

An appeal

- by -

World Internet Broadcasting Network Corp. operating as MYCityRadio.com
and Global Tree Technologies 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

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2004A/64

DATE OF DECISION: June 15, 2004

DECISION

SUBMISSIONS

On behalf of Global Tree Technologies:	Enid Marion, Harris & Company
On behalf of the Director:	Shelly Burchnell
On behalf of Joe Kiehley and Brian Else:	Cameron Ward, A. Cameron Ward & Company
On her own behalf:	Ani Kyd
On her own behalf:	Patricia Hardin
On his own behalf:	Greg Felton
On his own behalf:	Jon Mills
On his own behalf:	Patrick Vila
On his own behalf:	Robert W. Mackin Jr.

OVERVIEW

Global Tree Technologies Inc. (“GTT”) appeals a Determination of the Director of Employment Standards (“the Director”) issued March 5, 2004. A delegate of the Director found that World Internet Broadcasting Network Corp. operating as MYCityRadio.com (“WIBN”) and GTT were associated entities under section 95 of the Act. The delegate also found that WIBN/GTT contravened sections 17, 18, 44, 45, 58(3) and 63 of the *Act* in failing to pay 17 employees wages, annual vacation pay and compensation for length of service. The delegate ordered GTT and WIBN to pay \$50,973.69 to the Director on behalf of those employees.

GTT argues that the delegate erred in law in finding that the individuals were employees rather than independent contractors. GTT also contends that the delegate erred in law in treating GTT as “one person” with WIBN. It submits that WIBN is responsible for its liabilities, and there is no basis to include GTT in the Determination. Finally, GTT submits that it has new evidence that has become available that was not available at the time the Determination was being made that would demonstrate the independent nature of the relationship with certain of the claimants.

FACTS

The appellant does not appear to dispute the following facts set out in the Determination.

GTT is an extra provincial company registered in British Columbia. WIBN is a wholly owned subsidiary of GTT, and is incorporated in British Columbia. GTT and WIBN share the following common directors: Thomas Kennedy, Elston Johnston, Bruce Hirshe and Donald McLeod. Mr. Kennedy is the President of GTT. GTT and WIBN share the same address, which is also the registered and records office for WIBN and the head office of GTT in British Columbia. Both companies were active and in good standing at the time the complaints were filed.

WIBN was established to develop internet broadcasting services including internet radio through MYCityRadio.com. GTT owned shares of WIBN and owned or leased all WIBN assets. GTT loaned WIBN start up money for MYCityRadio.

Live web broadcasting through MYCityRadio station began in September 2000. On August 2, 2001, GTT suspended MYCityRadio operations because of financial difficulties. GTT management removed the equipment and closed the premises without notice to the employees. During the last six months of operation, employee wages were paid through GTT payroll accounts and WIBN staff received GTT payroll cheques and statements. WIBN accounts were consolidated in GTT's August 31, 2001 and 2000 financial statements.

Following closure of the station, the seventeen employees filed complaints with the Employment Standards Branch alleging they were owed wages, annual vacation pay and compensation for length of service. Four of the seventeen complainants, Brian Else, Patricia Hardin, Shellye Andrews, and Ani Kyd, although initially hired by WIBN as independent contractors, contended they were in fact employees of GTT/WIBN.

On December 3, and 28, 2001, the delegate issued Demands for Payroll records on both GTT and WIBN. GTT and WIBN retained the services of Dawn Pacific Management Ltd. ("Dawn") to, among other things, provide information to the Director. On or about December 21, 2001, Dawn provided the delegate with employee records from January 1, 2000 until December 1, 2001.

In a letter dated January 8, 2001, and copied to Mr. Kennedy, GTT and WIBN, Dawn wrote to the delegate, in part, as follows:

We also wish to confirm your telephone conversation on January 2, 2002 with Mr. Tom Kennedy of Global Tree Technologies, Inc. wherein you granted the Company an extension of time to produce the documents...

Mr. Kennedy has advised us, and we understand that he has also advised you, that the Company realises that there are certain monies owed to previous employees. Due to unforeseen circumstances, the company was not in a financial position to make the payments. The Company believes it will be in a position to make the required payments to the employees in approximately 60 days.

...

As per our letter of December 20, 2001, the Company is presently undergoing an independent audit of their records for the fiscal year ended August 31, 2002. In addition, the Company has arranged for an audit of the payroll records and the preparation of the Employee T4's by the Canadian Customs and Revenue Agency, which will take place on January 16, 2002.

...we feel that a sharing of information with ... the CCRA may serve your purposes.

Although some documents were provided to the delegate in January 2002, no other documents were provided. Dawn confirmed that CCRA had ruled that the four "independent contractors" were actually employees of WIBN working under contracts of service. Although Dawn advised the delegate she would provide the Branch with copies of the rulings, she did not do so.

In a telephone discussion with the delegate, Mr. Kennedy acknowledged wages were outstanding, but indicated that GTT and WIBN were not in a position to pay. Mr. Kennedy did not return further telephone calls from the delegate.

The delegate issued the Determination based on the information provided by GTT in January, 2002, and the evidence provided by the complainants.

The delegate determined that GTT and WIBN were associated entities under section 95 of the Act, that employees hired as independent contractors were actually employees as defined by the Act, and that the complainants had not been paid wages and benefits in accordance with the Act.

The delegate found that the CCRA ruling, while not binding on the Director, was of evidentiary value and merit in determining whether the complainants were employees or self employed contractors, since both applied the common law tests of control, integration and permanency in determining the status of an employment relationship.

The delegate set out the statutory definitions of employee, employer and work, and made passing references to several common law tests to determine whether an employment relationship existed. With respect to the four complainants who had been hired as independent contractors, the delegate found that all performed work and were required to provide personal services to WIBN, they were all directed, instructed, supervised and controlled by WIBN, and performed services integral to the operations of the business. Two were paid per show, one was paid per hour, and one was paid a monthly salary. The delegate found that none had any chance of profit or risk of loss.

The delegate found that the complainants were entitled to wages, noted that Mr. Kennedy had acknowledged that they were, and, in the absence of any evidence other than the 2002 payroll records from the employer, calculated wages outstanding based on those records and evidence submitted by the complainants.

ISSUES TO BE DECIDED

1. Did the delegate err in law in finding that GTT and WIBN were associated corporations under section 95 of the Act?
2. Did the delegate err in law in finding that the complainants were employees rather than independent contractors?
3. Is there new and relevant information that was not available at the time the Determination was being issued that would led the Director to a different conclusion on the material issue?

ARGUMENT

Counsel for GTT submits that the delegate improperly applied the test for determining whether or not a person was an employee or an independent contractor. In particular, she submits that she did not “give effect to the fact that Else, Hardin, Andrews and Kyd were all independent contractors who were free to pursue other commercial interests besides providing services solely to the Appellant”, and improperly relied on hearsay evidence regarding the CCRA determination. Further, counsel submits that the delegate failed to apply the proper test for determining employee status but considered an amalgam of several tests, and in doing so, failed to give appropriate weight to certain criteria, including the fact that some of the individuals had their own companies and billed the company for services.

Counsel further submits that the delegate's failure to identify the test used in arriving at the Determination and to apply a principled analysis constitutes a denial of natural justice in making the Determination.

Counsel further submits that the delegate erred in law in treating GTT as "one person" with WIBN.

Finally, counsel submits that GTT has completed an office move and has located relevant records which support its position "regarding the independent nature of the relationship with certain of the claimants".

The delegate submitted the record of material provided to the Branch with respect to the complaints. She indicated that she had difficulty in obtaining the cooperation of Mr. Kennedy and Dawn during the investigation. She stated that, in the only telephone conversation she had with Mr. Kennedy, he identified himself as the President of GTT and that GTT had made an investment in WIBN. Mr. Kennedy told the delegate that all WIBN assets were owned or leased by GTT, and that Mr. Mackin Sr. and Don McLeod were the driving force behind WIBN. He further acknowledged that wages were outstanding, but that the company was in no position to pay.

Mr. Kennedy advised the delegate that Dawn would provide her with any further documentation and information she would require to complete her investigation. She says that Mr. Kennedy did not return any telephone calls after that time, and that Dawn also did not return telephone calls or respond to her letters.

All of the employees' submissions contend the appeal is without merit, and that it should be dismissed.

Ms. Hardin submitted that Mr. Else, Ms. Andrews (Klink), and Ms. Kyd were hired as talk show hosts and contractors. She says she was hired as an employee, and could not perform her job anywhere else. She submitted that she was at the premises daily from 9:30 am until 4:00 p.m. each weekday, and that she used MYCityRadio's equipment, computers and telephones. She says that she was hired to perform a service for MYCityRadio, and that she was not in business for herself.

Mr. Mackin submitted that he was a full time producer for Mr. Keithley's show, and produced shows hosted by Ms. Ayd, Ms. Klink and Mr. Else. Mr. Mackin submitted that Ms. Kyd, Mr. Else, Ms. Klink and Ms. Hardin were correctly defined as employees by the delegate. He said that Ms. Hardin's production duties appeared to be identical to his, and that all four worked hours set by the employer, using the employer's equipment. Furthermore, he submits that their functions were integral to the operation of MYCityRadio.

DECISION

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- a) the director erred in law
- b) the director failed to observe the principles of natural justice in making the determination; or
- c) evidence has become available that was not available at the time the determination was being made

The burden of establishing the grounds for an appeal rests with an Appellant. GTT must provide persuasive and compelling evidence that there were errors of law in the Determination, or that there was a

denial of natural justice, as alleged. Further, if there is new and relevant evidence, it must meet the test of the provision of new evidence on appeal.

Having reviewed the submission, I am not persuaded that the Determination should be cancelled. I will address each ground of appeal separately.

Errors of Law

1. Did the delegate err in associating GTT with WIBN?

Section 95 of the Act provides as follows:

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 person 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 or in an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.

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

The delegate found that GTT and WIBN were separate companies, each of which was carrying on a business, trade or undertaking during the time relevant to the issues on appeal. That these were not 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) The delegate also found that the companies shared some directors, and registered offices. She further found that GTT management made the decision to shut down MYCityRadio, demonstrating that GTT had control over WIBN operations. Although the delegate did not expressly state as much, I infer that the reason for treating GTT and WIBN as one employer was to ensure payment of wages to the claimants. I find no error in her conclusion, and deny the appeal on this ground.

2. Did the delegate err in finding the complainants, and in particular four “independent contractors” to be employees?

While the delegate’s analysis was scanty, she did refer to the statutory definitions of employer and employee, and the common law tests of an employment relationship. She also noted that Mr. Kennedy, a director or officer of GTT and WIBN, acknowledged that the complainants were employees, as did Dawn, GTT and WIBN’s agent. I do not find the brevity of the analysis to constitute an error of law. Furthermore, irrespective of what common law test the delegate applied, I find no error in the delegate’s conclusion.

Section 1 of the *Act* defines employee to include

- (a) a person....receiving or entitled to wages for work performed for another, and
- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee....

An employer is defined as including a person

- (a) who has or had control or direction of an employee, or
- (b) who is or was responsible, directly or indirectly, for the employment of an employee.

Work is defined as meaning "the labour or services an employee performs for an employer whether in the employee's residence or elsewhere."

Remedial and benefits conferring legislation is, in general, to be given broad and liberal interpretation, as are definitions contained within legislation itself. (see s. 8, *Interpretation Act*, R.S.B.C. , *Fenton v. Forensic Psychiatric Services Commission* (1991) 56 BCLR (2nd) 170, *Re Rizzo & Rizzo Shoes* [1998] 1 S.C.R. 27, and *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986)

The overriding test is whether the complainants "performed work normally performed by an employee," or "performed work for another." The Tribunal has held that the definition is to be broadly interpreted: (*On Line Film Services Ltd v Director of Employment Standards* BC EST #D 319/97), and the common law tests of employment are subordinate to the statutory definition (*Christopher Sin* BC EST #D015/96).

The employer’s records show that GTT/ WIBN required each employee to complete time sheets on a daily basis. Records show that employees were paid bi-weekly, and that CPP, Income tax and EI deductions were taken. The employer’s records demonstrate that Bell, Felton, Harvey, Gander, Keithley, Mackin, Laertini, Mills, Romano, Roworth, Smith, Soligo, Villa were all employees. Some employees (Felton, Gander, Mackin, Laertini, Romano, Smith and Villa) also provided copies of their T-4’s and a Record of Employment (ROE) signed by Thomas Kennedy.

The delegate also considered the “independent contractor” status of Ms. Hardin, Ms. Andrews (Klink), Mr. Else and Ms. Kyd, and reviewed company records and those complainant’s descriptions of their job duties, Mr. Kennedy’s admissions, and Dawn’s confirmation of the conclusions of CCRA. Although counsel for GTT submits that it was an error for the delegate to rely on “hearsay” evidence from CCRA, the fact is that the information confirming the employment status of those four employees came from GTT/WIBN’s agent, not from CCRA. Given that the information was provided by the employer, I find the delegate did not err in relying on it, particularly in the absence of any other evidence to the contrary.

I am satisfied that the delegate did not err in concluding that Hardin, Andrews, Else and Kyd were all “entitled to wages for work performed for” GTT/WIBN, and that GTT/WIBN had had “control or direction” of those individuals.

Delegate failed to observe the principles of natural justice in making the determination

Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker.

The delegate was in contact with both Mr. Kennedy and Dawn, GTT/WIBN’s agent. Some documentation was provided, and both Mr. Kennedy and Dawn’s admitted that wages were owed and Dawn confirmed that CCRA had found Ms. Hardin, Mr. Else, Ms. Andrews and Ms. Kyd to be employees, before Mr. Kennedy and Dawn ceased to cooperate with the delegate’s investigation. Having provided this information and failing thereafter to co-operate with the delegate, GTT cannot now substantiate an appeal on the basis that it was denied natural justice.

New Evidence

In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

1. 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;
2. the evidence must be relevant to a material issue arising from the complaint;
3. the evidence must be credible in the sense that it is reasonably capable of belief; and
4. 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.

Counsel for GTT does not provide the “new evidence” with the appeal submissions, not does she specify what that new evidence is save for suggesting it is relevant to the issue of the “independent nature of the relationship with certain of the Claimants”.

Further, counsel does not disclose when the company move occurred, where the move was to or from, or why, with the exercise of due diligence, that material could not have been provided to the delegate during the investigation, which occurred over the course of two and one half years.

I find the four conditions set out in *Bruce Davies* have not been met, and deny the appeal on this basis.

The appeal is dismissed.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated March 4, 2004, be confirmed, together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal