

An appeal

- by -

0699027 BC Ltd. carrying on business as Speedy Brake Centres
("Speedy")

- 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: Carol L. Roberts

FILE No.: 2011A/106

DATE OF DECISION: October 17, 2011

DECISION

SUBMISSIONS

Raymond Chernoff	on behalf of 0699027 BC Ltd. carrying on business as Speedy Brake Centres
Emily K. Yao	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by 0699027 BC Ltd. carrying on business as Speedy Brake Centres (“Speedy”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued July 5, 2011.
2. Ronald Sese was hired June 1, 2003, by Apollo Brake Centres (“Apollo”). He worked for Apollo until May 31, 2010, and then for Speedy from June 1, 2010, until October 15, 2010, without interruption. On November 1, 2010, Mr. Sese filed a complaint with the Director alleging that Speedy had contravened the *Act* in failing to pay vacation pay and compensation for length of service.
3. A delegate of the Director held a hearing into the complaint on April 12, 2011, and on July 5, 2011, issued a determination finding Speedy responsible for Apollo’s liabilities under Section 97 of the *Act*. The delegate found Speedy in contravention of Sections 58 and 63 of the *Act* in failing to pay Mr. Sese annual vacation pay and compensation for length of service. The delegate also found Speedy in contravention of Section 46 of the *Employment Standards Regulation* (the “*Regulation*”) in failing to maintain payroll records. The Director ordered Speedy to pay wages and accrued interest in the total amount of \$8,187.70 and imposed administrative penalties in the total amount of \$1,500 for the three contraventions, pursuant to Section 18 of the *Act*.
4. Speedy contends that the Director failed to observe the principles of natural justice in making the Determination and seeks to have the Determination varied. Speedy argues that the delegate erred in finding Speedy responsible for Apollo’s liabilities. Speedy also seeks to have the administrative penalty set aside.
5. Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (Section 103), and Rule 17 of the Tribunal’s *Rules of Practice and Procedure* provide that 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). This decision is based on the Section 112(5) “record” and the written submissions of the parties.

ISSUE

6. Whether or not the Director failed to observe the principles of natural justice in making the Determination.

FACTS AND ARGUMENT

7. Apollo operated out of a shop at 371 West 2nd Avenue, Vancouver, BC. Raymond Chernoff and his father Fred Chernoff (Mr. Chernoff Sr.) were Apollo’s directors and officers. Although Raymond Chernoff ceased to be a director of Apollo on December 15, 2008, he continued to provide his services as CEO and shop

manager to Apollo until May 31, 2011. Mr. Chernoff had authority to sign cheques for employee wages and shop operations.

8. Mr. Chernoff Sr. passed away May 27, 2009. The record and submissions suggest that there were some difficulties with the administration of his estate that included issues with Mr. Chernoff Sr.'s wife and a second Apollo-operated property. Ernesto Lopez was appointed the administrator of the estate on April 1, 2010. His evidence at the hearing before the Director was that by the time he obtained signing authority over the account, there were no funds left for him to administer. Mr. Lopez testified that he thought Apollo would have made an assignment into bankruptcy but instead, the court ordered a forensic audit. It was Mr. Lopez' view that Mr. Chernoff simply took over the shop from the estate.
9. In April 2010, Apollo received notice from the landlord that the shop lease would be terminated. Although Mr. Chernoff advised the employees that he thought Apollo would terminate their employment in six weeks, he did not give them written notice. Mr. Chernoff said that after Mr. Lopez was appointed administrator of the estate, he was unable to obtain sufficient funds from the estate to pay the employees' wages so Speedy advanced the employees their wages as a repayable loan.
10. Apollo ceased operations on May 31, 2010, and Speedy began operating out of the shop previously occupied by Apollo on June 1, 2010. Speedy assumed Apollo's telephone and facsimile numbers and website address, and entered into a new lease with the landlord of the property.
11. Apollo issued Mr. Sese a Record of Employment (ROE) in June 2010. Mr. Sese also received a layoff notice and ROE from Speedy on October 15, 2010, but did not receive written working notice of termination or compensation for length of service. Mr. Sese contended that Apollo and Speedy were the same or related companies and that Speedy was simply a continuation of the same business run by Apollo, operated under a different company name.
12. During the course of a separate investigation, Raymond Chernoff sent all Speedy employees, including Mr. Sese, a letter dated August 19, 2010, stating, in part, as follows:

699027 BC Ltd. and Raymond Chernoff agree that under the Employment Standards Act (the "Act") your employment is continuous from Apollo. All rights and entitlements such as regular wages, statutory holiday pay, vacation pay, termination notice and compensation under the Act are maintained from your original hire date with Apollo.
13. Mr. Chernoff contended that he signed this letter after being "threatened" by the delegate that he would be fined unless he repaid the deductions from the employees' paycheques for Speedy's advances for Apollo's wage obligations.
14. Mr. Chernoff argued that Speedy was a new business and that it was not, in fact a successor company to Apollo. He contended that, in order for Section 97 of the *Act* to apply, Apollo would have to have assets to dispose of. He contended that because Apollo's lease had been cancelled, there were no assets to dispose of. He also argued that there had never been an agreement between Apollo and Speedy to acquire anything. Mr. Chernoff said that on May 31, 2010, Apollo's lease was terminated, the building sold and the new owner took possession. Mr. Chernoff contended that six weeks elapsed before Speedy entered into a new lease for the premises during which Apollo had the opportunity to take anything they wanted from the shop but did not do so. Speedy ordered new signage, entered into a sub-lease with the new owner and assumed the following items that Apollo had left behind: a tire changing machine, four hoists, air compressor, drum brake blades, computers, leak check trough, steel bench, bench grinder, welding and cutting torches, office counter and office furniture. Mr. Chernoff was the owner of the domain name apollomufflercentres.com.

15. Mr. Chernoff advised the delegate that he was unable to purchase parts from some suppliers or get credit because Apollo had not paid its accounts and suppliers regarded Apollo and Speedy as the same company.
16. Mr. Chernoff agreed that Mr. Sese was entitled to an additional 2% vacation pay but contended that the obligation was that of Apollo's, not Speedy's. Mr. Chernoff did not provide the delegate with the payroll records necessary to calculate the amount owed, contending that Mr. Lopez had taken them. Mr. Sese provided the delegate with his income tax summaries showing his total income for the years 2007 to 2010.
17. The delegate determined that there had been a disposition of Apollo assets to Speedy under Section 97 of the *Act*. She found that, notwithstanding the new signage outside the shop, to the employees as well as the outside observer, it did not appear there was a new owner. She determined that, even in the absence of a lease transfer, all of the assets, consisting of the goodwill in the form of the web address, telephone numbers, employees and personal property amounted to substantially all of the assets of Apollo. The delegate found that although Section 97 was most often triggered in the context of the purchase or formal transfer of a business, its application was not limited to those circumstances. She concluded that, even though there had been no agreement between Apollo and Speedy, what had occurred constituted a disposal as defined in the *Act*.

The use of the word "any" in section 29 [of the *Interpretation Act*] indicates the intention of the section is to capture traditional, and non traditional approaches to the transfer of assets. Moreover, although section 97 of the Act is titled the "sale of a business or assets" the body of the section utilizes the word disposal, and does so with the intention of capturing any number of types of transfer a business or assets. Although there was no agreement for purchase or any other type of formal assignment or transfer, Speedy took over the operations it says Apollo had effectively walked away from. However, saying it simply took the opportunity to scoop up something it "found" does not absolve Speedy of the responsibilities and liabilities attached to these assets; specifically, the employees. Based on the foregoing I find the second element to trigger section 97, a disposal, has been met. [reproduced as written]
18. The delegate also noted Mr. Chernoff's contention that he had signed the letter from the Branch under duress had been raised for the first time only after Mr. Sese filed his complaint. She considered Mr. Chernoff's suggestion that he signed an untrue letter and found his assertions unreliable. The delegate found that the letter had been drafted by a delegate in the regular course of conducting an investigation and noted that education regarding potential liabilities as a result of contraventions of the *Act* is one way the Director ensures that employers know about the consequences of a finding of a contravention. The delegate concluded that Mr. Chernoff agreed, on his own behalf as well as on behalf of Speedy, that any liabilities under the *Act* would be assumed by Speedy.
19. When the delegate found that this letter had been signed in relation to Apollo Muffler Centres (B.C.) Ltd. ("Apollo (BC)"), she sought submissions from the parties on whether or not Apollo and Apollo (BC) should be considered related under Section 95 of the *Act*. Mr. Chernoff advised the delegate that both companies had been incorporated and controlled by his father and that Apollo (B.C.) Ltd had been incorporated to continue the operations of Apollo in British Columbia. He also advised the delegate that Apollo owned Apollo (B.C.) Ltd. The delegate found that Apollo (B.C.) Ltd. and Apollo were under the common control and direction of Mr. Chernoff Sr. and concluded that it was appropriate to treat them as one employer under Section 95 of the *Act*.
20. The delegate noted that Mr. Chernoff conceded that Mr. Sese had not been given working written notice, arguing not that Mr. Sese was not entitled to compensation for length of service but that Apollo, rather than Speedy, was liable for paying that compensation. The delegate concluded that Speedy, as the employer at the time Mr. Sese's employment was terminated, was responsible for paying compensation for length of service.

The delegate also noted that Mr. Chernoff confirmed Mr. Sese had not been paid the additional vacation pay he was entitled to after working in excess of five years. Given that Speedy did not provide employer records as demanded by the Director, the delegate relied on Mr. Sese's tax summaries and evidence about his hours of work and rate of pay to calculate his vacation pay entitlement.

21. The delegate did not accept that Mr. Chernoff was unable to produce payroll records. She noted that Apollo's accountant had appeared at the hearing and testified that he did not have the payroll records as they were not required for the forensic audit. She also noted that Mr. Chernoff indicated at the hearing that he had materials that might include payroll records but that he would have to check with his bookkeeper. He later informed the delegate that the records had been seized by Apollo. The delegate then noted Mr. Chernoff's conflicting statements during the course of the hearing and did not accept that he was unable to produce the records because they had been taken by Apollo's representatives. She concluded that Speedy had not delivered payroll records in accordance with the Demand and imposed a penalty on Speedy for its failure to produce employer records.

ARGUMENT AND ANALYSIS

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

- the director erred in law;
- the director failed to observe the principles of natural justice in making the determination;
- evidence has become available that was not available at the time the determination was made.

23. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.

24. In *JC Creations* (BC EST # RD317/03) the Tribunal concluded that, given the purposes and provisions of the legislation, it is inappropriate to take an "overly legalistic and technical approach" to the appeal document: "The substance of the appeal should be addressed both by the Tribunal itself and the other parties, including the Director. It is important that the substance, not the form, of the appeal be treated fairly by all concerned."

25. Mr. Chernoff contends that he appeared at the hearing by telephone without counsel and was not familiar with the hearing procedures. He also says he was unaware that penalties would be imposed if he failed to produce documents sought by the Director.

26. The delegate submits that Mr. Chernoff has not demonstrated a failure on the part of the Director to observe the principles of natural justice.

27. I am satisfied, based on the record, that Mr. Chernoff knew the case he had to respond to and that he had the opportunity to reply. There is no evidence that the fact that he was unrepresented or appeared by telephone in any way affected his natural justice rights. Mr. Chernoff presented witnesses at the hearing in support of his position. Furthermore, the evidence is that this was not Mr. Chernoff's first interaction with the Director so he had some prior knowledge of the Director's role and responsibilities. Mr. Chernoff also responded to a supplementary issue raised by the delegate after the hearing and prior to the issuance of the Determination.

28. Mr. Chernoff says that all records available to Speedy were provided to the Director on previous occasions as well as to law firms in his father's divorce. He submits that the records "could be anywhere". I find that

Mr. Chernoff had the ability to find and produce the documents requested by the Director. Given his previous interaction with the Director, I do not accept his assertion that he was unaware of his consequences for his failure to produce them.

29. I find no basis for this ground of appeal.
30. Although Mr. Chernoff's ground of appeal is only that the Director failed to comply with the principles of natural justice ("this is a case of unnatural justice"), it is clear that he has equated his view of "fairness" with a natural justice argument. The Tribunal recognizes that parties without legal training often do not appreciate what natural justice means. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker. Natural justice does not mean that the delegate accepts one party's notion of "fairness". Because Speedy alleges that the delegate's conclusions are wrong, I have also addressed the appeal as if the grounds asserted were an error of law.
31. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
1. a misinterpretation or misapplication of a section of the Act;
 2. a misapplication of an applicable principle of general law;
 3. acting without any evidence;
 4. acting on a view of the facts which could not reasonably be entertained; and
 5. adopting a method of assessment which is wrong in principle.
32. In essence, Mr. Chernoff's position is that the liability for Mr. Sese's wages and vacation pay is that of Apollo's, not Speedy's, and because he is not the executor of his father's estate, he has no ability to resolve those outstanding obligations. Mr. Chernoff's position is that Speedy, as a separate company, is not responsible for Apollo's responsibilities and it is unfair of the delegate to conclude that Section 97 applies.
33. Mr. Chernoff further argues that the 'continuing liability letter' was not an agreement by Speedy to assume Apollo's wage liabilities.
34. The delegate contends that Mr. Chernoff is merely repeating arguments he made at the hearing and that an appeal is not an attempt to re-argue his case.
35. A review of the record shows that Mr. Chernoff's arguments are largely a duplication of the arguments he advanced before the Director.
36. Section 97 of the *Act* provides as follows:
- If all or part of a business or a substantial part of the entire assets of a business is disposed of, the employment of an employee of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition.
37. In *Lari Mitchell and Others* (BC EST # D107/98, reconsideration of BC EST # D314/97) the Tribunal held that "disposed of" was to be read broadly:

Although it is natural to speak of section 97 in relation to the “sale” of a business, it is the word “disposed” that is used in the legislation. Section 29 of the Interpretation Act, R.S.B.C. 1996, c. 238 defines “dispose” as follows:

“dispose” means to transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, lease, divest, release and agree to do any of those things;

The point we wish to make is that the language of section 97 is broad enough to include any disposition that results in a change in the legal identity of the employer.

38. In *Dharampal Singh Gill* (BC EST # D544/00, Reconsideration denied, BC EST # RD040/02) the Tribunal held that the purpose of Section 97 was:

....to preserve the employment status of employees when their employer’s business (or their employer’s business assets) is sold or otherwise transferred (“disposed of”) to a third party. This provision is sometimes referred to as a “successorship” provision in that it creates certain ongoing employment rights and entitlements for employees who continue to work for the subsequent or “successor” employer following the sale of the business or a substantial part of the business assets.

Section 97 is triggered when the individual in question is an “employee of the business” on the date of the disposition. The disposition itself does not terminate the employment relationship; the employment relationship merely continues with the successor employer being, in effect, substituted for the previous employer as the employer of record... [U]nless appropriate arrangements are made so that the employment of such person is terminated on or before the disposition is completed, those employees continue on as employees of the new employer and retain all of their accrued rights and entitlements...vis-a-vis the new employer.

39. As the Tribunal has repeatedly noted, employment standards legislation, as benefit conferring legislation, is to be given fair, large and liberal construction. (*Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27 and *Machtiger v. HOJ Industries Ltd.* [1992] 1 S.C.R. 986)
40. At issue before the Director was whether or not all or a substantial part of the entire assets of Apollo’s business was “disposed of” to Speedy. I am satisfied that a substantial part of Apollo’s assets were acquired by Speedy. Those assets included the municipal address, website address, telephone and facsimile numbers. It also acquired a significant amount of physical assets necessary to operate the same kind of business as that operated by Apollo. Speedy began operating an identical business one day after Apollo ceased its operations with the same management and employees.
41. Furthermore, and most significantly, Mr. Chernoff also signed a letter acknowledging that the employees were continued. Although Mr. Chernoff asserted that the document was signed under duress, I am unable to agree that duress has been made out in these circumstances. Mr. Chernoff signed the document after being informed of the penalties he would be facing for his failure to meet his legal obligations to his employees. Acknowledging legal obligations does not amount to duress.
42. I am not persuaded that Mr. Chernoff has demonstrated that the delegate erred in her interpretation of Section 97.
43. I am satisfied that the Director’s calculations for compensation for length of service and vacation pay were correct.

Penalty Assessment

44. In *Acton Super-Save Gas Stations Ltd.* (BC EST # D067/04) the Tribunal concluded that the *Act* provides for mandatory administrative penalties without any exceptions: “The legislation does not recognize fairness considerations as providing exceptions to the mandatory administrative penalty scheme.”
45. Once the delegate finds a contravention, there is no discretion as to whether an administrative penalty can be imposed. Furthermore, the amount of the penalty is fixed by Regulation. I find no error in the delegate’s decision to impose a penalty for Speedy’s failure to provide payroll records, which was not denied.
46. I dismiss the appeal.

ORDER

47. Pursuant to Section 115 of the *Act*, I order the Determination dated July 5, 2011, be confirmed in the amount of \$9,687.70, together with any interest that has accrued under Section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal