Employment Standards TRIBUNAL

An appeal

- by -

Zahed Haftlang
("Haftlang")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2013A/38

DATE OF DECISION: July 18, 2013

DECISION

SUBMISSIONS

Zahed Haftlang — on his own behalf

INTRODUCTION

1. This is an appeal filed by Zahed Haftlang ("Haftlang") pursuant to subsections 112(1)(a) and (b) of the *Employment Standards Act* (the "*Act*") and it concerns a Determination issued by a delegate of the Director of Employment Standards (the "delegate") on April 23, 2013 (the "Determination"). I am adjudicating this appeal based on my review of Mr. Haftlang's appeal submission and, in addition, I have reviewed the record that was before the delegate when he issued the Determination.

2. Following an oral hearing conducted on April 10, 2013, the delegate issued the Determination and accompanying "Reasons for the Determination" (the "delegate's reasons") in which he held that there was no employment relationship between Mr. Haftlang and his alleged employer, Powermax Automotive Corporation ("Powermax"). Thus, Mr. Haftlang's complaint, in which he claimed nearly $42,000 in unpaid wages earned during the period July 4 to November 5, 2012, was dismissed.

3. Mr. Haftlang appeals the Determination on the grounds that the delegate erred in law and failed to observe the principles of natural justice. However, there is an issue regarding the timeliness of this appeal and, accordingly, I will first address that issue.

THE APPLICATION TO EXTEND THE APPEAL PERIOD

4. The Determination contains a notice indicating that an appeal to the Tribunal must be filed by no later than the close of business on May 31, 2013. In fact, the appeal was filed on June 3, 2013. I presume the appeal period was calculated on the assumption that it would be served by registered mail under section 122 of the *Act*. There is nothing in the record before me to indicate that the Determination was served by registered mail, and if so, when it was sent out from the delegate's office. Nevertheless, Mr. Haftlang says that he tried to file his appeal documents by the deadline by electronic mail but "it went to wrong address that's why it to late" [*sic*].

5. Mr. Haftlang provided a copy of an e-mail from an office printing company in North Vancouver that indicates his appeal documents were sent on May 28, 2013, at 1:24 PM but, unfortunately, the materials were sent to the Tribunal c/o the following e-mail address: registrar@bc*b*est.bc.ca (my *italic*) rather than the correct address: registrar@bcest.bc.ca. On the assumption that the appeal was filed late (and I cannot conclusively say that was the case), it was filed only one business day late (June 1 and 2 fell on the Saturday/Sunday weekend), and I fail to see how this late filing could have resulted in any prejudice to either the delegate or Powermax. Accordingly, in the ordinary course of events, I would be inclined to extend the appeal period under subsection 109(1)(b) to June 3, 2013. However, given that I consider this appeal to be wholly lacking in merit, my decision regarding extending the appeal period is moot since this appeal must, in any event, be dismissed under subsection 114(1)(f).

BACKGROUND FACTS

6. Powermax Auto Repair Ltd. (note: this is not the current corporate name of the respondent, the alleged "employer") was incorporated on October 8, 2010, and so far as I can determine, at this point in time, Mr. Haftlang was its sole director and shareholder. This company operated an automotive and automotive glass repair business in North Vancouver.

7. On July 3, 2012, Mr. Haftlang and Chunshan Zhang ("Zhang"; he appeared on behalf of Powermax at the April 10, 2013 complaint hearing) executed two separate agreements. Both agreements appear to have been cobbled together by the two men without any legal assistance as the agreements are riddled with misspellings and, to some degree, their provisions are internally inconsistent. In any event, by way of the first agreement, described as a "Business Purchase and Sale Agreement", Mr. Haftlang agreed to transfer 51% of the corporation's assets to Mr. Zhang for $29,500.

8. By way of the second agreement, described as an "Incorporation Agreement", Powermax Auto Repair Ltd. was to be dissolved (the agreement referred to its "cancellation") and a new corporation, Power Max Automotive Incorporation (note: this is very similar to, but not quite the same name as the alleged "employer"), would be incorporated. The assets of Powermax Auto Repair Ltd. would be transferred to the newly incorporated company in which Mr. Haftlang would hold 49% of the shares and Mr. Zhang 51% of the shares. Both men agreed to contribute necessary operating capital in the same proportions. This agreement also provided that neither man would receive a salary "for services rendered to the business" but that Mr. Haftlang would receive $4,500 per month and Mr. Zhang $2,500 per month as "Service Compensation" provided the company had "net income" sufficient to pay these amounts (or proportionally lesser sums from whatever net income there might be). This "service compensation" is later described in the agreement as a "dividend". Mr. Haftlang's duties were described as "look after including but not limited to, all mechanical and technical tasks" [*sic*] and Mr. Zhang was responsible for business development and administration. Mr. Haftlang also agreed to "train" Mr. Zhang to be a "licensed mechanic".

9. Article 8.02 of the "Incorporation Agreement" states: "Any disputes between the Parties arising out of or related to this agreement and any amendments to it, whether before or after termination, or dissolution of the Incorporation, shall Unresolved disputes go to mediation before arbitration" [*sic*], and Article 8.03 states: "Whenever Arbitration applies, it shall be referred to and settled by a single arbitrator agreed upon by the Parties or, in default of such agreement, to a single arbitrator appointed pursuant to the relevant legislations [*sic*] in British Columbia. The decision of the arbitrator is final and binding on the Parties."

10. On July 21, 2012, the two men executed an "Amendment of Partnership Agreement" (this agreement was dated July 4, 2012) pursuant to which Mr. Zhang agreed to lend money to the automotive repair business and a further sum to Mr. Haftlang to defray the costs of the latter's pending surgical procedure in Iran. Mr. Haftlang also agreed to invest certain monies in the business. This agreement reaffirmed the earlier agreement that neither man would draw a salary but would be entitled to a "dividend" based on relative shareholdings and subject to there being operating profits. On July 16, 2012, the two men executed yet another agreement, simply headed "Agreement", with a third person whereby the latter would assume Mr. Haftlang's mechanic's duties during the one month period when Mr. Haftlang would be away in Iran.

11. Powermax Automotive Corporation (the "employer" respondent in this appeal) was incorporated on July 28, 2012.

12. On November 1, 2012, the two men executed an "Amendment of Partnership Agreement" whereby Mr. Haftlang transferred his entire 49% interest in Powermax to Mr. Zhang. By way of this agreement,

Mr. Haftlang also acknowledged his indebtedness to the corporation and agreed to repay it on certain terms and conditions. On November 21, 2012, Mr. Haftlang filed his unpaid wage complaint. As previously noted, his claim was for nearly $42,000 based on wages earned during the period from July 4 to November 5, 2012 ($22,600 or very nearly the same amount as the monthly "service compensation" provided for in the "Incorporation Agreement"), plus overtime pay ($18,000), vacation pay and statutory holiday pay. In the "details" section of his complaint form, Mr. Haftlang stated: "I sold my business to a corporation that kept me as an employee for smooth transition and never got paid any wages for a period of 5 months!" Simply for the sake of completeness, I will note that this statement is technically incorrect – the sale was a combined asset/share sale whereby Powermax Auto Repair Ltd. sold 51% of its assets to Mr. Zhang and Mr. Haftlang, in turn, sold 51% of his 100% shareholding in this firm to Mr. Zhang. Although the July 3, 2012 "Business Purchase and Sale Agreement" shows Mr. Haftlang to be the "vendor" of the assets in question, these assets were not his to be sold – they belonged to a separate legal person, Powermax Auto Repair Ltd., of which he was the sole principal and shareholder. Further, there is no corroborative evidence anywhere in the material before me to indicate that Mr. Haftlang ever entered into an employment agreement with Powermax Auto Repair Ltd. or Powermax Automotive Corporation.

THE DETERMINATION

13. Both Messrs. Haftlang and Zhang appeared before the delegate at the complaint hearing. Mr. Haftlang testified that he was employed by Powermax from July 26 (a slightly later date than he set out in his complaint) to November 5, 2012, and that there was a verbal agreement between the two men whereby Mr. Haftlang would be paid $20 per hour to work as a mechanic. Mr. Zhang, relying on the various written agreements between the two men, testified that each had separate duties (Mr. Haftlang's being to work as a mechanic) and that since the firm never made any profits, there was no dividend distribution to either man. Indeed, Mr. Zhang testified that he solely advanced additional operating funds to the firm since Mr. Haftlang was in financial "distress".

14. The delegate's reasons, at pages 5 – 6, state: "Considering Mr. Haftlang owned 49% of the business and his duties consisted of mechanical and technical tasks it is only reasonable he spend considerable time at the business". In other words, the delegate held that the services that Mr. Haftlang rendered were not in the nature of "work" undertaken by an "employee". The delegate's reasons continue:

> Mr. Haftlang presented no evidence to indicate he provided services to Powermax as an employee. No employment contract was presented as evidence to indicate the existence of a relationship outside of controlling mind and shareholder. Accordingly, Mr. Haftlang has not proved he was in an employment relationship with Powermax.

The delegate dismissed the complaint under subsection 76(3)(b) of the *Act* on the basis that "the Act does not apply to the complaint" since there was no employment relationship between Mr. Haftlang and Powermax.

REASONS FOR APPEAL AND FINDINGS

15. Mr. Haftlang advances two grounds of appeal: i) the delegate erred in law and ii) he failed to observe the principles of natural justice in making the Determination (subsections 112(1)(a) and (b)). Mr. Haftlang appended a 2-page handwritten note to his appeal form in which he more fully set out his reasons for appeal. There is nothing in Mr. Haftlang's appeal materials that raises even a *prima facie* assertion with respect to the natural justice ground. In essence, his appeal is solely predicated on the assertion that the delegate should have concluded that he was a Powermax employee during the time frame in question.

16. An error in fact-finding can constitute an error of law but only where the fact-finder has made a finding without any evidentiary foundation or, alternatively, where the finding of fact is wholly unreasonable given the totality of the evidence (see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)*, 1998 CanLII 6466 (B.C.C.A.). Mr. Haftlang's appeal submissions simply replicate the assertions that he made during the complaint hearing; namely, that he initially sold a 51% shareholding interest to Mr. Zhang and subsequently transferred the 49% balance and he was then put on Powermax's payroll as a mechanic as and from late July to early November 2012.

17. The fundamental problem with Mr. Haftlang's position is that it is totally at odds with the various agreements that he and Mr. Zhang executed. The parties' documents, on the other hand, corroborate Mr. Zhang's position that there was no employment relationship between Mr. Haftlang and Powermax. The parties were seemingly quite careful to document the arrangements between them regarding the ownership and operation of the business but, curiously, there is nothing in writing purporting to create an employment relationship between Mr. Haftlang and Powermax. Indeed, the documents indicate that both Mr. Haftlang and Mr. Zhang would provide services to the business but *not* in the capacity as employees but rather as principals and shareholders in the business (and their compensation would take the form of *dividend*s, not *wages*). I find it even more curious that the last agreement between the parties, dated November 1, 2012 (over 3 months after Mr. Haftlang's supposed employment commenced), contains no reference to any accrued unpaid wage liability from Powermax to Mr. Haftlang.

18. Finally, it appears to me that the dispute between the parties fundamentally concerns the interpretation and application of the various agreements and, in that regard, the parties have agreed that any disputes will be determined by arbitration. Thus, not only was the delegate correct to dismiss the complaint on the basis that there was no employment relationship, but equally could have dismissed Mr. Haftlang's complaint on the basis that the Employment Standards Branch had no jurisdiction since the dispute was fundamentally a shareholders' dispute that the parties have contractually agreed shall be determined by arbitration.

19. In sum, I am satisfied that the delegate's decision to dismiss the complaint on the basis that there was no employment relationship was one that was amply supported by the evidence before him. In my opinion, the delegate's decision was the only rational decision that could have been made in light of the available evidence. I consider this appeal to have no reasonable prospect for success and thus even though I would ordinarily be inclined to grant an order extending the appeal period (assuming the appeal was filed after the appeal period expired), I will not issue such an order in this case given that the appeal is wholly lacking in merit.

20. Accordingly, pursuant to subsection 114(1)(f) the appeal is dismissed.

ORDER

21. Pursuant to section 115 of the *Act* I order the Determination dated April 23, 2013, be confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal