

An appeal

- by -

Triangle Industries Ltd. and Bridges Reload Inc.
(“Triangle”)

- 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.: 2007A/050

DATE OF DECISION: September 5, 2007

DECISION

SUBMISSIONS

Geoffrey Edwards	on behalf of Triangle
M. Elaine Phillips	on behalf of the Director of Employment Standards
Steve Gardner	on his own behalf

OVERVIEW

1. This is an appeal by Triangle Industries Ltd., ("TI") and Bridges Reload Inc. ("Bridges"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued May 4, 2007.
2. Steven Gardner worked as a warehouseman for Western Select Transload Systems Inc. ("Western") until his employment was terminated on January 4, 2005. He filed a claim for compensation for length of service.
3. The Director's delegate investigated Mr. Gardner's complaint. Following her investigation, she determined that Western had sold or disposed of its assets to TI, a holding company for Bridges and Triangle Logistics ("TL"), and that TI, TL, Western and Bridges were associated corporations for the purposes of the Act. She also determined that the associated corporations ("the employer") had contravened Sections 34, 58 and 63 of the *Employment Standards Act* in failing to pay Mr. Gardner compensation for length of service, wages and annual vacation. She concluded that Mr. Gardner was entitled to wages and interest in the total amount of \$6,600.59. The delegate imposed a \$2,000 penalty on the employer for the contraventions of the Act, pursuant to section 29(1) of the *Employment Standards Regulations*.
4. TI contends that the delegate erred in law in finding that TI and Bridges were associated with Western and in finding Mr. Gardner to be an employee of TI rather than Western. TI also says that the delegate failed to observe the principles of natural justice in not fully disclosing her view of the facts and affording TI the opportunity to offer a "considered and reasoned response" before the Determination was issued.
5. Section 36 of the *Administrative Tribunals Act* ("ATA"), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal's Rules of Practice and Procedure provide that the tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). TI did not seek an oral hearing. I conclude that this appeal can be adjudicated on the section 112(5) "record", the submissions of the parties and the Reasons for the Determination.

ISSUES

6. 1. Did the delegate err in law in associating TI, TL, Bridges and Western?

7. 2. Did the delegate fail to observe the principles of natural justice in failing to disclose to TI the issues she was considering and not affording TI the opportunity of full response?

THE FACTS AND ARGUMENT

8. The undisputed facts as found by the delegate are as follows.
9. Mr. Gardner began working for Western on or about July 5, 1998. Western was in the business of transloading lumber and pulp at Annacis Island. Mr. Gardner's duties and rates of pay, with the exception of raises, remained the same, and he had no break in service until his employment was terminated on January 4, 2005. Mr. Gardner's employment was terminated by Mr. P, the General Manager of Bridges and TI. Mr. Gardner received a Record of Employment (ROE) indicating that the reason for his termination was "shortage of work" and his date of return was "unknown". In a February 9, 2005 letter, Mr. P. advised Mr. Gardner that, having worked for Bridges for from October 2003 until December 2004, he was entitled to two weeks' severance. Mr. Gardner contends that his severance was insufficient. He also claimed that he received no warning that his employment would be ending. Mr. Gardner also claimed that he had not been paid for January 4, 2005, and that he had not received his vacation pay entitlement.
10. Throughout Mr. Gardner's employment, Western was managed by a number of companies including Dusange and Son, TI and Bridges. On October 2003, Western became insolvent and filed a proposal in bankruptcy. Its two shareholders, Robert Dusange and Paul Maysenhoelder, entered into a management agreement with TI. Under the terms of that agreement, Mr. Dusange and Mr. Maysenhoelder resigned in favour of "Geoffrey Edwards of TI" as the sole director and officer. TI assumed all responsibilities for the management and operations of Western, including its entire staff, and provided it with working capital. TI had the option of acquiring all the shares of Western. The agreement provided that TI would manage the affairs of Western until Western lost one of its principal customers and determined that the conduct of the business was no longer feasible, that a proposal in bankruptcy was successfully paid out, or TI acquired all the shares of Western. The management agreement also provided that Western's shares vested in TI by operation of a general security arrangement when Western went bankrupt.
11. The agreement further provided that TI could transfer the entirety of its interest in the agreement to a wholly owned subsidiary. On October 15, 2003, TI assigned its interest in the management agreement to Bridges, its wholly owned subsidiary. TI managed Western's affairs until the spring of 2004 when Western lost its two main accounts. Western subsequently made an assignment in bankruptcy.
12. An August 1, 2006, Corporate Registry search disclosed that TI was incorporated November 1983. As of that date it had four directors including Mr. Edwards and John Loosley. Mr. Loosley and Mr. Edwards were also two of the three officers. The search further disclosed that TL, which was incorporated in March 1995, had no directors. Its two officers were Mr. Edwards and Mr. Loosley. The records contained a notation that as of October 1, 2004, Bridges changed its name to TL. The search disclosed that Bridges was incorporated June 2003 as a numbered company, with the name changed to Bridges in October, 2005. Mr. Edwards was the sole director as of August 1, 2006, with Mr. Edwards and Mr. Loosley identified as the two officers. The registered and records offices of TI, TL and Bridges were the same.
13. On February 7, 2007, the delegate advised Mr. Edwards that she was considering associating TI and Bridges and sought his response. Mr. Edwards submitted that no statutory purpose could be found to treat the entities as one employer. He argued that TI was the parent company of TL and therefore the conditions for treating the entities as one employer could not be met. He also argued that there was no

statutory basis for asserting that TL was liable to Mr. Gardner, that the delegate had not provided any documentation supporting Mr. Gardner's claim, and that Mr. Gardner ought to have claimed compensation from his employer during the time the liability for vacation pay arose.

14. Mr. Edwards took the position that TI was purely a holding company and that its wholly owned subsidiary, TL, provided management services to Western. He submitted that TI was to be protected from Western's creditors by Western's bankruptcy proceedings. Mr. Edwards said that TL provided warehouse staff, including Mr. Gardner, to Western following discussions with Workers Compensation Board. Mr. Edwards said that the October 2003 transfer was not a sale or transfer of assets, but a transfer of the management contract. Mr. Edwards acknowledged that Mr. Gardner worked for TL from October 1, 2003 until December 30, 2005, and acknowledged his rate of pay.
15. Mr. Edwards disputed that TL was a successor to Western. He contended it was nothing more than a contractor, and owned no beneficial interest in it.
16. On August 15, 2005, the delegate sent separate Demands for Employer Records to TI and TL. She received two separate responses from J. C. Loosley, who identified himself as a Director. Mr. Loosley denied that Mr. Gardner was employed by either TI or TL, and submitted no records. The delegate also contacted Cameron Cox, a contract accountant for TI, and sought detailed information on Gardner's job from him. She received no response.
17. On October 20, 2006, the delegate sent a Demand for Employer Records in respect of Mr. Gardner to Bridges, as well as Mr. Edwards and Mr. Loosley, who were Officers or Directors of Bridges. Mr. Edwards responded that Mr. Gardner was employed by TL, formerly known as Bridges, the current Bridges was "a completely different legal entity" from the previous Bridges, but which assumed the name for "historical" reasons but did not commence business until August 2005, and that Mr. Gardner did not work for Bridges. Mr. Edwards also stated that Mr. Loosley was neither an officer nor director of Bridges. No employer records were provided to the delegate.
18. In a letter dated June 13, 2006, Mr. Edwards advised the delegate that he had resigned as a Director and Officer of TL in August 2005, but that he remained President and Director of TI. He also said that TL ceased operations in July 2005 and commenced bankruptcy proceedings on August 11, 2005. There is no evidence Bridges filed for bankruptcy.
19. Mr. Gardner provided the delegate with several wage statements between the period January 2004 and December 2004 containing the names of Bridges and TL.
20. The delegate found the statements of Mr. Edwards and Mr. Loosley to be inconsistent and inconsistent with the documentary evidence and concluded that Mr. Gardner was an employee of TI. She also determined that there was a relationship between TI and Bridges at the time Mr. Gardner was employed.
21. The delegate further determined that there was a need to associate TI, TL, Western and Bridges in order to ensure that Mr. Gardner's wages were paid, and did so. She further found that Mr. Gardner's employment was continuous and uninterrupted between July 5, 1998 and January 4, 2005.
22. The delegate determined that Mr. Gardner was entitled to 6 weeks' wages on the termination of his employment, plus vacation pay on that amount. She calculated he was entitled to \$3079.80 in addition to

what he had been paid, and that the associated companies had contravened section 63 in failing to pay Mr. Gardner his full wage entitlement in this respect.

23. The delegate also found Mr. Gardner entitled to wages for January 4, 2005, and the associated companies in contravention of section 34 of the *Act* in this respect.
24. The delegate further found Mr. Gardner entitled to additional amounts for vacation pay and the associated companies in contravention of section 58 of the *Act*.
25. Finally, the delegate found Bridges and TI in contravention of section 46 of the *Employment Standards Regulation* for failing to produce employer records and imposed an additional administrative penalty.
26. Mr. Edwards contends the delegate erred in including TI and Bridges in the Determination as associated companies. He submits that one of the preconditions to such a determination is that the companies must carry on a business in common. He says that TI is merely a holding company that does not carry on any business and that Bridges was not in business at the time Mr. Gardner's entitlement arose.
27. Mr. Edwards further argues that much of Mr. Gardner's wage entitlement arose prior to TI's involvement with Western and that, in any event, Western's bankruptcy "eliminated" Mr. Gardner's entitlement.
28. Mr. Edwards says that the delegate failed to observe the principles of natural justice in "failing to present to [him] a coherent, summarized view of his case". He says that he was subjected to "a long series of demands and questions the purpose of which were not clear..." and that he was "deprived of the chance to make a considered and reasoned response" before the Determination was issued.
29. In summary, Mr. Edwards asserts that "no member of the Triangle Group of Companies" acquired any part of Western's business, that Triangle and Bridges are not associated with Western, that Bridges is wrongly named as a party to the Determination, and that "no person" is liable for Mr. Gardner's outstanding wages by virtue of Western's bankruptcy.
30. Mr. Gardner seeks to have the Determination upheld. He says that TI and Bridges are the same company, and that it cannot avoid its responsibility to pay his outstanding wages.
31. The delegate and Mr. Gardner sought to have the Determination confirmed.
32. In a reply submission, Mr. Edwards acknowledged that Mr. Gardner worked for Bridges in 2003 and 2004, as Bridges did not change its name to TL until October 1, 2004, and that, in any event, it was the same entity.

ANALYSIS

33. 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

34. The burden of establishing the grounds for an appeal rests with the Appellants. The Appellants must provide persuasive and compelling evidence that there were errors of law in the Determination, as alleged, or that the delegate failed to observe the principles of natural justice.

Error of Law

35. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:

1. A misinterpretation or misapplication of a section of the 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 be reasonably entertained; and
5. Exercising discretion in a fashion that is wrong in principle

36. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.*, BC EST # D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.

a. Did the delegate err in concluding that Western had disposed of all or part of its business to TI, TL and/ or Bridges?

37. Section 97 of the *Act* provides that if all or part of a business, or a substantial part of the entire assets of a business is disposed of, the employment of an employee of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition.

38. As I understand his argument, Mr. Edwards says that the delegate erred in law in determining that Western disposed of its business to TI under section 97. He argues that absent such a disposal, TI cannot be held liable for Mr. Gardner’s wages. He says the arrangement TI had was purely an administrative one under a management agreement, and that although TL paid Western’s employees from its own account, the amounts were recovered from Western. No evidence was provided in support of this argument to the delegate or on appeal.

39. The Appellants do not dispute that Western assigned responsibility for the management of its operations, including its staff, to TI on October 14, 2003. Although Mr. Edwards contends that “no member of the Triangle Group of Companies ever acquired any part of the business of Western...”, the evidence supports the conclusion that TL hired Western staff, including Mr. Gardner. In an October 21, 2005, letter to the delegate, Mr. Edwards acknowledged that TL hired Western staff. Furthermore, that TL considered Mr. Gardner as an employee is evident from Mr. Edwards’ September 22, 2006 letter to the delegate in which he states that “We have never denied that Mr. Gardner was employed by Triangle Logistics”.

40. In *Lari Mitchell and others* BC EST # D314/97, Reconsidered # RD107/98), the Tribunal considered the term “disposed of” in section 97. The panel concluded that the term was to be interpreted broadly, and incorporated the definition in the *Interpretation Act*:

“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;

41. I find no error in the delegate's conclusion that the terms of the management agreement constituted a disposition under section 97.

b. Did the delegate err in associating TI, TL, Bridges and Western?

42. One of the purposes of the *Act* is to ensure employees in the province receive the basic standards of compensation and conditions of employment (section 2). Section 95, which provides a remedy to employees for unpaid wages, is a part of the *Act's* comprehensive enforcement scheme. The enforcement provisions include the power of the director to make the one employer declaration for the purpose of facilitating the collection of wages owing under the *Act*.

43. Section 95 of the Act provides that:

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 this Act, and

(b) if so, they are jointly and separately liable for payment of the amount stated in a determination, a settlement agreement or an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.

44. As noted by the Tribunal in *Invicta Security Systems Corp.* (BC EST #D349/96), the purpose of s. 95 is to allow the director to

pierce the corporate veil and look behind the legal structure, or form, of a business to the relationships of various entities that in reality comprise the substance of the business. There are four preconditions to an application of Section 95 to the circumstances of any matter before the director:

1. There must be more than one corporation, individual, firm, syndicate or association;
2. Each of these 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

45. The evidence is that TL, TI and Bridges were all carrying on a business, trade or undertaking between approximately 2003 until 2006, or the time relevant to the issues on appeal. That these may not have been the same business or similar businesses is not a necessary precondition to the Director's determination under section 95. (*Brunswick Avenue Holdings* BC EST #D705/01) Furthermore, each company shared common corporate directors, shareholders and registered offices. TI and TL's head office were in the same location. They also submitted similar responses to the claims and the Determination. In my view, there was sufficient connection for the delegate to conclude that TI, TL and Bridges are under common control or direction, and I find no error of law in this aspect of her determination. However, I find no

basis for her associating Western with the three other companies on the basis that Western disposed of its labour supply contract to TI, TL and Bridges. However, as Western is bankrupt and not a party to the appeal, I make no order in this respect.

Natural Justice

46. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker. A Determination that does not go in an Appellant's favour is not, in and of itself, a denial of natural justice. The Appellants say that the delegate failed to provide them with a "coherent summarized view of his case". The evidence is that, on May 16, 2006, the delegate sent Mr. Edwards, in his capacity as an officer of TL, a letter summarizing Mr. Gardner's complaint. She referred to TI's agreement with Western and provided Mr. Edwards with relevant provisions of the Act. She issued a Demand for Employer Records on Bridges, TI and TL and received cursory replies from Mr. Loosley, one of the Directors of TI and TL, and from Mr. Edwards on Bridges' behalf. She spoke with a Mr. Cox who was a contract accountant for TI and an accountant for TI/TL, from whom she received some records relating to Mr. Gardner. The evidence suggests that Mr. Edwards sent the delegate approximately seven letters explaining how he felt TI, TL or Bridges was not responsible for Mr. Gardner's wages. I find that he was well aware of the nature of the claim during the delegate's investigation. He was also provided with the delegate's preliminary conclusions and invited to respond to them. His responses were evasive and pedantic.
47. I find no basis for this ground of appeal.

ORDER

48. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated May 4, 2007, be confirmed, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal