Employment Standards TRIBUNAL

An appeal

\- by -

Kootenay Network Systems Inc. and iDevco, Inc.

\- 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.: 2005A/57

DATE OF DECISION: June 20, 2005

DECISION

SUBMISSIONS

Gordon Soukoreff and Sam Conkin	on behalf of Kootenay Network and iDevco
Guy Auger	on his own behalf
Erwin Schultz	for the Director of Employment Standards

INTRODUCTION

1. This is an appeal filed by Kootenay Network Systems Inc. ("Kootenay Network") and iDevco Inc. ("iDevco") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). I shall refer to these latter parties jointly as the "Appellants".

2. The appeal concerns a Determination that was issued by a delegate of the Director of Employment Standards (the "Director"), following an investigation, on March 11th, 2005. The Director, through his delegate, held the Appellants jointly and separately (severally) liable to Guy Auger ("Auger") for the sum of $20,441.03 on account of unpaid wages ($14,000 regular wages; $3,968.65 vacation pay) and section 88 interest ($2,442.03). I shall refer to this latter payment order as the "Determination". The Determination was supported by lengthy "Reasons for the Determination" also issued on March 11th, 2005 ("Reasons").

3. The Director's delegate did not issue an administrative penalty against either of the Appellants.

IS AN ORAL APPEAL HEARING REQUIRED?

4. By way of a letter dated May 24th, 2005, the parties were advised by the Tribunal's Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held.

5. The Appellants, in their Appeal Form, asked for an oral hearing, however, in my view, this appeal can be properly adjudicated based on the parties written submissions since I do not find it necessary to hear any *viva voce* evidence or make any findings with respect to the parties' comparative credibility. Section 103 of the *Act* incorporates several provisions of the *Administrative Tribunals Act* ("*ATA*") including section 36 which states: "…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).

6. I have before me the section 112(5) record as well as written submissions from the Appellants, the delegate, and Mr. Auger. Mr. Auger also filed a second submission dated June 6th, 2005, however, since this latter submission was filed after the deadline for filing submissions, I have not considered its contents.

THE DETERMINATION

7. As recounted in the delegate's Reasons, Kootenay Network employed Auger from October 16th, 2000 to July 31st, 2001 as its "Vice-President of Marketing"; his monthly salary was $7,000. Kootenay Network (which I understand has now ceased operations and may be insolvent) operated a software development business. Kootenay Network is a wholly-owned subsidiary of iDevco and this latter firm has also ceased operations and is also apparently insolvent.

8. In any event, on January 10th, 2002 Auger filed a timely written complaint with the Director claiming unpaid wages and certain other unpaid expense items. On March 26th, 2002, Auger filed a B.C. Supreme Court action against iDevco claiming unpaid monthly wages and vacation pay. It appears that there was some considerable overlap between the relief sought in Auger's unpaid wage complaint and his Supreme Court action. On May 16th, 2002 Auger successfully applied to add three defendants to his existing Supreme Court action and on May 23rd, 2002, Auger filed an Amended Writ of Summons in which he joined Kootenay Network, Gordon P. Soukoreff ("Soukoreff") and Timothy Totten ("Totten") as defendants in the Supreme Court action.

9. Auger subsequently obtained a "default judgment" against Kootenay Network since that latter firm failed to file an Appearance or Statement of Defence in response to Auger's court action. On March 4th, 2004, Auger successfully applied to have the default judgment set aside and he concurrently discontinued his Supreme Court action against all defendants. It would appear that Auger discontinued his Supreme Court action in order to preempt the possible summary dismissal of his complaint under former section 76(2) of the *Act* [now section 76(3)].

10. In light of the foregoing circumstances, the Director's delegate, who had earlier essentially held Auger's complaint in abeyance, agreed to continue his investigation and on March 11th, 2005 issued the Determination that is now under appeal.

11. The Director's delegate determined that it was appropriate to continue the investigation since there was no longer an active proceeding before the court [former subsection 76(2)(e)] nor was there a final court adjudication relating to Auger's unpaid wage claim [former subsection 76(2)(f)]—these latter provisions are essentially identical to subsections 76(3)(f) and (g) of the *Act* as it now stands.

12. The Director's delegate determined that Kootenay Network and iDevco were "associated corporations" under section 95 of the *Act* and that, accordingly, both firms were jointly and severally liable for Auger's unpaid wages. In this latter regard, the Director's delegate determined that Auger was entitled to two months' regular salary ($14,000) and a further $3,968.65 on account of unpaid vacation pay. Finally, the delegate concluded that Auger was never an "officer" of either Kootenay Network or iDevco.

REASONS FOR APPEAL

13. The Appellants filed a joint Appeal Form in which they seek the cancellation of the Determination on the grounds that the Director's delegate erred in law, failed to observe the principles of natural justice, and on the ground that they have new evidence that was not available when the Determination was being made [see subsections 112(1)(a), (b) and (c) of the *Act*].

14. The Appellants appeal form is supported by a 6-page brief (with various additional attachments) and a second 3-page submission dated and filed on May 19th, 2005.

15. The Appellants also allege that Auger was not entitled to pursue his complaint under the *Act* since he "is believed to be a Bankrupt". There is no evidence before me to corroborate that latter assertion and, in any event, even if that were so, his complaint could nonetheless proceed—see *Wallace v. United Grain Growers Ltd.,* [1997] 3 S.C.R. 701.

FINDINGS AND ANALYSIS

The Director's Delegate Erred in Law

16. The Appellants say that the Director's delegate erred in law in three broad respects.

17. The first alleged error of law relates to the status of the complainant. While the Appellants seemingly accept that Auger was an "employee", they assert Auger was an "officer" of one or both of the Appellant firms and, accordingly, not entitled to file a complaint under the *Act.* I might add, simply for the sake of completeness, that in my view Auger clearly falls within the statutory definition of "employee" found in section 1 of the *Act.*

18. As noted above, the delegate determined that Auger was not an "officer" of either Appellant firm. The Appellants assert that Auger held a "vice-president" title with iDevco (as did two other individuals; in addition, there was a "chief executive officer" and a "chief operating officer") and that Auger was one of the five highest paid employees (indeed, so say the Appellants, the highest paid employee) of iDevco. It should be noted that there is no evidence before me that Auger was ever formally recorded as an "officer" in the corporate records of either Appellant firm. There is no evidence before me, and the Appellants do not assert, that Auger was a director of either Appellant firm.

19. The *Act* does not define an "officer", however, traditionally, the Tribunal has relied on the provisions of the now-repealed *Company Act* for guidance. The definition of "senior officer" contained in that repealed statute includes a reference to persons who are "vice presidents" or are one of the five highest paid employees of the company. The *Business Corporations Act* now contains a significantly different definition of "senior officer". I will assume, for purposes of this appeal, that Auger could be characterized as an "officer" under the former *Company Act* (the legislation that was in force during Auger's tenure with the Appellants). That being said, however, the mere fact that Auger was an officer does not disentitle him from advancing an unpaid wage claim under the *Act.*

20. The delegate, in his Reasons, seemed to suggest that officers are, by reason of that fact alone, disentitled from claiming unpaid wages under the Act. This latter proposition constitutes, in my view, an error of law as it is wholly inconsistent with the Tribunal's jurisprudence—see, for example, Annable, B.C.E.S.T. Decision No. D342/98; confirmed on reconsideration: D559/98; 542617 B.C. Ltd. et al., B.C.E.S.T. Decision No. D339/01; Burns, B.C.E.S.T. Decision No. D139/04.

21. Unless it could be said that Auger was the "controlling mind" of one or both of the Appellant firms, Auger has, in his capacity as an employee of one or both of the Appellant firms, a statutory right to have his unpaid wage claim adjudicated under the *Act.* Officers are in an employment relationship with the corporation they serve and may access, except in exceptional circumstances that do not apply here, the wage protection provisions of the *Act.* Thus, the question of whether Auger was, or was not, an "officer" is simply not relevant given the fact that the available evidence does not suggest that Auger was a "controlling mind" of either firm (see e.g., *McPhee*, B.C.E.S.T. Decision No. D183/97; *Wong*, B.C.E.S.T.

Decision No. D648/01). Among other things, the suggestion that Auger was a "controlling mind" is wholly inconsistent with his having been dismissed due to, according to the Record of Employment issued by Kootenay Network, a "shortage of work".

22. The Appellants also assert that the Director's delegate erred in law by accepting and investigating Auger's complaint without first requiring him to complete a "self-help kit". I consider this latter assertion to be entirely without merit; indeed, I would go further and characterize the argument as being frivolous. As noted by the delegate in his written submission dated May 2nd, 2005, the Director's current administrative practice requiring complainants to complete a "self-help kit" did not come into effect until well after the date when Auger's complaint was filed (Auger's complaint was filed on January 10th, 2002). Further, and in any event, there is nothing in the *Act* that would require the Director to refuse to receive and investigate a complaint simply because the complainant did not complete a "self-help kit".

23. Finally, the Appellants allege that the Director's delegate erred in refusing to summarily dismiss Auger's complaint under the former subsections 76(2)(e) or (f) of the *Act.* The Appellants submit that once Auger filed his B.C. Supreme Court action the Director was "precluded…from acting, both legally and as to the spirit and intent of the legislation". The Appellants also submit: "...the closing of the case and then re-opening it is a de Facto [sic] new application outside the complainants [sic] six month window of opportunity to initiate action".

24. At the time the Determination was issued there was no pending judicial proceeding since Auger had already successfully applied to have his default judgment vacated against Kootenay Network. Further, upon obtaining that latter Order, Auger immediately discontinued his entire B.C. Supreme Court claim against all of the defendants (including the two Appellants). Clearly, the B.C. Supreme Court never adjudicated Auger's claim on its merits. Even if Auger had not applied to set aside his default judgment he would still have had to prove his monetary claim before obtaining judgment for a particular monetary sum. In my view, former subsection 76(2)(f) in effect codified the doctrines of *res judicata* and issue estoppel, and in the absence of a final determination regarding the merits of Auger's unpaid wage claim, neither doctrine could be invoked in this case.

25. It should also be noted that Auger, unlike the complainant in *McCallum*, B.C.E.S.T. Decision No. D275/03, never withdrew his unpaid wage complaint and the Director never closed his file; indeed, the record seems to indicate that when Auger was required by the delegate to elect to pursue a single dispute resolution procedure, he unequivocally elected to pursue the Appellants by way of the complaint process under the *Act* rather than through a B.C. Supreme Court proceeding.

26. In my opinion, the delegate did not err when he refused to exercise his subsection 76(2) discretion to summarily dismiss Auger's complaint.

The Director's delegate failed to observe the principles of natural justice

27. The Appellants assert that the Director's delegate displayed a "monumental bias reminiscent of a police state attitude". This Appellants' submission on this score amounts to rather extreme hyperbole that is wholly unsupported by any credible evidence. The Appellants' main objection appears to relate to the delegate's refusal to summarily dismiss Auger's complaint under former subsection 76(2)(e) or (f). However, I have already observed that I do not consider that the delegate improperly exercised his discretion when he refused to summarily dismiss Auger's complaint.

28. The Appellants also imply that the delegate must have been biased against them since he did not conclude that Auger was a corporate “officer”. With respect to this latter matter, I have already noted that the delegate may have erred (and I go no further than that) in finding that Auger was not a corporate officer, however, since Auger was not a controlling mind of either Appellant firm, he was nonetheless entitled to invoke the wage recovery provisions available under the *Act*. In my view, whether the delegate was right or wrong with respect to his legal conclusion that Auger was not a corporate officer, that fact, standing alone, cannot lead one to conclude that the delegate was biased against the Appellants.

29. The Appellants also state, under the general heading of “bias”, that the delegate “coached” Auger in a “clear and diabolical attempt to subvert the intent and purpose of the Act”. There is absolutely no evidence before me to corroborate this rather outlandish assertion. The delegate, so far as I can determine, merely carried out his statutory duty—he investigated a timely complaint, directed Auger to elect whether he intended to proceed via the *Act* or via court action, and ultimately determined the issues that were is dispute between the parties when Auger elected (as was his right) to proceed under the *Act*. The mere fact that the Determination was ultimately adverse to the Appellants in no way suggests that the delegate was tainted by bias.

30. The Appellants further note that “a complainant must act within six months of an event” and then note that the delegate “continues an action for three and one-half years from inception”. I presume that the Appellants are referring to the 6-month complaint period—however, the complaint in this case was timely. Clearly, there was a lengthy delay associated with the determination of Auger’s complaint. However, that delay was at least as prejudicial to Auger as it was to the Appellants; it must be remembered that Auger, by reason of the delay in determining his complaint has been denied, for some considerable time, the wages to which he was (and remains) entitled.

Evidence that was not available when the Determination was being made

31. The Appellants describe their “new evidence” as follows:

> New and previously submitted documentation is enclosed or attached. In some cases, recent access to files was achieved. **This particularly relevant to the wage rates of the company’s employees, Officers and Directors.** (exhibit #1). Correspondence, supporting regulations and law are included. Corporate share structure has also been added. (see exhibit #6).
>
> (**boldface** in original text)

32. New evidence is admissible under section 112(1)(c) of the *Act* if the evidence is material and cogent, highly probative, credible and, despite exercising all due diligence, was not discovered and presented to the delegate during the investigation or at a Branch-level evidentiary hearing (see *Davies et al.*, B.C.E.S.T. Decision No. D171/03). All of the documents that have been tendered as “new evidence” were available and could have been provided to the delegate during his investigation. Further, I might also add that the documents appear to have little, if any, materiality or probative value.

33. The appeal is dismissed.

ORDER

34. Pursuant to section 115 of the *Act,* I order that the Determination be confirmed as issued in the amount of **$20,411.03** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act,* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal