

An appeal

- by -

Christina Briggs
("Briggs")

- 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: David B. Stevenson

FILE No.: 2006A/100

DATE OF DECISION: October 26, 2006

DECISION

SUBMISSIONS

Christina Briggs	on her own behalf
Dwight H. Ferguson	on behalf of Sapphire Logistics Ltd.
J.R. Dunne	on behalf of the Director

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “*Act*”) by Christina Briggs (“Briggs”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on July 21, 2006.
2. The Determination was made on a complaint filed by Briggs against Sapphire Logistics Inc. (“Sapphire”). The complaint alleged Sapphire had contravened *Act* by failing to pay regular wages, annual vacation pay and commissions to Briggs.
3. The complaint was dismissed because the Director concluded Briggs was not an employee under the *Act* and, consequently, the *Act* did not apply to her complaint.
4. Briggs says that conclusion is wrong.

ISSUE

5. The issue raised in this appeal is whether the Director erred in concluding Briggs was not an employee under the *Act*.

THE FACTS

6. The Determination provides the following background:

Sapphire operates a freight forwarding business which falls within the jurisdiction of the *Act*. Briggs was one of three Directors/Officers of Sapphire and the only Director/Officer who was engaged on a full time basis to carry out its business. Briggs became the Operations Manager on January 24, 2005 and was paid a yearly salary of \$36,000.00. Briggs was given verbal notice of termination on September 23, 2005 and her last day of work was October 7, 2005. Briggs is claiming regular wages for her last week of work as well as annual vacation pay and outstanding commissions.

7. The Director conducted a complaint hearing, which was attended by Dwight Ferguson (“Ferguson”) and Darrell Keen (“Keen”), on behalf of Sapphire, and by Briggs on her own behalf. The Determination notes the following evidence was given at the hearing:

- Briggs said she was a shareholder of Sapphire and had agreed to become a director of the company.
- Briggs was the only director who was employed by the company.
- Briggs was the Operations Manager and was in charge of the business operation, which included responsibility for growing the business and deciding who its customers and vendors would be.
- Briggs was responsible for keeping the other directors and shareholders informed of any problems and/or assistance she needed in the company’s operation.
- Briggs had complete decision making authority over how to handle the business of freight moving and brokerage and all related responsibilities.
- Briggs made the decision to move the location of the company’s office.
- Ferguson said Briggs was responsible for managing her own time.
- Briggs had cheque signing authority, along with one or more of the other directors of the company, but had no control over the financials of the company.
- Sapphire was created as a vehicle to set Briggs up in business.
- Ferguson and Keen were also directors and shareholders of the company.
- Keen had no direct involvement in the operation of the business.
- Ferguson was responsible for the cash flow and accounting functions for the company.
- Briggs, Ferguson and Keen jointly agreed to a compensation package for Briggs’ running the company that included a base salary, commission and benefits.
- Ferguson said the commission was only payable if there was cash available and the company was never in a position to pay.
- Ferguson gave Briggs verbal notice of the termination of her employment with the company on September 23, 2005.
- Ferguson said he retracted the notice after talking it over with Briggs.
- Ferguson said the decision to terminate Briggs was caused by a falling out between him and Keen, on the one hand, and Briggs on the other.

- The breakdown was described by Ferguson as resulting from a meeting called by Briggs at which Briggs' current employer (who attended at the invitation of Briggs) attempted to take control of the company.
- Briggs said she was not aware her current employer was going to do this.
- About a week after the notice of termination was retracted, Briggs told Ferguson she would accept the termination.
- Ferguson said that Sapphire ceased doing business on February 11, 2006 and had significant liabilities and no assets or other monies.

8. The Determination indicates that most of the oral evidence given by the parties was not contradicted. On the issue of whether Briggs was an employee under the *Act*, the Director reached the following conclusions from the evidence:

- Briggs was the only one of the three directors of Sapphire who provided remunerated services for the company.
- Briggs was the person substantially responsible for managing the business and had full authority over the operations of the business.
- Briggs had significant control over the operation and direction of the business and as such was one of the "controlling minds" of the company.
- There was no evidence in the form of corporate resolutions or written agreements showing a decision by the company to engage Briggs as an employee.

ARGUMENT

9. Briggs contends that, although she was a director and shareholder of the company, she was nothing more than a glorified employee. She says she had no decision making authority over the company itself; the decisions which she did make pertained to the operation of the business and were no different than any employee charged with the responsibility of managing the daily operations of a business.
10. Ferguson, responding to the appeal on behalf of Sapphire, repeats the position taken during the complaint process that he, Keen and Briggs were all engaged in a business venture into which he contributed his experience with business accounting functions, Keen contributed some initial funding and set up lines of credit for the business and Briggs contributed her skill and experience to operate the business.
11. The Director submits the appeal represents an attempt by Briggs to enhance the evidence and re-argue her case. The director also argues the appeal contains new evidence that does not satisfy the test for admitting new evidence on appeal. I do not need to decide this argument.

ANALYSIS

12. An appeal to the Tribunal is intended as an error correction process, with the burden being on the appellant to show there is an error in the Determination that compels the Tribunal's intervention under Section 112 of the *Act*. An appeal is not intended simply as an opportunity to restate one's position on the complaint or to reiterate assertions of fact that have not been accepted by the Director on the chance the Tribunal will reach a different conclusion on the complaint.
13. Subsection 112(1) of the *Act* sets out the grounds on which an appeal may be brought:
112. (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
- (a) *the director erred in law;*
- (b) *the director failed to observe the principles of natural justice in making the determination;*
- (c) *evidence has become available that was not available at the time the determination was made.*
14. In this appeal, Briggs submits that the Director erred in concluding she was not entitled to claim wages against the Company under the Act. While Briggs has framed the appeal as a failure by the director to observe principles of natural justice, it is more properly framed as a question of whether Director's finding that Briggs was a "controlling mind" of the business was an error of law.
15. The evidence clearly shows that Sapphire was a business venture involving Ferguson, Keen and Briggs. The material in the file suggests Ferguson's involvement was initially based on a desire to assist Briggs in starting her own successful business. The arrangement under which Briggs came to be the Operations Manager appears to have been a central feature in setting up the business. It was, in a very real sense, Briggs' contribution to the success of the business. In a document submitted at the complaint hearing, Briggs speaks of how the share structure was developed:
- At the time because I had no financials, I did not argue to this share structure as all I had to bring to the table was my skill and customers, but did not argue it for two reasons A) It was still 100% my company, darrell [sic] was to collect his bonus as a pay back to the investment, and I have them on tape saying "It's Your [sic] company, Chriss" and B) I had no funding of my own and was extremely grateful for the opportunity Darrell was assisting me with.
16. The argument by Briggs that she was nothing more than a glorified employee making the same kinds of decisions that any employee in her position would make ignores that Sapphire was set up as her company and she exercised considerable, and virtually exclusive, decision making authority over the operation and direction of the company. The full scope of her authority is demonstrated in her involvement in establishing and structuring the company and in bringing the business proposal to Ferguson and Keen that effectively finished the company. In respect of the latter, Briggs unilaterally decided to set up the meeting of the directors and shareholders of the company where the proposal was presented and advocated vigorously for its acceptance. The fact she did not prevail in her view of the proposal is irrelevant. As the Tribunal stated in *Lorna Lee Burns*, BC EST #D139/04:

It is not necessary, however, that a person be the prevailing authority within a company in order to be considered to be a "controlling mind". What is required in that context is evidence showing the

person to be part of the group making key decisions relating to the business (see, for example, *Richard Trus*, BC EST #D520/99). There is ample evidence in the material on file, confirmed in the appeal, that Burns participated in such decisions, even if she did not get her way on all of them.

17. But even more compelling than Briggs' involvement in the above decisions, is the evidence that she made all the key decisions for the company from an operational perspective. Ferguson and Keen appear to have relied almost entirely on her in respect of matters involving the operation of the business. She did not answer to anyone else in respect of those decisions. Those circumstances make her something considerably more than a "glorified employee" and lead to the inescapable conclusion that Briggs was a controlling mind of the business.
18. The conclusion that, as a controlling mind of the company, Briggs should not be considered an employee for the purposes of the *Act* is consistent with the principles set out in the cases identified in the Determination. Briggs has not shown those principles do not apply to her or why she should be considered an employee for the purposes of the *Act*. The appeal is dismissed.

ORDER

19. Pursuant to Section 115 of the *Act*, I order the Determination dated July 21, 2006 be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal