 96 and crystallized when Mr. Leventakis was a director and officer.
10. The delegate was unable to determine that Mr. Leventakis authorized, permitted or acquiesced in any Checker Flag *Act* contraventions and thus he was not held personally liable for the two penalties issued against that firm.

THE PARTIES' POSITIONS

The Appellants

11. The appellants say that the determinations should be cancelled since the delegate erred in law and breached the rules of natural justice in making the determinations. The first alleged error of law appears to be set out in the following excerpt from a note appended to the appellant's appeal form (Form 1):

I Peter Leventakis, director of Checkerflag Automotive, want to appeal this act against myself, Due to the fact that the company went into solvent at the end of October 2009 concealed by legal advice. At the time, Checkerflag Automotive was not carrying on business as Budget Brake and Muffler and Mr. Jiang was employed under Checkerflag Automotive. [sic]
12. I presume that the gist of the appellants' argument is that Checker Flag was *insolvent* when the determinations were issued and thus the delegate had no jurisdiction to issue either determination since, as regards Checker

Flag, Mr. Jiang's claim should have been filed as part of the bankruptcy proceedings and, as regards Mr. Leventakis personally, he is protected by section 96(2) of the *Act*.

13. There appear to be two other allegations that arguably could be characterized as alleged "errors of law". First, the appellants seemingly say that Mr. Jiang's earned wages were paid in full. Second, as regards Mr. Jiang's claim for compensation for length of service, the appellants appear to be saying that there was just cause for dismissal (see subsection 63(3)(c)) since Mr. Jiang damaged a customer's vehicle:

Mr. Jiang's employment under Checkerflag Automotive was terminated due to the fact of a miss diagnostic [sic] upon a vehicle and a damaged part that Mr. Jiang agreed to pay for, witch [sic] was worth more than a single days [sic] pay. Mr. Jiang had taken it upon himself to insert the ruined part back into the vehicle, as there was no senior technician on duty.

14. The appellants' "natural justice" argument appears to be encapsulated in the following assertion:

Employment Standards had conducted hearings and sent a request for my participation, March 18, 2010, in resolving this matter to a wrong address, via regular mail. This said, I did not receive a hearing date. Currently, I am living at [house address omitted] 217 street, Maple Ridge B.C. and have been for the past seven years. [sic]

Mr. Jiang

15. In his submission, Mr. Jiang essentially reiterated the evidence that he provided to the delegate, namely, that he was discharged without cause or notice over an alleged problem with respect to a customer's automotive fuel pump. Mr. Jiang says that when he refused to agree to allow the cost of the part to be deducted from his wages, Checker Flag refused to pay him his earned wages for his final pay period. He also says that payroll information submitted by Mr. Leventakis is inaccurate and that his apprenticeship "Work-Based Training Report", signed by Mr. Leventakis, fully supports his unpaid wage claim.

The Delegate

16. The delegate says that the appellants were well aware of Mr. Jiang's unpaid wage complaint, were both properly served with the hearing notice in accordance with the provisions of the *Act* and that the Tribunal should not countenance this *ex post facto* attempt by the appellants to now – for the very first time – attempt to put their case forward.

FINDINGS AND ANALYSIS

17. Since, in this case, the "natural justice" issue is a threshold issue, I propose to first address this matter and will then proceed to the alleged errors of law.

Natural Justice

18. The record includes a corporate registry search relating to Check Flag conducted on August 17, 2009. The search record indicates that Peter Leventakis was a corporate director and officer (president/secretary) and that his mailing/delivery address was on Dewdney Trunk Road in Maple Ridge. Mr. Danny Bevacqua was also identified as a corporate director with a mailing/delivery address on Royal Oak Avenue in Burnaby (Checker Flag's business address). The corporation's registered and records office and mailing/delivery address were indicated to be in downtown Vancouver (likely, the address of a law firm).

19. On October 23, 2009 the Employment Standards Branch faxed a letter to Checker Flag to the attention of Mr. Leventakis. This letter provided details concerning Mr. Jiang's complaint as well as several information sheets and also invited Checker Flag to provide its position if it was not prepared to settle the matter. An Employment Standards Branch internal record indicates that "ER left voice message that ER is gone broke" – this record does *not* identify the particular individual who apparently left this message although this person is identified as Mr. Leventakis in the delegate's reasons.
20. The delegate's reasons (appended to Corporate Determination, page R3) refer to a November 30, 2009, letter that was apparently sent by regular mail inviting the employer's participation in some sort of meditative process. There is no such letter in the record before me and there is no indication of this letter being sent in the Employment Standards Branch's "Workflow Sheet".
21. The delegate's reasons indicate that on March 18, 2010, a hearing notice was sent by registered mail, together with a section 85(1)(f) demand for records, and the record includes both a "Notice of Complaint Hearing" dated March 18, 2010, and a "Demand for Employer Records" also dated March 18, 2010. The record includes a registered mail trace sheet indicating that the hearing notice was sent to both Mr. Jiang and to Checker Flag (at its Royal Oak Avenue Burnaby business address together with the demand for employment records). Contrary to the information set out in the delegate's reasons, the record indicates that the hearing notice sent to Mr. Jiang was returned "unclaimed" on April 13, 2010, (the delegate stated that this "unclaimed" letter was originally sent to Checker Flag). The record shows that the registered letter sent to Checker Flag was returned on March 24, 2010, with a notation from Canada Post that the addressee had "moved".
22. The delegate's reasons indicate that certain documents that Mr. Jiang intended to submit into evidence at the complaint hearing were sent to Checker Flag by registered mail on April 22, 2010. The record before me indicates that an envelope described as containing "Letter/Submissions" was sent by registered mail to Checker Flag's Burnaby business address on April 23, 2010, and Canada Post and Employment Standards Branch records indicate that this envelope was returned to the Employment Standards Branch on April 28, 2010. The Canada Post notation on this envelope states that the item was being returned because the addressee "moved".
23. Although there are some discrepancies between what the delegate recorded in her reasons and the record before me (as noted above), it seems clear that Checker Flag was well aware that Mr. Jiang had filed an unpaid wage complaint and that if the matter was not resolved through mediation, it would proceed to a complaint hearing. I say this since it appears that the November 2, 2009, voice mail from someone representing Checker Flag was prompted by the Employment Standards Branch's October 23, 2009, fax to Checker Flag (that included 30 pages in all).
24. The "Notice of Complaint Hearing" dated March 18, 2010, was sent to both Checker Flag and to Mr. Jiang. The Notice was *not* addressed to Mr. Leventakis in his personal capacity. The Notice identifies Checker Flag as follows:

To: CHECKER FLAG AUTOMOTIVE INC.
carrying on business as
BUDGET BRAKE AND MUFFLER
6756 ROYAL OAK AVE
BURNABY, BC V5H 3P7

It is to be noted that the address to which the Notice was sent was the Checker Flag's former business address. Checker Flag did not receive this Notice – it was returned by Canada Post on March 24, 2010, with

a notation that the firm had “moved”. At this point, the hearing date was still over one month away and the Employment Standards Branch knew, or certainly should have known, that Checker Flag was not aware that a hearing date had been fixed for 9:00 AM on April 29, 2010. Despite this knowledge, the Employment Standards Branch did not deliver the Notice to an alternative address even though it had a corporate registry search on file that included Checker Flag’s registered and records office address (as noted above, likely a Vancouver law firm) as well as mailing addresses for its two directors.

25. Section 9 of the B.C. *Business Corporations Act* provides as follows:

Service of records in legal proceedings

9. (1) Without limiting any other enactment, a record may be served on a company
- (a) unless the company’s registered office has been eliminated under section 40, by delivering the record to the delivery address, or by mailing it by registered mail to the mailing address, shown for the registered office of the company in the corporate register,
 - (b) if the company’s registered office has been eliminated under section 40, in the manner ordered by the court under section 40 (4) (b), or
 - (c) in any case, by serving any director, senior officer, liquidator or receiver manager of the company.

26. A “legal proceeding” is defined in section 1 of the *Business Corporations Act* as follows:

“legal proceeding” includes a civil, criminal, quasi-criminal, administrative or regulatory action or proceeding;

27. Thus, under this legislation, the Notice of Complaint Hearing should have been sent to Checker Flag’s registered office or served on one or its two directors. In this instance, neither option was utilized. Section 122 of the *Act* is a “deemed service” provision but it only applies in regard to “a determination or demand or a notice under section 30.1(2)” and, in my view, the Notice of Complaint Hearing does not fall within the ambit of the section. In *Kerr*, BC EST # D082/05 (reconsideration refused: BC EST # RD153/05), Tribunal Member Stevenson made the following observations (at paras. 23 and 25):

23. The Notice [of Complaint Hearing], however, stands on a somewhat different footing. As noted by the Tribunal in *CDL Disposal Ltd.*, BC EST # D190/04, a complaint hearing by the Director is not a process that is addressed in either the *Act* or the *Regulation*. There is no specific legislative direction as to how a “complaint hearing” is to be conducted or how and when (relative to the hearing) a notice of complaint hearing must be delivered or served. The Notice of Complaint Hearing is not a “*determination or demand*” under the *Act* and is therefore not a document that is accorded the statutory presumption that is described in subsections 122(1) and (2)...

25. Accordingly, while a statutory deeming of service does not apply, the circumstances of the delivery of the Notice can give rise to a factual presumption of service. In this case, a strong presumption of effective service arises. The presumption may be rebutted but the evidence necessary to rebut the presumption must be convincing.

28. Even if it could be said that the section 122 “deemed service” provision applies to a hearing notice, the Notice of Complaint Hearing had to have been sent to Checker Flag’s “last known address”. In this case, the delegate *knew* prior to the hearing that Checker Flag’s former Burnaby location was not the last known address – although Checker Flag had “moved”, the delegate still had a valid registered and records address for

delivery on file (see *Diamond*, BC EST # D108/04) and this latter address thus constituted the “last known address” for purposes of section 122.

29. In the matter before me, it is apparent that the Notice of Complaint Hearing was never delivered to Checker Flag nor served in accordance with the provisions of the *Business Corporations Act*. In my view, when the delegate conducted an adjudicative hearing – and subsequently issued the Corporate Determination based on the evidence presented at that hearing – in a circumstance where the respondent, Checker Flag, was not properly served and otherwise had no notice of the hearing, the rules of natural justice were compromised. More specifically, the natural justice principle *audi alteram partem* (approximately translated as “hear the other side”) was not respected in this case (see *Confederation Broadcasting (Ottawa) Ltd. v. Canadian Radio-Television Commission*, [1971] S.C.R. 906 and *Noël v. Société d'énergie de la Baie James*, [2001] 2 S.C.R. 207). I do not wish to be taken as suggesting that the delegate’s findings were incorrect based on the evidence before her, merely that the Corporate Determination is fatally defective since Checker Flag was not given proper notice of the hearing and thus was denied the opportunity to present its evidence and challenge the evidence tendered by Mr. Jiang. In my judgment, the Corporate Determination is presumptively void by reason of the serious breach of natural justice that occurred.
30. There is a well established line of judicial authorities to the effect that natural justice breaches can be “cured” by way of a later right to be heard regarding the same matter, say, by way of appeal (see, for example, *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781). In my view, the natural justice breach in this case cannot be “cured” by the instant appeal proceedings. The alleged errors of law relate to findings made by the delegate based on the evidence before her and thus, to a degree, these appeals are “appeals on the record”. However, where, as is the case here, the record is incomplete because Checker Flag was unfairly denied an opportunity to present evidence and challenge the evidence tendered by Mr. Jiang, I cannot reliably say whether the delegate’s findings on key questions – such as the quantum of the unpaid wages or whether there was just cause for dismissal – are correct. It follows that I would cancel the Corporate Determination and refer Mr. Jiang’s original unpaid wage complaint back to the Director of Employment Standards to be reheard.
31. The rehearing need not take the form of an oral hearing. The Director could well decide to have this matter reheard by way of an investigation and both Checker Flag and Mr. Leventakis (and Mr. Jiang, too, for that matter) should clearly understand that if they choose to ignore the Director’s efforts to secure relevant evidence and argument from them, this will only redound to their detriment.
32. I now turn to the Section 96 Determination. Since the Section 96 Determination is predicated on the findings regarding the quantum of the unpaid wage claim and just cause that underlie the Corporate Determination, it follows that the Section 96 Determination must be cancelled. There is, of course, no issue regarding Mr. Leventakis’ status as Checker Flag director and officer – he concedes that he was both a director and officer during the period of Mr. Jiang’s employment. However, it still must be determined what, if any, personal liability Mr. Leventakis may have since Mr. Jiang’s unpaid wage claim must now be reheard. There is also the possibility that Mr. Leventakis may be entitled to the benefit of a section 96(2) defence.
33. Further, and perhaps even more fundamentally, there is nothing in the Employment Standards Branch’s October 23, 2009, letter that put Mr. Leventakis on notice that he could be held personally liable for any unpaid wages that Checker Flag might owe to Mr. Jiang. The Notice of Complaint Hearing, even if it had been properly served on Checker Flag, did not even obliquely suggest that Mr. Leventakis, *in his personal capacity*, was a respondent in the complaint hearing and that the Director of Employment Standards was considering issuing a section 96 determination against him. As noted above, the delegate’s October 23, 2009, faxed letter to Checker Flag had several attachments including several Employment Standards Branch

“Factsheets”. One such Factsheet is entitled “Enforcement Measures and Penalties”. The second page of this latter document contains a paragraph headed “Corporate Officer Liability” but this paragraph also states that this provision does not apply “in the case of bankruptcy, receivership or insolvency”. I do not know if Mr. Leventakis actually read this document and, even if he did, he may well have understood that he was not personally at risk in light of Checker Flag’s apparent *de facto* (albeit apparently not *de jure*) insolvency. In my view, the Section 96 Determination is also fatally flawed since there was no compliance whatsoever with section 77 of the *Act*.

Errors of Law

34. In light of my findings regarding the natural justice issue, I do not find it necessary to deal with the appellants’ alleged errors of law – indeed, it would be inappropriate for me to express any views regarding the merits of the issues raised by the appellants under this statutory ground of appeal.

ORDER

35. Pursuant to section 115(1) of the *Act*, I order that both the Corporate Determination and the Section 96 Determination be cancelled. I am referring Mr. Jiang’s original unpaid wage complaint back to the Director to be reheard.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal