Employment Standards TRIBUNAL

An appeal

- by -

John Asfar
("Asfar")

- 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/113

DATE OF DECISION: October 13, 2010

DECISION

SUBMISSIONS

John Asfar	on his own behalf
Malcolm Green	on his own behalf
Terry Hughes	on behalf of the Director of Employment Standards

INTRODUCTION

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), John Asfar ("Asfar") appeals a Determination issued by a delegate of the Director of Employment Standards (the "delegate") on June 30, 2010, ordering Mr. Asfar to pay Malcolm Green ("Green") the sum of $940.51 on account of unpaid wages, vacation pay and section 88 interest (the "Determination"). Further, and also by way of the Determination, the delegate levied a $500 monetary penalty against Mr. Asfar under section 98 of the *Act*. Thus, the total amount payable under the Determination is $1,440.51. The delegate issued the Determination following his investigation into Mr. Green's unpaid wage complaint.

2. I am adjudicating this appeal based on the parties' written submissions and, in that regard, I have before me submissions filed by Mr. Asfar, Mr. Green and by the delegate. I also have before me the Determination and accompanying 8-page "Reasons for the Determination" (the "delegate's reasons") as well as a copy of the section 112(5) "record" that was before the delegate.

GROUNDS OF APPEAL

3. There are two grounds of appeal identified in Mr. Asfar's original appeal documents. First, he says that the delegate erred in law (section 112(1)(a)) in determining that he was Mr. Green's employer. He says that the actual employer was a corporation – PPSA Secured Advance Corporation ("PPSA"). Second, he says that he has "new evidence" that supports the assertion that PPSA was the employer (section 112(1)(c)).

4. In his final reply submission (dated and filed September 16, 2010), Mr. Asfar changed his attack somewhat and asserted that the identity of the actual employer was irrelevant since Mr. Green was not owed any wages. He also said that even if Mr. Green were owed wages, the vacation pay entitlement should be fixed at 4% rather than the 6% allowed by the delegate.

FINDINGS AND ANALYSIS

5. I shall deal with each of the grounds of appeal in turn commencing with the "true employer" issue.

The True Employer

6. In his initial appeal submission, Mr. Asfar says that PPSA was Mr. Green's employer. Mr. Asfar says that wage payments made to Mr. Green and remittances forwarded to the Canada Revenue Agency were drawn on a PPSA account thus making PPSA an employer under the federal *Income Tax Act*. Mr. Green's T-4 "Statement of Remuneration Paid" for 2009 was also issued by PPSA. I suppose it is possible that PPSA is an "employer" of Mr. Green for purposes of the federal *Income Tax Act*, but it must be remembered that the

current unpaid wage dispute arises under, and is governed by, the provisions of the British Columbia *Employment Standards Act*. Thus, the issue is not whether PPSA might be an employer under the *Income Tax Act* but, rather, whether Mr. Asfar was correctly identified as an "employer" under the *Act*.

7. In my view, there was overwhelming evidence before the delegate to support his finding that Mr. Asfar was Mr. Green's employer for purposes of the *Act*. Under the *Act* an "employer" (defined in section 1) includes a person who directs and controls another person and a person who was directly or indirectly responsible for a person's employment. In the instant case, the period of compensable employment ran from September 1 to 18, 2009, during which time Mr. Green was providing website development services for Mr. Asfar and certain other entities that he controlled. Clearly, this was a "personal services contract" as is evidenced by Mr. Asfar's own documents. For example, in his December 24, 2009, submission to the delegate, Mr. Asfar states that he engaged Mr. Green and personally paid his wages (as he had promised to do). He also states in this same letter that Mr. Green was using tools and equipment owned by Mr. Asfar.

8. In addition, the delegate had before him a series of e-mails (reproduced in part at page R3 of the delegate's reasons), that include the following statements by Mr. Asfar to Mr. Green: "You work for *me*"; "*I* will be paying you your pay cheque *myself*"; and when their relationship appeared to be taking a wrong turn Mr. Green stated "we can terminate *our relationship*" (my *italics*). All of these statements bespeak of an employment relationship between the parties.

9. As for the notion that PPSA was the "true employer", this is problematic since the company was not incorporated until October 9, 2009, (about one month after the period of employment at issue here). Thus, if Mr. Asfar purported to contract with Green on behalf of PPSA, the legal situation would be that Mr. Asfar, as agent, was purporting to contract on behalf of a non-existent principal. That being the case, he would be personally liable to perform the obligations entered into on behalf of the non-existent principal (see, for example, *Maple Engineering & Construction Canada Ltd. v. 1373988 Ontario Inc.*, 2004 CanLII 46655 (Ont. S.C.); *Denbow v. Mihalcin*, 2004 MBQB 9; and *Lewko v. Peak Mechanical Ltd.*, 2005 SKQB 83 for some recent applications of this rule).

10. Finally, and quite apart from the above discussion, the nature of the representations made by Mr. Asfar to Mr. Green likely fall within the ambit of section 8 of the *Act* (employment inducements) in which case Mr. Green would be entitled to enforce his unpaid wage claim against Mr. Asfar under section 79(2) of the *Act*.

New Evidence

11. Strictly speaking, none of the proffered documents are "new" since they all could have been provided to the delegate during the course of his investigation. More importantly, these documents are wholly irrelevant since they do not speak to the question of Mr. Asfar's status as an "employer" under the *Act*. Rather (and this is placing the documents in the most favourable light possible from Mr. Asfar's perspective), they only speak to whether PPSA might also (along with Mr. Asfar) have been characterized as an employer under the *Income Tax Act*. As noted above, I have a great deal of difficulty with the fundamental proposition that PPSA could, as a matter of law, be characterized as Mr. Green's employer for a period of service that was completed before the company came into existence.

Calculation of Unpaid Wages

12. The delegate had conflicting evidence before him regarding the total amount of wages owed to Mr. Green. As is noted in the delegate's reasons (page R4), Mr. Green advanced a claim for nearly $2,000 but was

ultimately awarded only about one-half that figure. The delegate carefully scrutinized the evidence and based on the record before him, I cannot say that his conclusions are clearly wrong save for one matter, namely, the calculation of vacation pay.

13. The delegate, at page R6 of his reasons, determined that the employment relationship between the parties commenced as of September 1, 2009, and only lasted for a couple of weeks: "I find John Asfar was the employer starting September 1, 2009" and later on at the same page: "The email by Mr. Green stating he was not working past September 18 is un-contradicted. I find that the evidence does not support a finding that work was performed during the week of September 21 to 25, 2009."

14. The delegate did *not* find that there was an express agreement to pay 6% vacation pay and Mr. Asfar was *not* declared to be a "successor employer" under section 97 such that Mr. Green's prior service (and concomitant *Act* entitlements) was preserved and carried forward. That being the case, it would seem that Mr. Green was only entitled to vacation pay at a rate of 4% consistent with section 58 of the *Act* (I calculate this entitlement to be $134.89). I propose to vary this one aspect of the Determination.

ORDER

15. Pursuant to section 115(1) of the *Act*, the Determination is varied by deleting the $202.34 vacation pay award and substituting an award of $134.89 in its place. In all other respects, the Determination is confirmed. Mr. Green is also entitled to interest on the total amount awarded that shall be calculated by the Director of Employment Standards in accordance with section 88 of the *Act*.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal