

Appeals

- by -

GBC Banking Software Corp.

- and by -

Lito Turingia

- 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: John Savage

FILE Nos.: 2007A/49 & 2007A/52

DATE OF DECISION: August 10, 2007

DECISION

SUBMISSIONS

Alex Stuart, for the Appellant, GBC Banking Software Corp.

Richard J.S. Rainey, for Lito Turingia

Ian MacNeill, for the Director

Denise Tutte, for herself

INTRODUCTION

1. I have before me an appeal from a Determination by a Delegate of the Director dated April 26, 2007 (the “Determination”) finding that GBC Banking Software Corp. (“GBC”) contravened the *Act* by failing to produce records pursuant to demand, failing to pay wages, and failing to pay wages in a timely way. The Delegate imposed three administrative penalties in the total amount of \$1500 for these breaches and found wages and interest owing in the amount of \$4,881.29.
2. The central issue in the appeal concerns whether Denise Tutte (the “Complainant”) at the material times was an employee or an independent contractor. If the Complainant was an independent contractor then most of the wages alleged to be owing are not due and there were no breaches of the *Employment Standards Act*. If the Complainant was an employee, as found by the Delegate, then the *Act* was breached and some wages and administrative penalties are owed.
3. A second issue concerns whether certain expenses were expenses of the business or personal expenses. Again, the resolution of this issue depends on whether the Complainant was an employee or an independent contractor both generally and in respect of a particular business trip.
4. Finally, GBC takes issue with whether an administrative penalty was properly imposed for a failure to supply business records.
5. I also have before me an appeal filed on behalf of Lito Turingia (“Turingia”), a former director of GBC, of the above-noted Determination.
6. The submission made by Turingia restricts itself to the issue only of his own personal liability, and addresses the question of whether and when he was a director of GBC.
7. As there has been no determination against Turingia as a director his appeal is premature. Should there be a determination against Turingia, finding that he was a director at the material time, he has a right to appeal to this Tribunal.
8. In the absence of such a determination, however, he, as an interested person, has a right to make a submission on the merits but has declined to do so.

9. As the matter of Turingia's liability as a director is not properly before me, and he has made no submission on the merits, I will not address these submissions further.

ISSUES

10. Was an administrative penalty properly imposed against GBC for failure to supply business records?
11. Was the Complainant at the material times an employee or an independent contractor?
12. Are the expenses incurred business expenses for the employer or personal expenses for payment by the Complainant?

APPEAL PROVISIONS

13. Section 112 of the *Employment Standards Act* provides for an appeal to this Tribunal where there is an error of law, a breach of natural justice, or where new evidence becomes available that was not available at the time the Determination was made. It provides as follows:

112. (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

- (a) the director erred in law;
- (b) the director failed to observe the principles of natural justice in making the determination;
- (c) evidence has become available that was not available at the time the determination was being made.

14. It should be noted that an appeal from a Determination is a limited right of appeal, unlike that, for example, from a decision of a judge to a higher court. It is not open to an appellant to appeal factual findings, findings of mixed fact and law, or to introduce new evidence on appeal that was available at the time the determination was made.

15. In this case although the identified ground is that there was a breach of natural justice, the arguments presented concern the findings and analysis of the Delegate and more properly fall within section 112(1)(a) if they come within the appeal provisions at all.

16. In a number of decisions of the Employment Standards Tribunal, panels have adopted the definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.). That definition can be paraphrased as finding an error of law where there is:

1. a misinterpretation or misapplication of a section of a statute;
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 methodology that is wrong in principle.

17. In considering and analyzing the positions of the parties and the Determination of the Delegate, no reviewable grounds arise unless there is an error of law in the Determination that falls within this description.
18. An appeal is not an opportunity to simply re-argue the case already made before the Delegate, but must be founded in one of the statutory appeal grounds: *Re Masev Communications*, BCEST #D 205/04; *Re Webster*, BCEST #D 184/04.

ALLEGED BREACHES OF LEGISLATIVE PROVISIONS

19. In the course of his investigation the Delegate issued a Demand for Records. GBC did not comply by providing the requested payroll records.
20. Pursuant to section 28(1) of the Act an employer is required to keep certain records which include a record of hours worked in a day. Section 85(1)(f) authorizes the Director to require the production of records. Section 46 of the *Employment Standards Regulation* requires that a person produce or deliver the records as and when required.
21. With respect to the amount the Complainant was paid, she claims that GBC improperly deducted amounts from what it paid her, and those amounts are properly characterized as an employer's "business costs". If the Complainant is correct then the GBC contravened section 21 of the Act:
21. (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.
 - (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.
 - (3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.
- 1995, c. 38, s. 21.
22. Further, upon termination, the Complainant alleges she was not paid the wages which were due, which is a requirement under the Act:
18. (1) An employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment.
 - (2) An employer must pay all wages owing to an employee within 6 days after the employee terminates the employment.
- 1995, c. 38, s. 18.
23. Where in a Determination a contravention of the Act or Regulations is found, there is imposed a mandatory administrative penalty. Section 29 of the Regulations reads as follows:
29. (1) Subject to section 81 of the Act and any right of appeal under Part 13 of the Act, the following monetary penalties are prescribed for the purposes of section 98(1) of the Act:
 - (a) a fine of \$500 if the director determines that a person has contravened a requirement under the Act, unless paragraph (b) or (c) applies;

FAILURE TO SUPPLY BUSINESS RECORDS

24. The Delegate imposed a penalty because GBC failed to produce requested payroll records. GBC acknowledges that it received the demand, but claims that the response that it gave, Schedule "A", was such a timely response.
25. The November 8, 2006 Demand for Records required that GBC disclose any and all payroll records relating to wages, hours of work, etc. It is apparent that GBC did not keep such records. As a result, the Delegate was unable to calculate whether there could be liability to pay, for example, statutory holidays.
26. Whether a failure to provide payroll records constitutes a breach of the Act, however, is consequent upon whether GBC is an employer under the Act.

EMPLOYEE OR INDEPENDENT CONTRACTOR

27. The terms "employee" and "employer" are defined in section 1 of the Act as follows:
- "employee" includes
- (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
 - (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
 - (c) a person being trained by an employer for the employer's business,
 - (d) a person on leave from an employer, and
 - (e) a person who has a right of recall;
- "employer" includes a person
- (a) who has or had control or direction of an employee, or
 - (b) who is or was responsible, directly or indirectly, for the employment of an employee;....
28. The purposes of the Act are, inter alia, to ensure that employees receive at least basic standards of compensation and conditions of employment:
- 2 The purposes of this Act are as follows:
- (a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;
 - (b) to promote the fair treatment of employees and employers;
 - (c) to encourage open communication between employers and employees;
 - (d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;
 - (e) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia;
 - (f) to contribute in assisting employees to meet work and family responsibilities.
- 1995, c. 38, s. 2.

29. The provisions of the Act are minimum requirements and an agreement to waive those requirements is generally of no effect:
- 4 The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements, not being an agreement referred to in section 3(2) or (4), has no effect. 1995, c. 38, s. 4; 2002, c. 42, s. 2, part.
30. There are at least four common law tests of whether a person is an employee: (1) the control test, (2) the “four-fold” test, (3) the organization test, and (4) the permanency test.
31. The control test considers whether a person is subject to the control and direction of the employer with respect to the manner in which the work is done, when it is to be done, and how the employee must do it. If a person is “...hired, supervised, paid wages, given directions and is subject to the disciplinary authority of the company, he or she is that company’s employee even if no set of specific directions about how to the work exists”: Levitt, Howard A., *The Law of Dismissal in Canada*, 2nd Ed., 1992, Canada Law Book, page 12,
32. The “four-fold” test examines “whose business is it” by looking at the factors of control, ownership of the tools, who bears the chance of profit and the risk of loss.
33. The organization test examines whether an individual’s work is an integral part of the business or is only accessory to it.
34. The permanency test evaluates the permanency of the relationship by considering, *inter alia*, the duties to be performed, supervision and training, with a view to determining whether the relationship is one that can be terminated at will: *Bird v. Warnock Hersey Professional Services Ltd.* (1980), 25 B.C.R. 95.
35. As can be seen from the definitions of “employer” and “employee” contained in the Act, the statutory definitions specifically incorporate some of the elements of these common law tests, while being inclusive, not exclusive, definitions. For example, the definition of “employer” includes the notion of someone who is responsible for the “direction and control” of an employee and is “responsible” for the employment. The definition of “employee” includes the notion of someone who does “work ... for another”, and who does work that is “normally done by an employee”.
36. As this Tribunal has noted, there is no one decisive test. The total relationship between the parties must be examined with a view to determining “whose business is it”, and whether the complainant “performed work normally performed by an employee” or “performed work for another”: *Re Trigg*, BC EST #D 040/03.
37. As I read the Determination of the Delegate, he considered each of the common law tests as well as the statutory definitions. Moreover, as I read the submissions of GBC they do not take issue with the test or the analysis of the indicia of the various tests considered. Instead, the submission of GBC is directed at the evidentiary conclusions of the Delegate.
38. Although I have considered the detailed submissions of GBC, those submissions take the form of disagreeing with the conclusions of the Delegate based on GBC’s view of the evidence. A review of two of those submissions is representative, in my opinion, of the rest.

39. For example, GBC takes issue with whether the Complainant was provided with office space, a desk, phone, fax, or assistant. GBC says that the Complainant was “expected to be on the road growing her account base...” but that “we will acknowledge Ms. Tutte would use a phone and/or fax on occasion”. The Complainant, on the other hand, submitted that “I worked from the office on a daily basis” and that she “shared a work area with Mr. Stuart in which he had an additional CAT5 cable installed in this area so that I would also have full time internet and email access while at the office”.
40. The Delegate, in making his Determination concluded that GBC “provided the office location from which she and any other staff operated, provide the office furniture, faxes and telephones they used” and “Although Ms. Tutte used her own lap top computer for the installation and set up of the terminals; GBC provided those terminals, the ancillary electrical cords and hook ups and specialized software...”. In coming to this conclusion it is clear that the Delegate had to choose between varying and competing descriptions of the workplace by giving more weight to the evidence of the Complainant.
41. GBC also took issue with the Delegates finding that only GBC stood “to profit from the sale of terminals and only GBC is exposed to any risk of loss”. GBC says that the “entire industry and industry model for the marketing of POS terminals in the private sector is based on ‘Residual Income’ and ‘Stacked Income’....” The Complainant, however, says that “The reality is that I worked hours of overtime on a weekly basis and stat holidays for a ‘consultant’s fee’ of \$2500/month” and that she “never saw a dime of the commissions or residuals in this ‘profitable opportunity’” and that “The carrot of equity in the company never happened....”
42. Moreover, GBC submitted in evidence a document titled “Statement of Gross Wages” that shows a “Gross Wage per month” for the Complainant, consistent with a salaried employee, not an independent contractor exposed to the risk of loss or possibility of profit.
43. In my opinion, in reviewing this and other evidence the Delegate was entitled to conclude, as a matter of fact, that GBC stood to profit not the Complainant, and likewise, the risk of any loss was with GBC.
44. In these examples, and in the other submissions, GBC is taking issue with the Delegate’s assessment of the weight of the evidence.
45. The weight of evidence, however, is a matter for the Delegate and is a question of fact, not law: *Ahmed v. Assessor of Vancouver* (1992) BCSC 325; *Provincial Assessors of Comox, Cowichan and Nanaimo v. Crown Zellerbach Canada Ltd.* (1963) 42 WWR 449 at page 471. It is only where a conclusion reached is one that could not reasonably be entertained that an error of law is shown: *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.).
46. In considering this issue on appeal it is not necessary that the Tribunal necessarily agree with the conclusion of the Delegate. It is only if no reasonable person, acting judicially and properly instructed as to the law, could have come to the determination that an error of law is made out: *Delsom Estates Ltd. v. Assessor of Area 11 – Richmond / Delta* (2000), SC 431 (B.C.S.C.).
47. GBC also takes issue with how the parties at various times characterized their own relationship. In viewing the evidence it is apparent that at various times both parties characterized their relationship, either directly or inferentially, as one involving employment and as an independent contractor. Regardless, it is not how the parties might characterize their relationship, but the true nature of the relationship that governs the issue. The total relationship is to be examined, as noted by the Delegate: *Re*

Trigg, BCEST #D040/03; *Re J.F. Ventures Ltd.*, BCEST #D131/05; *Re Alabon Country Kennels*, BCEST #D172/05, reconsideration denied BCEST #RD013/06.

48. In my opinion the Delegate did not err in law in finding that the Complainant was an employee of GBC.

TRAVEL EXPENSES / BUSINESS COSTS

49. The Complainant says that she incurred certain costs and expenses while traveling and working on behalf of GBC.

50. This Tribunal has determined that a variety of expenses are the business costs of an employer including, in certain circumstances, travel costs (*Pacific Forest Maintenance Ltd.* BC ESTD# 202/96) costs of a company vehicle (*Aluminex Extrusions Ltd.* BC ESTD# 250/98) credit card costs (*Pacific Shores Nature Resort* BC ESTD# 309/00), the cost of courses (*Lacroix* BC ESTD# 267/96) gasoline costs (*Keep on Trucking* BC ESTD# 087/99) airfare costs (*Olympic Forest Products* BC ESTD# 588/98), and the lease payments on a laptop computer (*City Choices Digital Guides Inc.*, BC ESTD # 510/02).

51. The question in each case is whether such costs are appropriately characterized as the “employer’s business costs” with the meaning of section 21(2) of the Act.

52. In this particular case there are two sets of alleged business costs. The first concerns fuel, cellular telephone and meal expenses while traveling and working on behalf of GBC.

53. With respect to such costs, the Delegate noted in his Determination that the amount of such costs was not disputed by GBC only whether they were business costs. In my opinion, in finding that GBC was the Complainant’s employer, GBC was properly responsible for such expenses as they are properly characterized by the Delegate as an employer’s business costs: *Re: Jody Nelson and Beyond Sense Silver and Jewelry*, BCEST D#002/05.

54. The second set of alleged business costs are those associated with a trip taken to Toronto. Here the argument by GBC is that this was a separate business venture in which GBC and the Complainant were co-venturing. The Complainant took the view that she was misled by GBC into paying for her costs associated with this trip because the real reason for the trip was to find a new supplier for GBC.

55. In considering these expenses the Delegate considered the Memorandum of Agreement signed by the Complainant and the principal of GBC, Alex Stuart. The Delegate notes that “The memo discusses the acquiring of a product to support the development of GBC, talks about the due diligence needed to pursue this venture, that Ms. Tutte was going to pay for it and there is going to be an exchange of equity when the due diligence is completed”. The Delegate notes that the memo is signed by the parties in their capacities with GBC. It is signed on GBC letterhead.

56. The Delegate held that the trip to Toronto was a “trip set up by Mr. Stuart and benefiting GBC”. As such, the Delegate concluded that the costs incurred were business costs of GBC.

57. In my opinion the finding that the trip to Toronto was a business cost of GBC is a finding of fact made by the Delegate on contested evidence. In examining the proper characterization of this expense the Delegate properly considered the purpose of the trip, and who was to benefit from the trip. In finding that

the trip was properly an employer's business cost, the Delegate examined, as he should, both the form of the agreement and the realities underlying it. In my opinion the Delegate did not err in law in doing so.

ADMINISTRATIVE PENALTIES

58. Where there is a finding in a Determination that there is a breach of the *Act* the Delegate is required to impose an administrative penalty.
59. In this case, consequent on finding that the Complainant was an employee, there is a requirement to keep and produce on demand payroll records, as well as findings that certain expenses were business costs, and thus there were unpaid wages.
60. In the circumstances, the Delegate was required to impose an administrative penalty for each separate contravention he found. Where there is an issue of whether a person is an employee or independent contractor there will almost invariably be multiple and separate contraventions of the *Act*. Whether appropriate or not, this Tribunal has no jurisdiction to waive or reduce the penalties imposed in such circumstances: *Re N & G Retail Inc.*, BCEST # D012/06.

ORDER

61. I Order, pursuant to Section 115 of the *Act*, that the Determination of the Director is confirmed.

John Savage
Member
Employment Standards Tribunal