

An appeal

- by -

Gina Patelli

- and -

Jorgine Patelli.

- 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

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE Nos.: 2005A/25 and 2005A/26

DATE OF DECISION: April 13, 2005

DECISION

SUBMISSIONS

Gina Patelli for Jorgine Patelli and on her own behalf
Chantal Martel for the Director of Employment Standards

INTRODUCTION

I have before me two appeals filed by, respectively, Gina Patelli (E.S.T. File No. 2005A/025) and Jorgine Patelli (E.S.T. File No. 2005A/026); the appeals were filed pursuant to section 112 of the *Employment Standards Act* (the “*Act*”). Gina and Jorgine Patelli filed a joint appeal of separate, but essentially identical, Determinations that were issued by a delegate of the Director of Employment Standards (the “Director”) on January 5th, 2005 (the “Determinations”).

Section 103 of the *Act* incorporates several provisions of the *Administrative Tribunals Act* (“*ATA*”) including section 36 of the *ATA*. Section 36 of the *ATA* states that “the tribunal may hold any combination of written, electronic and oral hearings” (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). By way of a letter dated March 30th, 2005 the parties were advised by the Tribunal’s Vice-Chair that these appeals would be adjudicated based on their written submissions and that an oral hearing would not be held. I note that Gina and Jorgine Patelli, in their joint notice of appeal, did not ask the Tribunal to hold an oral appeal hearing.

The only documents I have before me are the section 112(5) record, a brief submission from the Director’s delegate dated February 24th, 2005 and the joint notice of appeal (with attachments) originally filed by Gina and Jorgine Patelli. Despite being invited to do so, the respondent, Mr. Donald Klassen, did not file a submission with the Tribunal.

THE DETERMINATIONS

The Director’s delegate determined that Gina and Jorgine Patelli each owed Donald Klassen (“Klassen”) the sum of \$1,154.06 (including section 88 interest) on account of unpaid regular wages, vacation pay and compensation for length of service. The Determinations were issued against Gina and Jorgine Patelli on the basis that each was a director and/or officer of Mr. Klassen’s former employer, Pulse Motorsports Ltd., and accordingly liable for Mr. Klassen’s unpaid wages by reason of section 96(1) of the *Act*:

Corporate officer’s liability for unpaid wages

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.

Mr. Klassen’s regular wages were apparently earned during the period April 10th to 30th, 2004; his period of employment was from January 19th to April 30th, 2004. I understand that on December 23rd, 2004 a determination was issued against Pulse Motorsports Ltd., that this latter firm never appealed the

determination, and that the company has now ceased operations although it has not been formally declared insolvent.

REASONS FOR APPEAL

Gina and Jorgine Patelli appeal the Determinations issued against them on the ground that the Director erred in law and on the ground that evidence has become available that was not available at the time the Determinations were being made [see subsections 112(1)(a) and (c) of the *Act*]. In a 1-page letter dated February 10th, 2005, signed by Gina Patelli and appended to the joint notice of appeal, the appellants' grounds of appeal are more fully particularized as follows:

The Director erred in law or was unaware of evidence that is now available.

- We notified the Employment Standards [sic] verbally that both Gina & Jorgine Patelli had ceased to be directors of Pulse Motorsports Ltd. in December 2003. The Notice of Change of Directors had not been file [sic] but has now been completed and the Corporate records are update [sic].
- Blair Patelli, did notify [the Director's delegate] of Pulse Motorsports Ltd. [sic] position concerning the contract employment for Mr. Klassen and also confirmed both Gina & Jorgine Patelli had ceased to be directors.
- Please find attached the Form 10-Notice of Change of Directors that has been filed with the corporate registry. A new company search will confirm that neither of us have [sic] been a director of Pulse MotorsSports [sic] Ltd. since December 28, 2003.

In addition, and this issue is only raised rather obliquely, the appellants are apparently alleging that Mr. Klassen was an independent contractor and not a Pulse Motorsports Ltd. employee.

FINDINGS AND ANALYSIS

The issue of Mr. Klassen's status might be characterized as an error of law if the delegate did, in fact, err in concluding that Mr. Klassen was an employee rather than an independent contractor. There is nothing whatsoever in the material before me that would cause me to question the delegate's finding in that regard. Indeed, the sparse evidence that was submitted by Pulse Motorsports Ltd. to the delegate supports, rather than undermines, the delegate's conclusion that there was an employment relationship (e.g., Pulse Motorsports Ltd. deducted taxes and other remittances from Mr. Klassen's wages).

I presume that the "new evidence" relates to Gina and Jorgine's status as corporate directors. I note that during the course of the delegate's investigation she forwarded, by registered mail, letters dated September 16th, 2004, to both Gina and Jorgine Patelli. In her September 16th letter, the delegate identified each of the latter persons as corporate directors. Neither Gina Patelli nor Jorgine Patelli responded to the delegate in any formal manner; at this point in time they could have put their position forward that they were not corporate directors (along with supporting documentation). It is rather late in the day for Gina and Jorgine Patelli to be raising the matter of their status. Purely on evidentiary grounds, this appeal fails—the so-called new evidence *was* available at the time the Determinations were being made and could have been provided to the delegate had the appellants exercised even a modicum of diligence.

Further, and in any event, in issuing the Determinations that are now before me, the delegate relied on a corporate search undertaken on June 7th, 2004; this search indicated that both Gina Patelli and Jorgine Patelli were corporate directors when Mr. Klassen's unpaid wage claim arose. It was not until February 5th, 2005 that Gina and Jorgine Patelli filed a *backdated* Notice of Change of Directors. There are no corporate records before me to corroborate their bare assertion that they ceased to be corporate directors (and they have *never* challenged their alleged status as corporate *officers*) on December 28th, 2003.

I have serious doubts about the *bona fides* of their alleged resignations on December 28th, 2003 given the absolute dearth of corroborating evidence (e.g., formal resignation letters; internal corporate records). I must also query why they did not purport to correct the Registrar's records until *after* the Determinations were issued against them; they were apparently content to leave themselves recorded as directors in the Corporate Registry for some 13 months after they supposedly ceased to be directors.

The corporate records maintained by the provincial Corporate Registry create a rebuttable presumption that the persons identified therein are properly recorded as corporate officers and/or directors. In my view, the appellants have not rebutted that presumption in this case.

ORDER

Pursuant to subsection 115(1)(a) of the *Act*, I order that the Determinations be confirmed as issued, each in the amount of **\$1,154.06**, together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal