Employment Standards TRIBUNAL

An appeal

\- by -

Danny Helgesen
("Helgesen")

\- and -

Bhora Mayer, in his capacity as "President, Gulf Coast Materials Ltd."
("Bhora Mayer")

\- 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.: 2009A/046 & 2009A/047

DATE OF DECISION: July 20, 2009

BRITISH COLUMBIA

DECISION

SUBMISSIONS

Danny Helgesen	on his own behalf
Gwendoline Allison	on behalf of Bhora Mayer
Mhinder Mayer & George F. Gregory	on behalf of Mhinder Mayer
Terry Hughes	on behalf of the Director of Employment Standards

OVERVIEW

1. I have two appeals before me both relating to a single Determination issued by a delegate of the Director of Employment Standards. These appeals were filed pursuant to section 112(1)(a) of the *Employment Standards Act* (the "*Act*"). The first appeal is filed by Danny Helgesen, the original complainant and he, in essence, asserts that he is entitled to more wages than were awarded by way of the Determination. The second appeal was filed by Bhora Mayer, one of the two brothers that control the alleged corporate employer; the central thrust of this appeal is that the Determination should be cancelled because there never was an employment relationship between the complainant and this corporation.

2. None of the parties seeks an oral hearing and, in my view, this appeal can be fairly adjudicated based solely on the parties' written submissions. The Appellant Bhora Mayer initially sought an order suspending the Determination, however, since the Director of Employment Standards gave a written undertaking that he would not attempt to collect any monies owed under the Determination pending the Tribunal's decision on the appeals, the Tribunal declined to issue a suspension order. I might add that several parties filed further submissions after the submission deadline passed. I previously advised the parties that these submissions (which I briefly reviewed and found to be of marginal, if any, value since they simply reiterated positions previously advanced) would not form part of the record before me.

THE DETERMINATION

3. On January 8, 2008, Danny Helgesen ("Helgesen") filed an unpaid wage complaint against Gulf Coast Materials Ltd. ("Gulf Coast") that was subsequently investigated by a delegate of the Director of Employment Standards (the "delegate") who, in turn, on February 24, 2009, issued a Determination ordering Gulf Coast to pay Mr. Helgesen the sum of $33,369.35 on account of unpaid wages ($32,076.84) and section 88 interest ($1,292.51) (the "Determination"). In addition, and also by way of the Determination, the delegate levied a $500 monetary penalty under section 98 of the *Act* against Gulf Coast. Thus, the total amount payable under the Determination is $33,869.35.

4. As is detailed in the Determination, Gulf Coast operates a ready mix plant on Salt Spring Island and is controlled by two brothers, Bhora Mayer and Mhinder Mayer, each of whom holds 50% of the corporation's issued shares. According to information on file at the B.C. Corporate Registry, each brother is a Gulf Coast director and officer (Bhora Mayer is the company's president, Mhinder Mayer is its secretary). The two brothers appear to be locked in a pitched battle for control over Gulf Coast and Mr. Helgesen has apparently found himself in the middle of the siblings' rivalry. Mhinder Mayer wholly supports Mr. Helgesen's position whereas Bhora Mayer takes a polar opposite position.

5. The delegate, during the course of his investigation, interviewed several Gulf Coast employees as well as the two brothers and also reviewed certain corporate records. The delegate made several findings based on the information he obtained. First, he concluded that Mr. Helgesen was employed by Gulf Coast since October 15, 2007, and continued to be a Gulf Coast employee as of the date of the Determination. Second, he determined that Mr. Helgesen was promised a $5,500 monthly salary in exchange for a 5-day, 40-hour workweek. Third, the delegate concluded that during the 6-month period from October 15, 2007, to April 15, 2008, Mr. Helgesen earned $32,076.84 in wages but had not received any payment from Gulf Coast for these earned wages. Accordingly, as noted above, the Determination was issued reflecting the unpaid wages, accrued section 88 interest and a single $500 monetary penalty.

6. Mr. Helgesen did not receive any wages during the time that he has worked for Gulf Coast since the firm's payroll was administered by a company known as Bastion Management Ltd. – a firm controlled by Bhora Mayer's son, Richard Mayer:

> Since payroll is done from Bastion, and Bastion is aligned to Bhora's group of companies, Bhora has the ability to make and control wage payments and deposits. Mhinder has no independent authority to have pay cheques issued to an employee. (Determination, page R4).

Thus, in order to provide an income stream to Mr. Helgesen, Mhinder Mayer's wife, Kelly Mayer, advanced several "loans" to Mr. Helgesen. The delegate concluded that these advances were *bona fide* loans rather than "wages" and that Mr. Helgesen must repay these loans to Kelly Mayer (Determination, pages R9 – R10). Accordingly, the delegate did not give any "credit" to Gulf Coast when calculating its unpaid wage liability to Mr. Helgesen.

THE APPEALS

7. As noted at the outset of these reasons, there are two appeals before me both relating to the Determination. By way of an Appeal Form dated April 1, 2009, Mr. Helgesen asks the Tribunal to vary the Determination since the delegate erred in law (EST File No. 2009A/046). More particularly, in a letter attached to his Appeal Form, Mr. Helgesen says:

> I don't agree with the director's interpretation of section 80.
>
> My claim was submitted in January 2008 and took over one year for a determination to be made.
>
> When I filed my claim in the Nanaimo office I asked if I needed to continue to file claims on an ongoing basis. I was told that I only needed to file a claim once.
>
> I think in this case because I am still employed at GCM; the six month period should be extended.

8. Mr. Helgesen seeks the following order from the Tribunal: "I would like the tribunal to allow the determination time to be extended in my case. I think if they look at the circumstances of the case they will find it to be unique and the six month time limit should be changed."

9. The second appeal before me was filed by the law firm Clark Wilson, LLP on April 3, 2009, in the name of "Bhora Mayer, President Gulf Coast Materials Ltd." (EST File No. 2009A/047). By way of this appeal, the appellant asks the Tribunal to cancel the Determination because the delegate erred in law in issuing it. In a letter dated April 3, 2009, appended to its Appeal Form, Clark Wilson, LLP asserts "We are solicitors for Bhora Mayer and Gulf Coast Materials Ltd." and says that the delegate erred "by applying the 'indoor

management rule' to determining [*sic*] whether Helgesen was employed by Gulf" and also erred in finding that Mr. Helgesen was employed by Gulf during the material time period.

10. In the April 3, 2009, written submission, legal counsel essentially reiterates the submissions that were advanced by Bhora Mayer during the delegate's investigation, namely, that Mhinder Mayer had no authority to hire Mr. Helgesen and that Bhora Mayer, on several occasions, made it clear to Mr. Helgesen that he was not properly employed by Gulf Coast. In the course of its April 3, 2009, submission, legal counsel made various factual assertions including the following:

- Gulf operates a ready mix plant on Salt Spring Island. It is owned [*sic*] by two brothers, B. Mayer and Mhinder Mayer ("M. Mayer"), 50% each. B. Mayer is the President and M. Mayer is the Secretary… [para. 4]

- B. Mayer is the signing authority for Gulf. [para. 5]

- Helgesen has been employed for over 20 years at various Mayer family operations, including a previous term of employment at Gulf for 2 years. Immediately prior to the time period in dispute, Helgesen was employed for 7 years at D & A Crushing Ltd., a company owned [sic] by M. Mayer and his wife, Kelly Mayer. B. Mayer is not involved with D & A Crushing Ltd. On October 13, 2007, Helgesen was laid off by D & A Crushing Ltd. due to the company losing a contract for gravel crushing. [para. 6]

- M. Mayer purported to offer Helgesen a job at Gulf beginning on October 15, 2007. B. Mayer took issue with this as he did not want Helgesen to be hired back at Gulf. On October 11, 2007, B. Mayer wrote to M. Mayer advising that employees of D & A, specifically naming Helgesen, should not be working at Gulf. [para. 7]

- B. Mayer then wrote a letter to Helgesen on October 18, 2007, advising that he was not an employee and was to leave the site immediately, and told he would be charged with trespassing if he entered the premises. [para. 8]

- B. Mayer wrote another letter to Helgesen on October 19, 2007 advising that he was not employed by the company and would not be put on the payroll. B. Mayer also instructed Bastion Management not to pay Helgesen wages. [para. 9]

- B. Mayer maintained his position that Helgesen was not to work for Gulf. Despite this fact, according to Helgesen and M. Mayer, Helgesen continued to go to Gulf and perform work. He was never paid for any work by Gulf. The signing authorities on the Gulf payroll account are B. Mayer, M. Mayer, and a senior accountant working at Bastion. Two signatures are required to process payments. M. Mayer has no independent authority to have pay cheques issued to an employee. [para. 10]

- There have been no payroll remittances to Canada Revenue Agency, nor WCB remittances for Helgesen since October 2007. [para. 11]

11. Bhora Mayer's principal position is that Mhinder Mayer did not have the lawful independent authority to hire Mr. Helgesen and, accordingly, Mr. Helgesen was never lawfully employed by Gulf Coast. Further, Bhora Mayer says that although Mr. Helgesen was an "employee" as defined by section 1 of the *Act*, his "employer" was Mhinder Mayer rather than Gulf Coast and that Mr. Helgesen has already been paid for his work during the period in question [April 3, 2009, submission, at paras. 41 – 42 and 44]:

- Further, given the evidence that M. Mayer and his wife have been paying Helgesen themselves, this indicates that they are his employer, not Gulf. In our submissions, an employer is someone who has

> control or direction of an employee, which would be M. Mayer. And as per the definitions, an employee includes a person receiving or entitled to wages for work performed for another. In this case, Helgesen was performing work for M. Mayer.
>
> - Therefore, under the first issue, it is submitted that there is no dispute that Helgesen is an "employee" as defined in the Act, but he is not an employee of Gulf.
> - …our submission with respect to the wages calculated as owing to Helgesen is that they are in fact not owing to Helgesen from Gulf at all. In fact, because M. Mayer and his wife have been paying Helgesen all along, there should be no issue with him being paid at all.

12. I shall now separately address the issues raised by each of the two appeals before me commencing with the Helgesen appeal.

THE HELGESEN APPEAL (EST File No. 2009A/046)

13. Mr. Helgesen's appeal concerns the proper interpretation of section 80(1) of the *Act*:

> 80. (1) The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning
>
> (a) in the case of a complaint, 6 months before the earlier of the date of the complaint or the termination of the employment, and
>
> (b) in any other case, 6 months before the director first told the employer of the investigation that resulted in the determination,
>
> plus interest on those wages.
>
> [subsections 80(1.1) and (2) omitted]

Subsection 80(1)(b) is not relevant since, in this case, Mr. Helgesen filed a complaint (this latter provision would be relevant if, for example, wages were found owing following a section 76(2) investigation – *i.e.*, an investigation undertaken in the absence of a complaint). Subsections 80(1.1) and (2) are not relevant since the former subsection concerns complaints filed prior to May 30, 2002 and the latter subsection concerns complaints filed against "talent agencies" (see *ESA*, section 1).

14. Mr. Helgesen's position (one ultimately accepted by the delegate) is that he continued to be employed by Gulf Coast when he filed his complaint on January 8, 2008. For purposes of my analysis of this issue, I will accept Mr. Helgesen's position that he was still employed by Gulf Coast when he filed his unpaid wage complaint. Further, I note that Bhora Mayer's position is that Mr. Helgesen was employed when he filed his unpaid wage complaint but that his employer was Mhinder Mayer rather than Gulf Coast. Thus, whether Mr. Helgesen was employed by Gulf Coast or by Mhinder Mayer, subsection 80(1)(a) is the governing provision.

15. Subsection 80(1)(a) is a form of "limitation of liability" provision. In short, employers cannot be held liable for wages that became "payable" prior to commencement of the "wage liability" period (see, *e.g.*, *Huang*, BC EST # D159/04; see also further proceedings: D015/05 and RD086/05; see also *Paradigm Management (B.C.) Ltd.*, BC EST # D420/00; reconsideration refused: RD291/01 and *Woo*, BC EST # D430/02 to like effect dealing with the scope of section 80(1)(a) when it contained a 24-month rather than a 6-month wage liability limitation period). It may be that unpaid wage claims that crystallized prior to the commencement of the 6-month period can be recovered through a civil court action for breach of contract (see *Act*, section 118),

however, the Director of Employment Standards no longer has the statutory authority to issue a determination for such unpaid wages. Wages that were "earned" *prior* to the commencement of the 6-month pre-complaint period but only become "payable" *during* that 6-month period (for example, vacation pay, commissions or compensation for length of service) may be recovered under section 80(1)(a) but not wages that were both "earned" and "payable" prior to the commencement of the 6-month period (see, *e.g.*, *Orca Security Corporation*, BC EST # D003/09).

16. As noted above, Mr. Helgesen's unpaid wage complaint was filed on January 8, 2008, and, accordingly, since he remained employed as of that date, Mr. Helgesen's employer could only be held liable for unpaid wages (plus section 88 interest) that became payable commencing 6 months prior to January 8, 2008 (*i.e.*, commencing July 8, 2007). In this case, Mr. Helgesen did not commence his employment until October 15, 2007, and thus he was entitled to recover unpaid wages under the wage recovery provisions of the *Act* that became payable as of and from October 15, 2007. The delegate's reasoning (Determination, page R10) on this point are set out below:

> The Director's interpretation of Section 80 is that if employment is ongoing, recovery of wages is limited to wages that became payable in a six month period. Danny Helgesen continued to be employed after the complaint was filed. As a result the audit period in this Determination is limited to the wages that became payable from October 15, 2007 to April 15, 2008.

17. Thus, the delegate did not calculate Mr. Helgesen's unpaid wage entitlement based on a 6-month period commencing 6 months prior to the filing of the complaint but, rather, on a 6-month period that included 2.5 months prior to (*i.e.*, from the date when Mr. Helgesen's current employment with Gulf Coast commenced) and 3.5 months subsequent to, the complaint filing date.

18. In its submission dated May 20, 2009, counsel for Bhora Mayer asserted that subsection 80(1)(a) effectively terminates Mr. Helgesen's wage recovery claim as of the date of his complaint (at paras. 9 and 12):

> Consequently, the tribunal is limited by the statute to award an amount for the six month period before the date of the complaint. The complaint was filed in January 2008. The period is, therefore, from October [date missing] 2007 to January 8, 2008…
>
> Finally, Gulf and Mr. [Bhora] Mayer submit that the amount of the Determination be reduced to any amount payable between October [date missing] 2007 and January 8, 2008.

19. The delegate asserts that subsection 80(1)(a) does not create a global 6-month "cap" on a complainant's allowable wage recovery but simply establishes a "cut-off" point prohibiting the recovery of any unpaid wages (utilizing the *Act* wage recovery scheme) that became payable prior to that point:

> …When employment continues and the contravention(s) continue the Director has awarded an amount going back six months from the date of the complaint and an amount going forward to the date of the determination.
>
> It is the interpretation of the Director that the awarding of wages going forward, where the employment is not terminated and the contravention continues, is in accordance with the section 2 purposes of the Act, the wording of section 80 of the Act, and the Tribunal and common law decisions on the proper interpretation of employment standards legislation. The Director reads section 80 as relating only to the commencement of the recovery period and not to its end…
>
> It would also be an absurd result if where employment is ongoing, the employer only had to pay a maximum of six months wages going back and was saved harmless from owing any wages going forward.

(Delegate's June 11, 2009 submission, pages 2 – 3).

20. In his June 11, 2009, submission the delegate also notes that Mr. Helgesen has filed two further unpaid wage complaints (December 16, 2008, and June 2, 2009) and that "the Director is awaiting the outcome of this appeal prior to dealing with these two complaints" and may issue one or more subsequent determination(s) covering 6 months' unpaid wages or a longer period "up to the date of the next determination" (page 3).

21. Mr. Helgesen says that the delegate ought to have awarded him unpaid wages that were earned and became payable after April 15, 2008. Presumably, Mr. Helgesen seeks an order spanning the period from his initial date of hire (October 15, 2007) to the date of the Determination (February 24, 2009) although in his appeal documents he simply asks the Tribunal to "extend" the wage recovery period.

22. For my part, I do not read subsection 80(1)(a) as creating a "ceiling" limiting a complainant's maximum unpaid wage recovery entitlement to those wages that became payable during the 6-month period dating back from the complaint filing date. Certainly, and as the Tribunal has repeatedly held, a complainant cannot recover wages that became payable prior to the commencement of the "wage recovery period" (*e.g.*, wages that became payable more than 6 months before a complaint was filed). In the vast majority of appeals that come before the Tribunal, the unpaid wage complaint was filed after the complainant's employment ended and, in such circumstances, the complainant will usually only be able to recover those wages that became payable in the 6-month period immediately preceding the employment termination date. In some rare instances, an employee whose employment has ended may be able to recover wages that were earned before, but only became payable after, the employment ended (*Orca Security Corporation*, *supra*, is such a case).

23. However, in the unusual situation where the complainant files a complaint against their current employer, and their employment continues thereafter, I do not interpret subsection 80(1)(a) as limiting their unpaid wage claim to a specific 6-month period. In my view, the reference to "6 months" in subsection 80(1)(a) simply fixes the historical point in time from which the complainant's unpaid wage claim may be calculated but it does not mandate a fixed interval limiting the maximum claim period for any and all unpaid wage claims. If the Legislature had intended to limit all unpaid wage claims under the *Act* to a defined 6-month interval it could have simply done so by removing the word "beginning" in subsection 80(1) and perhaps by including other directory language in subsections 80(1)(a) and (b). I agree with the Director's position that was also successfully advanced in *Orca Security Corporation*, *supra*, namely, that section 80(1)(a) defines the commencement of the wage recovery period but does not necessarily fix the duration of that period (see para. 52).

24. Bhora Mayer's argument that Mr. Helgesen can only recover wages payable within a period not more than 6 months dating back from the date of the complaint is broadly similar to that advanced by the employer in *British Columbia Securities Commission v. Burke*, 2008 BCSC 1244 with respect to section 51 of the *Act* (the "parental leave" provision). Section 51(1)(c) states that a birth father is entitled to a leave of "up to 37 consecutive weeks…beginning after the child's birth and within 52 weeks after that event". The employer took the position that Mr. Burke was entitled to parental leave provided it began *and ended* within 52 weeks after his child's birth, however, the Director determined that Mr. Burke's leave only had to *commence* within the 52-week post-natal period. The Tribunal confirmed the Director's view and the court, on judicial review, concluded the Tribunal's interpretation of the leave provision was reasonable. In *Burke*, the B.C. Supreme Court affirmed yet again the well-established principle that the *Act* is a benefits-conferring statutory scheme and thus ought to be construed liberally in favour of granting rather than limiting benefits (see, *e.g., Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27; *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, [2005] 3 S.C.R. 425). If one were to give effect to Bhora Mayer's argument that Mr. Helgesen cannot recover any wages after the date of his complaint (even though such wages were earned

and payable), the employer would unfairly benefit from the employee's labours – a result that hardly seems consonant with the remedial nature of the *Act* scheme.

25. It follows from the foregoing comments that I do not accept Bhora Mayer's position regarding the proper interpretation of subsection 80(1)(a). Further, I do not accept the delegate's view, set out at page R10 of the Determination, that section 80 limits a complainant's recovery "to wages that became payable in a six month period" where a complainant has been filed by an employee whose employment has not yet been terminated. Clearly, the Director cannot issue an order, by way of a section 79 determination, for the recovery of wages that are not yet payable. I do find, however, that the Director *can* order payment of wages that are payable as of the date a determination is issued. Of course, the complainant's complaint form will normally only assert a claim for wages payable as of the date of the complaint. Accordingly, a determination should not be issued for wages that became payable after the complaint was filed unless the employer has been given notice of, and an opportunity to respond to, the claim as it relates to "post-complaint" wages – this follows from the Director's general obligation to respect the rules of natural justice, the section 2(b), (c) and (d) purposes and from the more specific obligation set out in section 77 of the *Act*.

26. In *Orca Security Corporation*, *supra*, the employer argued that section 80 effectively limited the complainants' wage claims (commissions) to a defined 6-month period following termination of employment (see para. 54). The Tribunal rejected this approach and held that the Director was entitled to retain jurisdiction to continue to adjudicate claims for wages that were earned, but were not yet payable, even though such claims might extend beyond a 6-month post-termination period (see paras. 57 – 58). Although *Orca Security Corporation* does not speak directly to the issue before me, the approach taken by the Tribunal in that case supports my view that section 80(1)(a) establishes a commencement point for an unpaid wage claim and does not, in all cases, create a 6-month maximum recovery period. Thus, and subject to notice and other natural justice considerations, I am of the view that in the case of a continuing employment relationship, the Director may issue a determination for unpaid wages payable as of the date of the determination.

27. If, in the case of an ongoing employment relationship (and, again, it must be emphasized that this is an unusual case since most complainants' employment has already ended when they file their complaints), additional wages become due and payable after the complaint has been filed but before a determination has been issued, I see no sensible reason for requiring the employee to file another complaint and for successive determinations to be issued each limited to a 6-month post-complaint interval. Such a process seems needlessly bureaucratic and not at all in keeping with the stated purpose of the *Act* to promote fair and efficient dispute resolution procedures (section 2(d)). It should also be noted that the Director's jurisdiction to investigate a possible unpaid wage issue is not predicated on the existence of a formal complaint (see section 76(2)). Fairness concerns (section 2(b)) can be addressed by ensuring that employers are given notice of, and an opportunity to respond to, claims for unpaid wages that have allegedly crystallized in the post-complaint period. While there appears to be a view within some quarters that *Act* unpaid wage claims are limited to 6 months there is, in fact, no such express provision in the statute. In the ordinary course of events, where a complainant's employment has ended prior to their having filed a complaint, the wage claim will normally be limited to wages that became payable within the 6-month period preceding the complaint filing date. However, in the unusual case where the employment continues after a complaint has been filed there is nothing in the *Act* that limits the complainant's unpaid wage claim to a defined 6-month period. Obviously, in such cases, it is preferable if an investigation can be concluded (or a hearing held) and a determination issued as soon as may be reasonably possible after the complaint filing date.

28. I would, therefore, allow Mr. Helgesen's appeal inasmuch as I find the delegate erred in law by limiting the "recovery period" to a 6-month interval straddling the date Mr. Helgesen's complaint was filed. I agree with Mr. Helgesen that the Director could have issued an unpaid wage award spanning the period up to the date of the Determination was issued. I am not finding that Mr. Helgesen is entitled to a further sum reflecting unpaid wages

that were earned and became payable after April 15, 2008 – that entitlement is yet to be established. However, I do say that the delegate erred in law in determining that "recovery of wages is limited to wages that became payable in a six month period" (Determination, page R10). I now turn to Mr. Bhora Mayer's appeal.

THE BHORA MAYER APPEAL (EST File No. 2009A/047)

29. Bhora Mayer's principal line of attack is that his brother, Mhinder Mayer, had no legal authority to bind Gulf Coast to an employment contract with Mr. Helgesen. While Bhora Mayer acknowledges that Mhinder Mayer was a Gulf Coast officer, director and 50% shareholder, he also says that Mhinder Mayer had no authority to hire employees generally, and Mr. Helgesen specifically. Legal counsel for Bhora Mayer says that the delegate erred in applying the "indoor management rule" to find a subsisting employment relationship between Mr. Helgesen and Gulf Coast because Mr. Helgesen knew, or should have known, that Mhinder Mayer, although he was a Gulf Coast officer, director and 50% shareholder, "had no authority to exercise the powers or perform the duties that are customary in the business of the company or usual for such director or officer, that is, hiring capacity" (April 3, 2009 submission, para. 27).

30. Counsel also referenced section 146 of the B.C. *Business Corporations Act* and suggested that this provision "codified" the "indoor management rule" and that subsection 146(2) reflects the recognized exception to that rule regarding persons dealing with the alleged corporate agent who have actual notice of that agent's restricted authority. In the context of this case, section 146(1)(c) states that a company cannot defend itself against a claim for breach of contract on the basis that the corporate officer or director who purportedly negotiated the contract on the company's behalf had "no authority to exercise the powers and perform the duties that are customary in the business of the company or usual for such director, officer or agent". Clearly, and Bhora Mayer does not challenge this proposition, in the usual course of events someone in the position of Mhinder Mayer would have the presumptive legal authority to bind the company to an employment contract. However, Bhora Mayer says that in this case Mr. Helgesen knew that Mhinder Mayer did not have such authority and, accordingly, the common law "notice" exception to the "indoor management rule" applies as well as subsection 146(2) which states that the provisions of section 146(1) do "not apply in respect of a person who has knowledge, or, by virtue of the person's relationship to the company, ought to have knowledge, of a situation described in paragraphs (a) to (e) of that subsection".

31. It is important, at this juncture, to return to the delegate's findings. As I read the Determination, the delegate made two independent findings neither of which was predicated on an application of the "indoor management rule" or section 146(1)(c) of the *Business Corporations Act*. First, the delegate concluded (Determination, page R8) that Mr. Helgesen was an "employee" as defined in section 1 of the *Act*. Second, the delegate concluded that Mr. Helgesen was employed by Gulf Coast (Determination, page R9). I am unable to conclude that either finding amounts to an error of law inasmuch as the delegate appears to have correctly applied the relevant statutory definitions to the facts at hand.

32. With respect to Mr. Helgesen's status, Bhora Mayer accepts that Mr. Helgesen was an "employee" as defined in section 1 of the *Act*, however, says that Mr. Helgesen was employed by Mhinder Mayer rather than Gulf Coast:

> Further, given the evidence that M. Mayer and his wife have been paying Helgesen themselves, this indicates that they are his employer, not Gulf. In our submissions, an employer is someone who has control or direction of an employee, which would be M. Mayer. And as per the definitions, an employee includes a person receiving or entitled to wages for work performed for another. In this case, Helgesen was performing work for M. Mayer.

> Therefore, under the first issue, it is submitted that there is no dispute that Helgesen is an "employee" as defined in the Act, but he is not an employee of Gulf. (Counsel for Bhora Mayer April 3, 2009 submission, paras. 41 – 42)

33. Although all parties agree that Mr. Helgesen was an "employee" as defined in the *Act*, the parties do not agree on the identity of his employer. Counsel for Bhora Mayer says, relying in part on the Tribunal's decision in *Kaycan Ltée./Ltd.* (BC EST # D606/97), that since Bhora Mayer specifically instructed Mr. Helgesen that he was not to work for Gulf Coast the delegate erred in finding an employment relationship between Mr. Helgesen and Gulf Coast (April 3, 2009, submission, para. 31). I find *Kaycan*, a case where the employee's immediate supervisor clearly instructed the employee that he was not to work overtime, to be wholly inapplicable to the case at hand. In this case, as counsel concedes, Bhora Mayer was "rarely at the [Gulf Coast] site" and the evidence before me is that Mr. Helgesen's immediate supervisor, namely Mhinder Mayer, specifically directed Mr. Helgesen that the latter *was* to report for work at the Gulf Coast site.

34. Counsel for Bhora Mayer also says, relying on the Tribunal's decision in *Just Pia Productions Inc.* (BC EST # D175/99), the mere fact that Gulf Coast may have benefited from Mr. Helgesen's work is not, of itself, sufficient to establish an employment relationship between those two parties (April 3, 2009, submission, paras. 37 – 40). I wholly endorse the notion that the mere provision of beneficial services does not make the beneficiary the employer of the service provider. However, and as I observed in the *Just Pia* decision, if a person does receive some benefit from a person's services, that factor can properly be taken into account (along with other factors) in determining if the parties are in an employment relationship (see page 4). I think it important to recall that "work'" is defined in section 1 of the *Act* as "the labour or services an employee performs for an employer". As I read the Determination, the delegate did not conclude Gulf Coast was Mr. Helgesen's employer simply because it benefited from his services. Rather, the delegate considered, in addition, that i) Mr. Helgesen was engaged by a person apparently in a position of authority with Gulf Coast, ii) no person other than Gulf Coast received the benefit of Mr. Helgesen's labours, iii) Bhora Mayer took no formal legal steps to have Mr. Helgesen barred from the workplace, and iv) bearing in mind the relevant statutory definitions, Mr. Helgesen performed work normally performed by an employee and was subject to Gulf Coast's direction and control (exercised through Mhinder Mayer).

35. The delegate made a finding of fact that Mhinder Mayer was the one brother who was most closely involved in the day-to-day management of Gulf Coast (see Determination, pages R4 and R9) and there is nothing in the material before me calling that finding into question. Indeed, Bhora Mayer does not challenge that factual determination and, in any event, challenges to findings of fact cannot constitute an error of law unless there is no proper evidentiary foundation for the disputed fact (an issue that does not arise in these appeals). The delegate determined, based on largely uncontroverted evidence, that: i) Mhinder Mayer hired Mr. Helgesen, ii) Mr. Helgesen worked at Gulf Coast's worksite; and iii) he provided services that tangibly benefited Gulf Coast. Mhinder Mayer never purported to engage Mr. Helgesen on behalf of any person other than Gulf Coast and there is no evidence in the material before me to suggest that Mr. Helgesen worked anywhere other than at the Gulf Coast work site on Salt Spring Island. In light of these findings, and the statutory definitions of "employee", "employer" and "work" contained in section 1 of the *Act*, I am unable to conclude that the delegate's finding that Mr. Helgesen was employed by Gulf Coast during the relevant period constitutes an error of law. Mr. Helgesen was a person who provided labour and other services normally performed by a employee, for the benefit of Gulf Coast, under the direction and control of a Gulf Coast principal (Mhinder Mayer) and with the expectation of reward.

36. Bhora Mayer's principal concern seemingly relates to the ongoing dispute between himself and his brother regarding the internal affairs of the corporate employer. Bhora Mayer says that he advised Mr. Helgesen that he was "not employed" by Gulf Coast and should not attend the work site; Mhinder Mayer, on the other

hand, assured Mr. Helgesen that the latter was properly engaged and would be paid, in due course, for his services. Mhinder Mayer arranged for loans to be made to Mr. Helgesen (given that Bhora Mayer apparently exclusively controlled the Gulf Coast payroll account) to provide Mr. Helgesen with an income stream pending a resolution of the brothers' dispute. I do not think it inappropriate for Mr. Helgesen to have accepted the assurances of a principal of the company (an officer, director, 50% shareholder and the one brother who had the closest contact with the firm's daily operations) that his employment was secure and that he should continue on as a Gulf Coast employee. There are many avenues available for these two brothers to sort out their differences (for example, the dispute resolution procedure in their shareholders' agreement if one exits; the dispute resolution processes embedded in the *Business Corporations Act*), however, this appeal process is not one such avenue. In short, Mr. Helgesen was an employee who was engaged by, and provided services to, Gulf Coast and the latter firm has not paid him for those services. In such circumstances, a Determination ordering Gulf Coast to pay Mr. Helgesen the wages he has earned (but for which he has never been paid by Gulf Coast) was, in my view, entirely properly issued.

SUMMARY

37. In my view, the delegate did not err in finding that Mr. Helgesen was employed by Gulf Coast during the period from October 15, 2007, to April 15, 2008, and I see no basis for setting aside the Determination as it relates to the wages payable during this latter period. However, in my view, the delegate erred in law by narrowing the wage recovery period to a maximum 6-month interval. Subject to natural justice considerations (particularly, providing notice and particulars), I see nothing in the *Act* that prohibits the Director, in the case of an ongoing employment relationship, from issuing a wage payment order with respect to wages earned and payable up to the date of the Determination. Accordingly, I am referring the matter of Mr. Helgesen's further wage entitlement, if any, back to the Director for further investigation.

ORDER

38. Pursuant to section 115(1)(a) of the *Act*, I am confirming the Determination insofar as it relates to Mr. Helgesen's wage entitlement as against Gulf Coast (his employer) during the period from October 15, 2007, to April 15, 2008, and the concomitant monetary penalty imposed with respect to that wage entitlement. Pursuant to section 115(1)(b) of the *Act*, I am referring the matter of Mr. Helgesen's further wage entitlement during the period from April 15, 2008, to the date of the Determination (February 24, 2009) back to the Director for further investigation and, if appropriate, adjudication.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal