Employment Standards TRIBUNAL

An appeal

- by -

Matthew Wren carrying on business as Ad Star Advertising,
aka Ad Star Advertising Ltd.
("Wren")

- 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.: 2010A/101

DATE OF DECISION: September 28, 2010

DECISION

SUBMISSIONS

Terry J. Hewitt	Counsel for Matthew Wren carrying on business as Ad Star Advertising, aka Ad Star Advertising Ltd.
Nathan Gatabaki	on his own behalf
Darrell Little	on his own behalf
Scott Moloney	on his own behalf
Glen Smale	on behalf of the Director of Employment Standards

INTRODUCTION

1. On June 9, 2010, the Director of Employment Standards, through his delegate (the "delegate"), issued a determination pursuant to section 79 of the *Employment Standards Act* (the "*Act*") against Matthew Wren, carrying on business as Ad Star Advertising, aka Ad Star Advertising Ltd. ("Wren"), in the total amount of $28,771.82 (the "Determination"). Appended to the Determination are the delegate's 17-page "Reasons for the Determination" issued in accordance with section 81 of the *Act* (the "delegate's reasons"). The determination amount represent $25,771.82 in unpaid wages and section 88 interest owed to three individuals, alleged to have been former employees of Mr. Wren's advertising and marketing business, as well as $3,000 on account of six separate $500 monetary penalties (see *Act*, section 98). The wages are, of course, payable to the individual complainants and the monetary penalties are payable to the provincial government and are collectable by the Director of Employment Standards.

2. Mr. Wren appealed the Determination on the grounds that the delegate erred in law, failed to observe the principles of natural justice and because he has new evidence that was not available when the determination was issued (see *Act*, subsections 112(1)(a) to (c)). In addition, Mr. Wren sought an order pursuant to section 113 of the *Act* suspending the effect of the Determination pending the adjudication of the appeal (Tribunal File Number 2010A/102). On September 20, 2010, I issued reasons for decision refusing to order that the Determination be suspended (see BC EST # D099/10). I am now issuing my reasons for decision in the main appeal.

3. I am adjudicating this appeal based on the parties' written submissions (see *Act*, section 103, and *Administrative Tribunals Act*, section 36). I have before me written submissions filed on behalf of Mr. Wren, the Director of Employment Standards, and submissions filed by each of the three complainants. I have also reviewed the section 112(5) record that was before the delegate when the Determination was being made.

THE DETERMINATION

4. On February 5, 2010, Nathan Gatabaki ("Gatabaki"), Darrell Little ("Little") and Scott Moloney ("Moloney") all filed unpaid wages complaints with the Burnaby office of the Employment Standards Branch. Two of the complainants identified "Ad Star Advertising" as the employer while the other complainant named "Ad Star Ltd." as his employer. Mr. Gatabaki claimed over $3,400 on account of statutory holiday pay and unlawful wage deductions; Mr. Moloney claimed over $7,700 on the same basis together with a further claim for

unpaid regular wages; Mr. Little claimed nearly $68,000 including claims for vacation pay, statutory holiday pay and $57,600 in unauthorized wage deductions. The delegate subsequently investigated these complaints and concluded, firstly, that Mr. Wren had employed all three complainants and, secondly, that all three complainants had valid unpaid wage claims. The delegate awarded $4,064.52 to Mr. Gatabaki, $15,139.23 to Mr. Little and $6,568.07 to Mr. Moloney (all three amounts include section 88 interest).

5. Mr. Wren was, and apparently still is, the principal operator of a business known as "Ad Star Advertising" that carries on business in British Columbia from an office on Columbia Street in New Westminster. I understand that the business may have been operated, at some point in time, through a business corporation (Ad Star Advertising Ltd., a company headquartered in North York, Ontario) that was incorporated under the *Canada Business Corporations Act* but was dissolved on January 4, 2006, for having failed to file an annual report since 2003. Mr. Wren was one of two directors of this dissolved corporation. A corporate registry search undertaken by the delegate indicated that there was no registration in any of British Columbia, Manitoba or Ontario for a corporation known as "Ad Star Advertising Ltd.". That being the case, the delegate proceeded on the basis that Mr. Wren operated the business as a sole proprietor and Mr. Wren has not taken issue with that aspect of the Determination in his appeal documents.

6. As is detailed at page R3 of the delegate's reasons, and also discussed in my reasons concerning the section 113 suspension application, Mr. Wren did not participate in the delegate's investigation and that is the major issue that arises in this appeal – in other words, did Mr. Wren have a lawful excuse for having failed to respond to the delegate's various requests for information.

GROUNDS OF APPEAL

7. As noted above, Mr. Wren appeals the Determination based on all three of the statutory grounds set out in section 112(1) of the *Act*. His principal ground of appeal is that he was not given proper notice that the delegate was investigating the three unpaid wage complaints and thus was denied the opportunity to put his position forward for the delegate's consideration. Mr. Wren says that the delegate did not comply with section 77 of the *Act* and otherwise breached the principles of natural justice in making the Determination without giving Mr. Wren a prior opportunity to submit his evidence and argument to the delegate. Section 77 of the *Act* states: "If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond."

8. Mr. Wren says that if he had been given an opportunity to put his position before the delegate he would have made the following points (excerpted from "Schedule One" appended to Mr. Wren's Appeal Form):

- Mr. Little "was a completely independent contractor" rather than an "employee" as defined in section 1 of the *Act* and, accordingly, is not entitled to claim unpaid wages under the *Act*: "The complainant, Darrell Little, was a completely independent contractor, who sold the Appellant's gift certificates for a flat rate commission."
- Mr. Wren says that that the "business expenses" that were awarded to Mr. Little ($9,432.80 plus interest) are not recoverable because the parties' written "independent contractor" agreement "expressly stated that the complainant Darrell Little would be responsible for all of his own expenses, and did not require the Appellant to reimburse any expenses of Darrell Little, and all expenses incurred by Darrell Little, were expenses incurred entirely at his discretion, with no input whatsoever from the Appellant."
- Mr. Wren further says: "The complainants, Nathan Gatabaki and Scott Moloney, were neither employees or independent contractors of the Appellant, and in fact had no business relationship

with the Appellant whatsoever. The Appellant has *never* engaged the complainants Nathan Gatabaki and Scott Moloney for any purpose, and has *never* paid them any amount. The Appellant had on once occasion [sic] been introduced these complainants [sic] by the complainant Darrell Little. The Appellant understood that the Complainants, Nathan Gatabacki [sic] and Scott Moloney, worked directly for the complainant Darrell Little to assist him in selling the Appellant's gift certificates. The Appellant believes that the complainant, Darrell Little, continues to employee [sic] the complainants, Nathan Gatabaki and Scott Moloney. [*italics* in original text]

- Finally, Mr. Wren says that if the so-called "new evidence" had been before the delegate, he would have "concluded that the complainants were not employees of the Appellant, and…would have determined that [there] was no jurisdiction to make the Determination".

9. Although Mr. Wren has also raised "error of law" as a ground of appeal, that ground has not been specifically particularized although Mr. Wren's position appears to be that the delegate erred in finding there was an employment relationship between Mr. Wren and each of the three complainants.

FINDINGS AND ANALYSIS

10. The so-called "new evidence" tendered on Mr. Wren's behalf cannot reasonably be characterized as "evidence [that] has become available that was not available at the time the determination was being made" since the "new evidence" consists entirely of asserted facts about the relationship between Mr. Wren and the complainants (primarily concerning their alleged "employee" status) and other matters that were well-known to Mr. Wren long before the Determination was issued. Mr. Wren's position, it seems to me, is not that this evidence is "new"; rather, Mr. Wren says that the delegate did not consider this evidence because he (Wren) was unlawfully denied a fair opportunity to participate in the delegate's investigation.

11. Similarly, a conclusion that the delegate erred in law depends on whether – based on the evidence before him at the time the Determination was made – the delegate could have reasonably concluded that Mr. Wren employed all three complainants. On the other hand, if the delegate contravened section 77, it must then be determined whether the "new evidence" about the precise nature of the parties' relationships is sufficiently credible, material and probative to justify a cancellation of the Determination or a referral back order to the Director for reconsideration (see *Davies et al.*, BC EST # D171/03). Accordingly, since the section 77 "notice" issue is a threshold matter, I propose to first address this issue.

Opportunity to Respond

12. It is common ground that Mr. Wren did not provide any information to the delegate prior to the issuance of the Determination. The delegate set out, at page R3 of his reasons and more fully in his August 13, 2010, submission, the various efforts he made to obtain Mr. Wren's evidence and argument before the Determination was issued. Mr. Wren, through his legal counsel, says that he was never made aware of the fact that unpaid wage complaints had been filed against him until he received the Determination.

13. Mr. Wren is the principal operator of, and the complainants were determined to have been employed by, a business operating under the firm name "Ad Star Advertising". As noted above, this business may have been operated at some point through a business corporation, however, "Ad Star Advertising Ltd." was not a validly registered business corporation in any of British Columbia, Manitoba or Ontario when the complainants' unpaid wage claims were filed. Mr. Wren maintains an "Ad Star" business office at 403 Columbia Street in New Westminster but also says he "rarely visits" this office and "does not generally receive mail" at that office.

14. In May 2009 Mr. Wren applied for, and was granted, a New Westminster business licence under the name "Ad Star Advertising Ltd." to operate a business at 403 Columbia Street. Mr. Wren's business licence application identified his mailing address as 351 Berry Street in Winnipeg. The business licence is current for the 2010 calendar year. Mr. Wren's legal counsel says that the Berry Street address ceased to be his address in June 2009 and that he currently resides at 298 Springfield Road in Winnipeg. However, Mr. Wren's counsel does not say why Mr. Wren did not file any change of address information with the New Westminster business licence office or, perhaps more problematically, why Mr. Wren did not make the necessary arrangements with Canada Post to have mail redirected from the old Berry Street, to the new Springfield Road, address – these sort of arrangements are routinely undertaken when one moves residences and are easily and inexpensively arranged.

15. In any event, on February 24, 2010, the delegate wrote to Mr. Wren advising him about the three complaints filed by the respondents on February 5, 2010 (the letter also referred to a fourth complaint filed by another employee) – this letter was mailed, by registered mail, to "Ad Star Advertising Ltd." at its Columbia Street address and was also "c.c.'d" and sent, by registered mail, to Mr. Wren at his Berry Street address in Winnipeg. In other words, the delegate's letter was mailed to the very two addresses (namely, the Columbia Street and Berry Street addresses) that Mr. Wren identified in his business licence application as being the business address and his personal address for notification purposes. The delegate's letter included a section 85 demand for employment records relating to all four individuals identified in the February 24 letter. Canada Post records confirm that the delegate's February 24 letter was not able to be delivered to the business address and so a notification card was left (February 25) but the envelope was never claimed and was returned to the Employment Standards Branch on March 16, 2010 – the letter was available to be picked up from the local post office for nearly three weeks before it was returned to the sender. The same letter that was copied to Mr. Wren was not personally delivered to him and thus, once again, a notice card was left at his Winnipeg Berry Street address (on February 26); this letter was never claimed and therefore returned to the Employment Standards Branch on March 1, 2010.

16. The record shows that the delegate conducted some further investigation and became aware of Mr. Wren's Springfield Road address in Winnipeg. Accordingly, on March 10, 2010, the delegate re-sent the February 24 letter (including all enclosures) by registered mail to Mr. Wren at his Springfield Road address. Canada Post records confirm that on March 15, 2010, the post office attempted to deliver this letter to Mr. Wren but since he was not apparently at the location, a notice card was left advising him where he could pick up the letter. The letter was never claimed and thus was returned to the Employment Standards Branch on April 6 and was actually received at the Branch's Burnaby office on April 12, 2010.

17. Mr. Wren's legal counsel says that Mr. Wren was travelling from Hawaii to Vancouver on March 31 and did not return to Winnipeg until April 2, 2010 (and some documents have been submitted to corroborate that assertion). However, there is no explanation as to why Mr. Wren did not pick up the letter when he was given notice on March 15 that the letter was available for pickup – Mr. Wren does not say when he left Winnipeg for Hawaii prior to March 31, 2010. Further, if Mr. Wren returned to Winnipeg on April 2, he still had until April 6 to attend at the local post office and retrieve the letter. Mr. Wren's counsel does not say why Mr. Wren failed to attend the post office to pick up the envelope during this latter period.

18. One of the problematic aspects of Mr. Wren's submissions is that they have been crafted, in their entirety, by his legal counsel. Mr. Wren has not provided any evidence – say in the form of an affidavit – to attest to the assertions that have been advanced on his behalf. While I do not wish to be taken as suggesting that his counsel has stated anything other than that which Mr. Wren has been communicated to him, Mr. Wren's evidence on critical matters essentially amounts to rather incomplete hearsay evidence. Further, even if I were to accept these hearsay assertions, I am fully satisfied that Mr. Wren did have an opportunity to

participate in the delegate's investigation but, for whatever reason, chose not to avail himself of the opportunity that was afforded to him.

19. I am also satisfied that the delegate's section 85 demand (enclosed in the February 24 letter) was lawfully served on Mr. Wren. Section 122 states, among other things, that "demands" are "deemed to have been served" 8 days after mailing "if sent by registered mail to the person's last known address". Mr. Wren acknowledges that the Columbia Street address is his business address in British Columbia. He says he "rarely" visits the office and "generally" does not receive mail at that address. I find those assertions to be curiously drafted – whether he regularly visits the premises or not (or whether mail is "generally" sent to him at that office address), the fact remains that 403 Columbia Street is the office Mr. Wren maintains in British Columbia as the site of his firm's business operations. The delegate relied on address information provided by Mr. Wren himself and it seems to me if, in fact, the February 24 letter never reached Mr. Wren, he is entirely to blame for that circumstance. I would have thought, at the very least, Mr. Wren would have put some protocol in place to ensure that mail sent to him at the Columbia Street address would be forwarded on to him especially if he only "rarely" attends that office. In the circumstances of this case, I do not accept Mr. Wren's assertion that the delegate was obliged, by section 77 of the *Act*, to make further attempts to contact him, say by e-mail or telephone, when it appeared that he was avoiding service by registered mail.

20. I wish to briefly turn to the substance of the delegate's February 24 letter. The delegate clearly identified the possible "employee v. contractor" issue in his letter stating: "[the complainants] assert that [your] position is that they were self-employed" and continued "if my findings support your position then the complainants will be deemed to not be covered by the Act and no further activity will be pursued by the Branch". The delegate provide extensive information regarding sources that could be consulted about the matter and clearly advised Mr. Wren that he would likely be prejudicing himself if he did not provide the information that was being sought. The delegate asked for a timely reply and provided contact information in the form of a mailing address, a telephone number, a fax number and an e-mail address. In my view, the delegate did make a reasonable effort to advise Mr. Wren about the nature of the complaints that had been filed against him and, in addition, the delegate also advised Mr. Wren about the nature of the issues that were being investigated and how he could best respond to those issues.

21. It follows from the foregoing that I am not satisfied that the delegate fell short in terms of his section 77 obligation or otherwise failed to observe the principles of natural justice in making the Determination. I now turn to the "employee v. contractor" issue.

Alleged Errors of Law – Employee v. Independent Contractor; Who is the true employer?

22. As noted above, the so-called "new evidence" could have been provided to the delegate – indeed, the evidence now tendered on appeal is exactly the sort of evidence that was requested in the delegate's February 24, 2010, letter. Since Mr. Wren could have provided all of this evidence to the delegate before the Determination was issued – and was given a fair opportunity to do so – I am not prepared to consider this evidence on appeal.

23. Thus, the only remaining question before me is whether, on the evidence that *was* before the delegate, did he err in law firstly, in finding an employment relationship between Mr. Wren and each of the three complainants and, secondly, whether Mr. Little was responsible for any and all business costs under the terms of his agreement. I shall address these two matters in turn.

Employment Relationship

24. Mr. Wren says that Mr. Little was an independent contractor rather than an employee and that the other two complainants – Messrs. Gatabaki and Moloney – were not associated with him in any capacity (that is, he never engaged them as either employees or independent contractors).

25. The record includes two web pages relating to "Ad Star Advertising". The first refers to the business as "a Vancouver based promotional company specializing in advertising exclusively for the salon, spa and beauty industry". The second is an advertisement dated January 30, 2010, stating the firm is "immediately looking for approx. 10 new sales reps. to promote Salons and Day Spas locally in the greater Vancouver area" and that it is "Now Hiring 15 New Promotions Representatives" and "2 New Promotions Contractors". These advertisements appear to relate to the same sort of work that was apparently undertaken by two of the three complainants. The complainants all provided the delegate with evidence and argument supporting their position that they were employed by Mr. Wren including evidence that:

- Mr. Wren determined the working hours and when they worked and "penalized" them if they were absent or tardy;
- during the course of their duties they used tools and equipment provided by Mr. Wren;
- they travelled throughout western Canada on Mr. Wren's behalf; and
- they were paid on a straight commission basis (either daily or weekly) based on their sales performance.

26. In one of his submissions made to the delegate in the course of the latter's investigation, Mr. Little characterized himself as the "office manager" and described his arrangement with Mr. Wren and his general duties as follows:

> "…. [Mr. Wren and I] had a verbal agreement in which he stated that I would never be responsible for any operations costs of the business. My duties would be to place advertising, conduct interviews, hiring & firing, client acquisition, ongoing training of staff, some bookkeeping, and opening and closing the office on a daily basis. For which I would receive a set portion of all sales done through the company."

27. Mr. Wren's position is that Mr. Little was an independent contractor rather than an employee and in support of this position he now submits a "blank" 2-page "independent contractor agreement". As noted above, this document is not admissible on appeal and, in any event, I fail to see how a blank (undated and unsigned) document assists me. Further, Mr. Little says that he never had a written agreement and there is nothing in the record before me to contradict that assertion other than an unsupported statement from Mr. Wren's legal counsel. The record before the delegate indicated that Mr. Little took direction from, and reported to, Mr. Wren and that he managed (working out of premises leased by Mr. Wren) the day-to-day affairs of Mr. Wren's business. Mr. Little was paid out of revenues primarily payable to Mr. Wren (Ad Star) and he deposited net sale proceeds into an Ad Star bank account. Mr. Little and the other two sales representatives were selling (and were being directed to sell) products (for example, gift certificates) that Mr. Wren had created through his "Ad Star" business model. The fact that the complainants' compensation was commission-based is irrelevant since the *Act* specifically envisions payment by commission (see section 1 definition of "wages"). I am satisfied that the delegate could reasonably conclude, based on the evidence before him, that there was an employment relationship, governed by the terms of the *Act*, as between Mr. Little and Mr. Wren. In light of that finding, Mr. Wren was obliged to reimburse Mr. Little for any business costs that Mr. Little incurred in the course of the his employment duties and to pay Mr. Little vacation pay on all of his earnings.

28. Mr. Wren's case as it relates to Messrs. Gatabaki and Moloney is that he had no business relationship with either gentleman, either as an employer or someone who engaged them on an independent contractor basis. This assertion stands in marked contrast to the evidence that was before the delegate including evidence that "Ad Star" was "hiring" sales representatives for its New Westminster office and the significant control that was exercised over their activities by Mr. Wren through his branch manager, Mr. Little. I accept that the evidence – recounted in the delegate's reasons at pages R3-R7 – amply supports the determination that Messrs. Gatabaki and Moloney were Mr. Wren's employees whose day-to-day activities were largely directed and controlled by Mr. Little (acting on behalf of Mr. Wren). Since both were employees under the *Act*, they were entitled to the benefit of that statute including the provisions relating to minimum daily pay, vacation pay, statutory holiday pay and the right to recover business expenses they incurred while carrying out their employment duties.

29. Finally, I might add that Mr. Wren's position that he had only met Messrs. Gatabaki and Moloney on a single occasion and "never" paid them any funds appears, based on the record before me, to be untenable.

ORDER

30. Pursuant to section 115(1)(a) of the *Act*, I confirm the Determination as issued in the total amount of $28,771.82 together with whatever further section 88 interest that may have accrued since the date of issuance.

Kenneth Wm .Thornicroft
Member
Employment Standards Tribunal