

An appeal

- by -

Marbec Build-All Ltd.
("Marbec")

- 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: David B. Stevenson

FILE No.: 2010A/70

DATE OF DECISION: July 22, 2010

DECISION

SUBMISSIONS

George Douvelos	counsel for Marbec Build-All Ltd.
Jose de Jesus Hernandez	on his own behalf
Stephanie Bogaert	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal brought by Marbec Build-All Ltd. (“Marbec”) under section 112 of the *Employment Standards Act* (the “*Act*”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on April 13, 2010, against Alpha Cement Refinishing & Renovation Ltd. (“Alpha”) and Marbec. The Determination was made by the Director on a complaint filed by Jose de Jesus Hernandez (“Hernandez”) who alleged that Alpha had contravened the *Act* by failing to pay regular wages overtime and statutory holiday pay.
2. The Determination found Part 3, section 17, Part 4, section 40, Part 5, section 44 and Part 7, section 58 of the *Act* had been contravened. The Director associated Alpha and Marbec under section 95 of the *Act* and ordered those entities pay Hernandez an amount of \$2,040.24, an amount which included wages and interest.
3. The Director also imposed administrative penalties on Alpha and Marbec under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1,500.00.
4. The total amount of the Determination is \$3,540.24. Marbec has appealed the Determination, on the grounds that the Director erred in law in finding Alpha and Marbec were associated companies under the *Act*.
5. Hernandez has suggested in his reply that an in person, or oral, hearing should be held on this appeal. The Tribunal has a discretion whether to hold an oral hearing on an appeal: see Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s. 103), Rule 17 of the Tribunal’s *Rules of Practice and Procedure* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575. In this case, the Tribunal has decided an oral hearing is not necessary. This appeal can be decided on the submissions and the material submitted by all of the parties, including the section 112 (5) Record filed by the Director.

ISSUE

6. The issue in this appeal is whether Marbec has shown the Director erred in law in finding Alpha and Marbec to be associated companies under the *Act*.

THE FACTS

7. For the purposes of an appeal under section 112 of the *Act*, the Determination is the primary source of the facts and the findings of fact and should be consistent with and supported in the section 112(5) Record.

8. Alpha is a construction company. A corporate search of that company indicated it had an incorporation date of September 30, 2008. The corporate summary for the company lists Mr. Alejandro Jose as the sole director/officer. Marbec is also a construction company. A corporate search of that company showed an incorporation date of July 3, 2008 and the corporate summary records Mr. Alex C. Martinez as its sole director/officer.
9. Hernandez was employed by Alpha as a cement finisher from April 2007. His last day of employment was March 16, 2009. Hernandez told the Director he left his employment because of changes that were being made. He said Mr. Jose and Mr. Martinez told employees they had to accept Marbec as the new company name and accept a wage cut. He left the employment because he was not prepared to work for 30% less than his current rate.
10. In his complaint and in the investigation, Hernandez named Mr. Jose and Mr. Martinez as his supervisors.
11. For the work performed in his last period of employment, Hernandez was paid by Marbec on a cheque drawn on their bank account and he received his wage statement from Alpha. The amount of the cheque and the net amount of the wage statement were identical. During the investigation, Marbec said it had taken over some or all of Alpha's jobs because Alpha was unable to meet financial obligations and contended that Hernandez had been hired as a contractor on, or about, March 2, 2009, as were other employees of Alpha. Marbec was unable to provide a copy of any contract with Hernandez.
12. Hernandez claimed wages for five days in December 2008 and for March 9, 2009. He also claimed statutory holiday pay for December 25, 2008, and January 1, 2009. During the investigation it was determined that Hernandez worked overtime hours and was not paid overtime as required by the *Act* for those hours. The Director found wages were owed to Hernandez. There is no dispute about that finding, or with the calculation of the amount owed.
13. The Determination indicates the Director placed a telephone call in late April 2009 to the telephone number for Alpha provided by Hernandez and spoke with Mr. Martinez at that number. Mr. Martinez identified himself as "an administrator" for Alpha.
14. The Director considered whether Alpha and Marbec should be associated under section 95 of the *Act*. The Director considered the preconditions to such a decision and found there were two corporations, Alpha and Marbec, and that both were carrying on business during the periods of time relevant to Hernandez's claims.
15. The Director found the two companies were under the common control of Mr. Jose and Mr. Martinez. This finding appears to be based on information that:
 - (a) Hernandez identified Mr. Jose and Mr. Martinez as his supervisors, although it is not clear from the Determination whether that information covers a general period or specific periods of time;
 - (b) Hernandez was paid for a period of work in early March 2009 that he supposedly performed for Marbec as a contractor with a cheque issued by Marbec and coincidentally received a wage statement from Alpha for that same period, showing net wages in the same amount as the Marbec cheque; and
 - (c) Mr. Martinez answered a telephone call by the Director to the number for Alpha and stated to the Director he was "an administrator" of Alpha.
16. The Director found there was a statutory purpose for associating the two companies.

ARGUMENT

17. Counsel for Marbec argues the Director erred in law in finding the two companies were under “common control or direction”. Counsel notes there is no common directorship in the two companies; he says the facts show the extent of the relationship between the two companies was that Marbec took over some of the jobs initially being done by Alpha and engaged some of Alpha’s employees as contractors on those jobs.
18. The Director and Hernandez have responded to the appeal.
19. The Director says the test for deciding whether to associate Alpha and Marbec under section 95 of the *Act*, described by the Tribunal in *Invicta Security Systems Corp.*, BC EST # D349/96, was relied on and, specifically on the matter of common control or direction, the facts supported the conclusion reached.
20. Hernandez has filed a brief submission that summarizes the information he gave to the Director and supports the Determination.

ANALYSIS

21. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:
 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 made.*
22. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.
23. It is helpful at this stage to appreciate what is accepted by the Tribunal as an error of law. The Tribunal has adopted the following 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.):
 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.
24. The appeal, although not entirely clear, seems to be arguing an error that would fall into the third or fourth category of error of law.

25. The Director correctly adopted the decision of the Tribunal in *Invicta Security Systems Corp.*, *supra*, as summarizing the preconditions necessary for establishing a basis for associating entities under section 95 of the *Act*. The relevant statutory provision reads:

95 *If the Director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,*

(a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one employer for the purposes of the Act, . . .

26. In *Invicta Security Systems Corp.*, BC EST # D349/96, the Tribunal indicated that provision sets four preconditions to a decision to associate:

1. there must be more than one individual, firm, syndicate or association;
2. each of those entities must be carrying on a business, trade or undertaking;
3. there must be common control or direction; and
4. there must be some statutory purpose for treating the entities as one employer.

27. At issue in this appeal is the Director's conclusion that there was "common control or direction" over the two companies. This aspect of the statutory provision, and how it should be approached, was described in *Invicta Security Systems Corp.*, *supra*, as follows:

The third precondition is directed toward the manner in which the various entities inter-relate within the common enterprise. One entity may have financial control, another may have operational control and yet another may have *de facto* control through majority shareholding or control of the Board of Directors. These examples are not meant to be exhaustive, but illustrative of how control may be demonstrated. Similarly, direction may be demonstrated in a variety of ways, but generally it will normally be found in an entity which makes significant decisions respecting how the business, trade or undertaking has been, is, or will be, run.

28. With respect, I am unable to conclude there was a sufficient evidentiary basis for the Director to conclude Alpha and Marbec were under common control or direction.

29. There is no evidence of commonality of directors, officers or shareholders between the two entities. There is no evidence of joint ownership of the assets of the companies and no evidence of joint or common financing. There is no indication that Mr. Jose had any degree or kind of operational influence over Marbec or Mr. Martinez over Alpha. Of particular import in this respect is the absence of any evidence showing that Mr. Martinez had any influence on the decision of Alpha to effectively abandon its jobs or that Mr. Jose had any involvement in the decision of Marbec take over that work. There is also no evidence that Mr. Jose had any say in the operational management of Marbec's operations, or Mr. Martinez had any input into how Mr. Jose operated his business. I can place no weight on the indication from Hernandez that he was supervised by both Mr. Jose and Mr. Martinez. In the absence of better particulars concerning the nature of the supervision and the time during which this supervision took place it would only make sense that Mr. Martinez would have supervised Hernandez after March 2, 2009 because Marbec had taken over the job on which Hernandez worked from Alpha. It would also make sense that Mr. Jose would have supervised Hernandez in his employment up to that time. Those facts would not indicate anything other than two companies independently supervising jobs in their own way. If there is any more to the "supervision" element in the decision to associate than what appears on its face, the Director ought to have recorded it in the Determination and analyzed it in the context of the requirements for associating entities under section 95.

30. The finding of commonality in the Determination appears to flow from little more than Mr. Martinez' statement on the telephone and the cheque and wage statement issued by the two companies in March 2009.
31. In respect of the statement made by Mr. Martinez on the telephone, I am again compelled to find, in the absence of much clearer evidence of what Mr. Martinez' actual function was when he referred to himself as "an administrator", that such a comment is not evidence of common control or direction. The Director has, in this case, done exactly what the Tribunal has said should be avoided in these types of cases – place form over substance. On the matter of the cheque and wage statement, while I accept this event, which on its face appears to be a one-time occurrence, suggests some kind of interrelationship between Alpha and Marbec during that period, there is nothing in the material to show this interrelationship shows a degree of control or direction within a *common enterprise* that is necessary to support a finding of common control or direction under Section 95 of the *Act*.
32. For the above reasons, I find, on balance, there was no evidentiary basis for a section 95 decision.
33. That does not, however, end the matter. In my view, based on the information provided and the assertions made by the parties, this matter should have been considered in the context of section 97 of the *Act*. In this respect, I will make two points about section 97. First, section 97 is triggered by a disposition; employees who continue on as employees of the new employer retain all of their accrued rights and entitlements under the *Act* against the new employer: see, for example, the Tribunal's comments in *Dharampal Singh Gill*, BC EST # D544/00 (Reconsideration denied, BC EST # RD040/02) at pages 6-7.
34. Second, the term "disposed" has been given a broad application. In *Lari Mitchell and others*, BC EST # D107/98 (Reconsideration of BC EST # D314/97), the Tribunal stated, in respect of the term 'disposed':
- We note that the language of section 97 is broad in scope. Although it is natural to speak of section 97 in relation to the "sale" of a business, it is the word "disposed" that is used in the legislation. Section 29 of the Interpretation Act, R.S.B.C. 1996, c. 238 defines "dispose" as follows:
- "dispose" means to transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release and agree to do any of those things.
- The point we wish to make is that the language of section 97 is broad enough to include any disposition that results in a change in the legal identity of the employer . . .
35. It is probable that Marbec's assuming the jobs that Alpha could no longer perform would be a disposition under section 97, although I reach no final conclusion on that, as there is little evidence in this file about the change. As well, it is improbable that Marbec's view of Hernandez as a contractor, rather than an employee, in the period from March 2 to March 16, 2009, could be sustained.
36. Hernandez' complaint needs to be considered in the context of section 97.
37. For the above reasons, the appeal succeeds. However, in the circumstances, the appropriate response is to refer this matter back to the Director for further investigation and consideration of both of the above concerns.

ORDER

38. Pursuant to section 115 of the *Act*, I order the Determination dated April 13, 2010, be cancelled and the matter referred back to the Director for further investigation and consideration.

David B. Stevenson
Member
Employment Standards Tribunal