

An appeal

- by -

Harjit Singh Gill, Director of HG Soliman Enterprises Ltd. carrying on business as
HMS Home Care

- 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: Carol L. Roberts

FILE No.: 2009A/062

DATE OF DECISION: July 23, 2009

DECISION

SUBMISSIONS

Harjit Singh Gill	on his own behalf
Katherine Lin	on her own behalf
Caleb Toombs	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Harjit Singh Gill, pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued April 6, 2009.
2. Katherine Lin filed a complaint with the Director alleging that HG Soliman failed to pay her regular wages upon termination of her employment, contrary to s. 18 of the *Act*.
3. After investigating Ms. Lin's complaint, the Director's delegate found that HG Soliman had contravened Sections 18 and 58 of the *Act*, and ordered that it pay \$2,058.15 in wages and interest to the Director on behalf of the complainant. Because the delegate was concerned about the solvency of the company, he simultaneously issued a Director Determination against Mr. Gill, who was identified as the sole director of HG Soliman at the time Ms. Lin's wages were earned and should have been paid. The delegate therefore determined that Mr. Gill was personally liable to pay the full amount of the wages.
4. Mr. Gill's grounds of appeal are that that new evidence has become available that was not available at the time the Determination was made. He also seeks a suspension of the Determination because "the company has no money".
5. I have determined that the matter can be adjudicated based on the written submissions of the parties.

ISSUE

6. Has new evidence become available that was not available at the time the Determination was made that demonstrates that the Determination should be changed?

FACTS

7. Although Mr. Gill's appeal documentation refers to an appeal of the Director Determination only, his submissions take issue with factual findings arising out of the Corporate Determination. As a result, I have set out the facts relevant to both.
8. Ms. Lin worked as a bookkeeper for HG Soliman, a home care supply business, from June 11, 2008 until June 28, 2008. There is no dispute she was never paid for that work. At issue before the delegate was whether or not Ms. Lin was an employee or an independent contractor.
9. Ms. Lin worked for Mr. Gill personally as an independent contractor in 2008. Mr. Gill asked her to perform some work for HG Soliman. Ms. Lin said that Mr. Gill subsequently asked her to take the work on a

permanent basis but that he could only offer her wages of \$20.00 per hour. She agreed to take the position because as an employee she would have the benefit of consistent work. Ms. Lin said that she worked in HG Soliman's offices for 92.5 hours under Mr. Gill's general supervision and control.

10. Mr. Gill contended that the Branch had no jurisdiction over the complaint because Ms. Lin was not an employee. It was his position that Ms. Lin performed some consulting work for the company in June, 2008 but that she had never invoiced the company for her work. He stated that she ought to have done so if she wanted to be paid. Subsequently, during the investigation, Mr. Gill told the delegate that Ms. Lin had wanted to take accounting records home with her but because he did not want the records to leave the premises, she performed the work in the company offices for a few days. He also acknowledged that Ms. Lin sent him an invoice but the company was not in a position to pay it.
11. In late February 2009, HG Soliman's affairs were taken over by a trustee in bankruptcy and Mr. Gill refused to communicate further with the delegate.
12. The delegate preferred Ms. Lin's evidence over Mr. Gill's and found that they had intended to create an employment relationship. After evaluating the evidence in light of the common law and statutory definitions, he concluded that Ms. Lin was an employee of HG Soliman.
13. The delegate determined that Ms. Lin was entitled to \$1,850 regular wages for 92.5 hours of work plus overtime wages and vacation pay. As Mr. Gill was the sole Director of HG Soliman at the time the wages were earned, the delegate determined that he was personally liable for the full amount of those wages pursuant to section 96 of the *Act*.

ARGUMENT

14. Mr. Gill filed his appeal on May 13, 2009, claiming that evidence had become available that was not available at the time the Determination was being made, but attached no submissions about what that new evidence was. The Tribunal's administrator asked Mr. Gill to provide reasons for his appeal and specifically, how that new evidence met the Tribunal's test for considering new evidence.
15. Mr. Gill argues that Ms. Lin agreed to work for him knowing the financial difficulties of the company. He says that she agreed to provide consultancy services on this basis but that because he would not allow records to be removed from the premises, she performed her consulting work at the company office. He submits that working from the company office was not evidence she was an employee, only evidence that he would not allow her to remove financial records from the office.
16. Mr. Gill says that company records were lost when the landlord took steps to recover the premises over what I infer was a failure to pay rent. He says these records will show that Ms. Lin was a consultant. He further asserts that he will have to ask "certain witnesses who were not available before to also provide testimony". Finally, Mr. Gill says the company is "in bankruptcy" and that most of the records are not available to him.
17. Mr. Gill says that he cannot fully provide the evidence necessary unless he obtains a lawyer as it "is complex and will raise many legal issues". Mr. Gill further asserts that he will be instructing his legal team to bring an action against Ms. Lin for conspiracy to damage HG Soliman as well as him personally. He says that his appeal against Ms. Lin must be "delayed" until he has the chance to file his lawsuit. Mr. Gill says that the conspiracy has been going on for some time and that a trial will be necessary to obtain further information. He says that the evidence gathered in the trial will show that the conspirators found ways of increasing company expenses and costs. He asserts that the evidence will show that Ms. Lin knew of and participated in

the conspiracy. He further asserts that Ms. Lin knew HG Soliman was in severe financial difficulty and that any additional costs would cause further hardship.

18. Mr. Gill sought a delay of the appeal until his lawyers could file a lawsuit against Ms. Lin.
19. In light of Mr. Gill's submissions, the Director's delegate provided submissions on both the Director Determination as well as the Corporate Determination. His submissions also addressed all the statutory grounds of appeal although Mr. Gill's appeal document identified only one.
20. The delegate submits that Mr. Gill has failed to demonstrate either an error of law or that new evidence is available. He contends that Mr. Gill is simply advancing arguments that were made during the investigation – that Ms. Lin was an independent contractor not an employee – and which were addressed in the Determination.
21. The delegate says that Mr. Gill has not demonstrated any failure by the delegate to observe principles of justice. He submits that Mr. Gill never indicated that there were records he did not have access to that might assist his case. The delegate referred to emails from Mr. Gill in which Mr. Gill said “I have nothing to provide you” during the investigation.
22. Finally, the delegate says that Mr. Gill has not met the test for the provision of new evidence. He further says that Mr. Gill has not stated what the missing documents might be, who the witnesses are or what they would say. The delegate sought confirmation of the Determination.
23. Ms. Lin agrees with the delegate's submissions.

ANALYSIS

24. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination; or
 - evidence has become available that was not available at the time the determination was being made
25. The burden of establishing that the Determination is incorrect rests with an Appellant. Having reviewed the submissions of the parties, I am unable to find that Mr. Gill has discharged that burden.
26. I have decided to treat Mr. Gill's appeal as an appeal of both the Director Determination as well as the Corporate Determination. Further, I have also treated the appeal as being on all three statutory grounds of appeal even though Mr. Gill has not identified them as such.
27. Mr. Gill has not demonstrated any errors of law in either Determination. The delegate weighed the evidence of Mr. Gill and Ms. Lin and applied appropriate common law and statutory tests in arriving at his conclusion that Ms. Lin was an employee. Mr. Gill has provided me with no information that this conclusion is wrong in law. Further, Mr. Gill advanced no arguments on the issue of the delegate's conclusion that he is personally liable for Ms. Lin's wages. I find no basis for this ground of appeal.

28. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:
- the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - the evidence must be relevant to a material issue arising from the complaint;
 - the evidence must be credible in the sense that it is reasonably capable of belief; and
 - the evidence must have high potential probative value, in the sense that , if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
29. While I accept that HG Soliman's affairs are now managed by a trustee in bankruptcy, that does not explain Mr. Gill's failure or refusal to provide the delegate with the information he now says he had during the delegate's investigation of the complaint. The Tribunal has repeatedly stated that it will not consider on appeal evidence that was available during the investigation.
30. Furthermore, Mr. Gill does not say what the new evidence is or its relevance to the issues the delegate had to decide. In the absence of that information, I am not persuaded that new and relevant evidence is available that would cause the delegate to arrive at a different conclusion on the issue of whether or not Ms. Lin was an employee at the relevant time, or the calculation of her wages.
31. Although Mr. Gill asserts that Ms. Lin is a participant in a conspiracy to destroy the company, that issue is of little or no relevance to this appeal. In any event, Mr. Gill provided no evidence that he had instructed counsel to commence any legal proceedings against Ms. Lin for any reason.
32. The appeal is dismissed and the application to suspend the Determination is denied.

ORDER

33. I Order, pursuant to Section 115 of the *Act*, that the Determination dated April 6, 2009, be confirmed in the amount of \$2058.15, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal