

An appeal

- by -

Barca Enterprises Ltd.
carrying on business as Barca Overnight
("Barca")

- 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 (as amended)

TRIBUNAL MEMBER: Shafik Bhalloo

FILE No.: 2015A/50

DATE OF DECISION: June 4, 2015

DECISION

SUBMISSIONS

Karl Cocks on behalf of Barca Enterprises Ltd. carrying on business as Barca Overnight

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Barca Enterprises Ltd. carrying on business as Barca Overnight (“Barca”), has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 16, 2015 (the “Determination”). In that Determination, the Director ordered Barca to pay its former employees – Benson Lai, Tse Wan Ma, Benny C.M. Tsang and Tyrone Kwok Chu Wu (collectively, the “Complainants”) - \$19,222.13 in wages, overtime, annual vacation pay, compensation for length of service, business costs and accrued interest. The Director also imposed five (5) administrative penalties in the total amount of \$2,500.00 for Barca’s contraventions of sections 18, 21 and 63 of the *Act*, as well as sections 37.3 and 46 of the *Employment Standards Regulation* (the “*Regulation*”). The total amount of the Determination against Barca is \$21,722.13.
2. Barca appeals the Determination, alleging that the Director failed to observe the principles of natural justice in making the Determination.
3. Section 114 of the *Act* and Rule 22 of the Employment Standards Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”) provide that the Employment Standards Tribunal (the “Tribunal”) may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria. At this stage, I will assess the appeal based solely on a review of the Reasons for the Determination (the “Reasons”); the written submissions of Karl Cocks (“Mr. Cocks”), the sole director and officer of Barca; and the section 112(5) “record” that was before the delegate when the Determination was being made (the “Record”). If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114 of the *Act*, the Complainants will, and the Director may, be invited to file further submissions. Alternatively, if I find the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

ISSUE

4. The issue in this appeal is whether there is any reasonable prospect that Barca’s appeal will succeed.

FACTS

5. Barca operated a courier and warehousing service with multiple “hub” locations in British Columbia, offering complete pick-up and delivery services in its hub locations and beyond.
6. Based on a BC Online corporate search of Barca, conducted by the delegate on October 27, 2014, Barca was incorporated on August 5, 1992, with Mr. Cocks listed as its sole director and officer.
7. The Complainants were employed by Barca in various roles, at various rates of pay and for various periods of time.

8. The Complainants each filed a complaint under section 74 of the *Act*, alleging that Barca contravened the *Act* by failing to pay them their regular wages, overtime wages, accrued annual vacation and by terminating their employment without proper working notice or wages in lieu of notice (the “Complaints”). The Complainants also alleged in the Complaints that Barca required them to pay costs of its business.
9. In conducting his investigation into the Complaints, the delegate issued a Demand for Records for each of the Complainants to Barca by registered mail on December 12, 2014, requiring Barca to produce the records by 4:00 p.m. on December 29, 2014. Barca failed to produce any records and thereby contravened section 46 of the *Regulation*.
10. In the investigation of the Complaints, the delegate, first, considered the question of whether the Complainants were employees of Barca or independent contractors. In this regard, the delegate reviewed the evidence of both the Complainants and Barca in context of the definitions of employee and employer in the *Act*, common law tests. In concluding that Barca was an employer of the Complainants within the meaning of the *Act*, the delegate reasoned as follows:

Therefore, in applying the above definitions to the issue of employer/employee, the key factor to be addressed is whether the parties fell within the statutory definitions of employer and employee. In other words, did the Complainants perform work normally performed by an employee, did they perform work for another and did Barca have control or direction over the Complainants, or was Barca responsible, directly or indirectly, for their work?

Barca contends it did not have the level of control and direction over the Complainants that would normally be present in a traditional employee/employer relationship, and disagrees with the Complainants’ suggestion that they should be considered employees under the Act. Barca states that none of the Complainants were hired as employees and suggests that any claims for outstanding wages by them are made in bad faith.

I have determined that the services performed by the Complainants for Barca, specifically, unpacking and sorting shipments in Barca’s warehouse and driving parcels to their intended destination, constituted ‘work’ as defined in the Act.

I have also determined that Barca was an ‘employer’ in that it exercised a substantial degree of control and direction with respect to the work of the Complainants. For instance, Barca determined the rate of pay to which the Complainants were entitled as well as the amount of work available to them each week. It also provided direction as to whether the Complainants were to perform work in its warehouse or deliver parcels. I find that the ability to direct that an individual wear a uniform bearing a business’ name, and that has no safety function, suggests a significant degree of control with respect to its workers. It is logical to infer that Barca customers would have assumed that Barca exercised a significant degree of control over individuals wearing its uniforms.

Finally, I find that each of the Complainants meet the definition of ‘employee’. This conclusion is based on my finding that the Complainants performed general services, such as packing, sorting and delivering parcels for Barca. The services described are the kind of work that would normally be performed by employees of an organization whose primary business is the delivery of such parcels. While the fact that some of the Complainants used their own vehicles to complete deliveries suggests a strong element of independence, I find that this evidence is tempered by the reality that the delivery of parcels was the primary component of Barca’s business.

The work offered to the Complainants was regular, ongoing and would have left two of the Complainants with very little time to pursue opportunities to work for other businesses. All of the Complainants had worked with Barca for more than three months, and there was no evidence to indicate that their working relationship with Barca would have ended if not for the closure of the business.

11. After having determined that the Complainants were employees of Barca at all material times, the delegate then considered the individual claims of the Complainants, starting with the claim for regular wages advanced by each of the Complainants. The delegate noted that while Mr. Cocks submitted that in some cases the amounts the Complainants alleged as still owing were not accurate and offered to provide copies of bank statements of Barca to support his position, he did not follow up and produce any records during the investigation. Therefore, the delegate preferred the evidence of the individual Complainants, and found that Barca had contravened section 18 of the *Act* by failing to pay them wages owed, including outstanding annual vacation pay, within 48 hours after Barca terminated their employment.
12. With respect to the Complainants' claims for overtime hours worked, the delegate noted that Mr. Cocks argued that none of the Complainants were entitled to overtime as he did not consider them to be employees. However, the delegate having concluded that the Complainants were employees, relied on the Complainants' evidence in determining overtime wages owed to each of them.
13. With respect to the Complainants' claims for compensation for length of service, the delegate noted that the employment of the Complainants was terminated by Barca when it ceased its operations when it became financially unviable, and the landlord seized Barca's business premises. While Mr. Cocks argued that the Complainants were not employees of Barca and therefore not entitled to compensation for length of service under the *Act*, the delegate rejected that argument (as previously indicated) and went on to determine each Complainants' entitlement for compensation for length of service based on their service.
14. The delegate also determined that each Complainant was owed annual vacation pay which, based on Mr. Cocks' evidence, Barca did not pay because Barca did not consider the Complainants to be employees.
15. Finally, the delegate also determined that Barca contravened section 21 of the *Act* by requiring the Complainants to contribute towards the costs of its business by requiring them to pay money on Barca's behalf, such as for gasoline purchases and fares for the ferry, in context of the work the Complainants did for Barca. Barca did not reimburse expenses to the Complainants because Barca did not consider them to be employees.
16. As indicated previously, the Determination ordered Barca to pay Complainants a total of \$19,222.13 in wages, overtime, annual vacation pay, compensation for length of service, business costs and accrued interest. The Determination also imposed five (5) administrative penalties in the total amount of \$2,500.00 for Barca's contraventions of sections 18, 21 and 63 of the *Act*, as well as sections 37.3 and 46 of the *Regulation*.

SUBMISSIONS OF BARCA

17. On behalf of Barca, Mr. Cocks submits that the Complainants "are truly Owner/Operators" or independent contractors, and the Director, in the Determination, neglected to take this into consideration.
18. Mr. Cocks further submits that the Complainants knew why Barca was unable to meet its financial obligations to its employees, as well as to the Complainants, and unsecured creditors. He indicates that Barca's largest account, BCLC, was served with a pre-judgment garnishing order by one of Barca's creditors, Trailer Wizards Ltd. ("TWL") which effectively caused Barca to shut down. Mr. Cocks states that the Employment Standards Branch, on behalf of the Complainants, "should have first rights on this money [that was garnished] to pay [Barca's] employees and employee deductions".
19. Mr. Cocks disputes that the Complainants were employees of Barca, and feels that they have taken advantage of any claims advanced by employees of Barca.

20. Mr. Cocks submits that Barca is now insolvent and he has lost hundreds of thousands of dollars.
21. He is asking that both the Determination against Barca, as well as the Director's determination against him personally under section 96 be cancelled or dismissed.
22. It should be noted that Mr. Cocks' written submissions contain, as an attachment, a fact sheet of the Employment Standards Branch entitled "Employee or Independent Contractor Factsheet" explaining how to determine whether a worker is an employee or an independent contractor. I note Mr. Cocks has made some handwritten notes on the fact sheet which do not really convey any substantive argument.
23. He has also attached correspondence between the delegate and himself, prior to the Determination being made, relating to the court proceeding by TWL against Barca, and the amounts garnished by TWL from BCLC, which amount appears to be held in court. Mr. Cocks also attaches a copy of the garnishing order before judgment, as well as an affidavit of a representative of TWL in support of the garnishing order that was issued to TWL. I have read these materials carefully and do not find it necessary to set them out in any greater detail here.

ANALYSIS

24. The *Act*, in section 112(1), delineates three (3) grounds upon which a party may appeal a determination of the Director to the Tribunal, namely:
- (a) the director erred in law;
 - (b) the director failed to observe the principles of natural justice in making the determination; and
 - (c) evidence has become available that was not available at the time the determination was being made.
25. The onus is on the appellant to show that the appeal is properly based on one (1) or more of the said statutory grounds of appeal, failing which the appellant's appeal may be dismissed.
26. In the case at hand, Barca has checked off the box on the Appeal Form identifying the "natural justice" ground of appeal only. It should be noted that failure to check off the appropriate boxes identifying the applicable grounds of appeal in the Appeal Form is not, in itself, fatal to an appellant's appeal. In *Triple S Transmission Inc.* (BC EST # D141/03), the Tribunal expressed the view that it should not "mechanically adjudicate an appeal based solely on the particular 'box' that an appellant has --often without a full, or even any, understanding --simply checked off". In that case, the Tribunal stated:
- When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, *prima facie*, invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant's explanation as to why the determination ought to be varied or canceled or why the matter should be returned to the Director.
27. In accordance with the view expressed by the Tribunal in *Triple S Transmission Inc.*, *supra*, I have reviewed the submissions of Mr. Cocks and assessed the nature of Barca's challenge to the Determination, and whether that challenge properly invokes any other statutory ground of appeal, in addition to the "natural justice" ground of appeal checked off in the Appeal Form.

28. Having said this, with respect to the natural justice ground of appeal, the Tribunal has consistently noted that natural justice principles are essentially procedural rights that ensure that parties have the right to be heard by an independent decision maker. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party (see *BWI Business World Incorporated*, BC EST # D050/96).
29. In this case, while Barca has invoked the natural justice ground of appeal, Mr. Cocks has not adduced any evidence in support of the said ground of appeal in his written submissions nor do I find any evidence in the Record that would lend any support to this ground of appeal. As indicated, the onus is on the appellant to show that the appeal is properly based on one or more of the available statutory grounds of appeal set out in section 112(1) of the *Act*. I find Barca has failed to establish the natural justice ground of appeal and, therefore, I dismiss that ground of appeal.
30. This then leads me to consider the submissions of Mr. Cocks in context of the error of law ground of appeal in section 112(1)(a) of the *Act*. The British Columbia Court of Appeal, in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] BCJ. No. 2275 (BCCA.) described “error of law” to include the following:
1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
 2. a misapplication of an applicable principle of general law;
 3. acting without any evidence;
 4. acting on a view of the facts which could not reasonably be entertained; and
 5. adopting a method of assessment which is wrong in principle.
31. The Tribunal, in *Britco Structures Ltd.* (BC EST # D260/03), stated that the definition of error of law in *Gemex Developments Corp.*, *supra*, should not be applied so broadly as to include errors which are not in fact errors of law, such as errors of fact alone, or errors of mixed law and fact which do not contain extricable errors of law. In *Britco*, *supra*, the Tribunal also added that unless there is an allegation that the delegate erred in interpreting the law or in determining what legal principles are applicable, there cannot be an allegation that the delegate erred by applying the incorrect legal test to the facts.
32. It is also important to note that the Tribunal has consistently indicated that it does not have jurisdiction over questions of fact unless, of course, the matter involves errors on findings of fact which may amount to an error of law (see *Re: Pro-Serv Investigations Ltd.*, BC EST # D059/05); *Re: Koivisto (c.o.b. Finn Custom Aluminum)*, BC EST # D006/05). Furthermore, in *Re: Funk* (BC EST # D195/04), the Tribunal added that the appellant would have to show that the factfinder made a “palpable and overriding error” or that the finding of fact was “clearly wrong” to establish error of law.
33. Having said this, the Tribunal is generally reluctant to substitute the delegate’s findings of fact even if it is inclined to reach a different conclusion on the evidence. In the case at hand, having reviewed the Reasons, the Record, and the submissions of Mr. Cocks, I find that the delegate properly applied the definitions of employee and employer in the *Act* and employed relevant common law tests in determining the Complainants were employees of Barca and not independent contractors. I find there is no evidence of any palpable or overriding error on the part of the delegate in that conclusion. To the contrary, I find that the delegate acted on the basis of evidence or on a view of evidence that could reasonably be entertained in concluding that the Complainants were employees of Barca. Therefore, I do not find there is any basis for overturning the Determination on the error of law ground of appeal.

34. With respect to the new evidence ground of appeal in section 112(1)(c), I find that there is no evidence adduced by Barca or Mr. Cocks in this appeal that would constitute new evidence under the criteria for admitting new evidence on appeal set out in the Tribunal's decision in *Re: Merilus Technologies Inc.* (BC EST # D171/03).
35. In the result, I find that Barca's appeal has no reasonable prospect of any success, and I dismiss it pursuant to section 114(1)(f) of the *Act*.

ORDER

36. Pursuant to section 115 of the *Act*, I order the Determination, dated March 16, 2015, be confirmed in the amount of \$21,722.13, together with any interest that has accrued under section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal