

An appeal

- by -

Franklin Street Holdings 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 (as amended)

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2007A/108

DATE OF DECISION: December 19, 2007

THE FACTS

8. The Determination sets out the following facts by way of background:
- Ancient Mariner Industries Ltd. and Franklin Street Holdings Inc. and Ancient Mariner Sign Services Inc. (“Ancient Mariner”) operates an awning and sign company which falls within the jurisdiction of the *Act*.
- Ancient Mariner operated 7 days a week and on or about May 14, 2007, closed the location at 1112 Franklin Street Vancouver, BC V6A 1J6. The mail for Ancient Mariner is now being sent to #310-1441 Creekside Drive, Vancouver BC, V6J 5B6.
9. I note that while the above background is stated in the Determination as being “facts not in dispute”, I can find no agreement in the Section 112(5) record – and no evidence – supporting the statement that the companies named collectively operated an awning and sign company. There is ample evidence in the record that Ancient Mariner Industries Ltd. carried on such a business from 1112 Franklin Street. I can find no evidence in the record that the other companies were involved in that business. In fact, the available evidence as it related to FSH was to the contrary.
10. The Determination identifies three issues: whether Ancient Mariner Industries Ltd., FSH and Ancient Mariner Sign Services Inc. are associated entities under Section 95; whether the complainants are owed wages; and whether there is compliance with the *Act*.
11. As indicated above, the only issue with which this appeal is concerned is whether Ancient Mariner Industries Ltd., FSH and Ancient Mariner Sign Services Inc. should have been associated under Section 95 of the *Act*.
12. The basis on which the Director associated the entities was scant. The Determination refers to the following information and findings:
- Mr. Smith was recorded as a director and officer of Ancient Mariner Industries Ltd., although there was some indication from both Mr. Meiklejohn and Mr. Smith that he had resigned as a
 - There was reference to Mr. Smith as president of Ancient Mariner director and officer of that company effective December 23, 2005;
 - That Mr. Smith authorized hours of work for the complainants before they could be paid wages;
 - FSH was formerly Ancient Mariner Awning & Signs Ltd. The latter company owns the property at 1112 Franklin Street, the operating location for Ancient Mariner Industries Ltd.;
 - One of the complainants had an employment agreement with Ancient Mariner Sign Services Ltd., although that complainant was paid wages by Ancient Mariner Industries Ltd.; and Industries Ltd. in an old web site for that company.
13. Mr. Smith provided some information during the complaint investigation. The salient points are summarized in a letter to the delegate, with accompanying documents, which was received May 22, 2007 and include the following:
- The only relationship between FSH and Ancient Mariner Industries Ltd. was that of lessor and lessee and that Ancient Mariner Industries Ltd. had broken the lease and left the premises;

- He had resigned as a director and officer of Ancient Mariner Industries Ltd. in January 2006 when that company was sold to Mr. Meiklejohn; and
 - From January of 2006 he had only been employed by Ancient Mariner Industries Ltd. in the position of manager.
14. In a later letter to the delegate, dated May 23, 2007, Mr. Smith reiterated the above points and made additional assertions about FSH:
- FSH did not engage in any business activity or have any business income, other than that related to the Franklin Street property, and had no employees; and
 - Ancient Mariner Industries Ltd. was operated solely by Mr. Meiklejohn¹.
15. The Director appears to have largely ignored that information.

ARGUMENT AND ANALYSIS

16. In this appeal, FSH has the burden of persuading the Tribunal that the Determination is reviewable on one of the grounds set out in Subsection 112(1) of the *Act*, which states:
- 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.*
17. An appeal is an error correction process with the burden of showing the error being on the appellant. It is not simply an opportunity to add further information and re-argue one's case, hoping the Tribunal will reach a different conclusion.
18. FSH has grounded this appeal on Section 112(1)(c).
19. The Tribunal is given discretion to accept or refuse new or additional evidence. The Tribunal has taken a relatively strict view of what will be accepted as new, or additional, evidence in an appeal, indicating in several decisions that this ground of appeal is not intended to be an invitation to a dissatisfied party to seek out additional evidence to supplement an appeal if that evidence could have been acquired and provided to the Director before the Determination was issued. The Tribunal has discretion to allow new or additional evidence. In addition to considering whether the evidence which a party is seeking to introduce on appeal was reasonably available during the complaint process, the Tribunal considers whether such evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it is reasonably capable of belief, and whether it is probative, in the sense of being capable

¹ A substantial list of matters that were attended solely by Mr. Meiklejohn was provided in that letter by Mr. Smith.

of resulting in a different conclusion than what is found in the Determination (see *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03).

20. The material supplied with the appeal is substantial. Some of it was provided during the complaint process; some is newly added material. The task of determining whether the newly added material satisfies the conditions for acceptance in an appeal, however, has been eliminated as a result of an acceptance by the Director that FSH “is not associated under Section 95 of the *Employment Standards Act*”. I take that acceptance to be a concession that FSH should not have been associated under Section 95 of the *Act* with Ancient Mariner Industries Ltd. and Ancient Mariner Sign Services Inc. and that the Director committed a reviewable error in that respect.
21. Based on my review of the file, I agree with that concession. Accordingly the Determination is cancelled against FSH.
22. It is unnecessary in this decision to consider whether the Director erred in concluding Mr. Smith was a director and/or officer of Ancient Mariner Industries Ltd. The Director has inferred the Tribunal does not need to address that question since no Determination has been issued against Mr. Smith under Section 96 of the *Act*. I agree with that view, but wish to be very clear that the from the Tribunal’s perspective, the question of Mr. Smith’s liability under Section 96 has not been either addressed or decided by this Tribunal. The material and information Mr. Smith has provided raises a legitimate question about his status as a director and/or officer of Ancient Mariner Industries Ltd. at the material time and is a matter that will have to be considered in the event a Determination is issued against Mr. Smith and an appeal of that Determination is filed.
23. The appeal by FSH is allowed.

ORDER

24. Pursuant to Section 115 of the *Act*, I Order that part of the Determination dated August 6, 2007 associating FSH with Ancient Mariner Industries Ltd. and Ancient Mariner Sign Services Inc. under Section 95 of the *Act* to be set aside and the Determination cancelled as against FSH.

David B. Stevenson
Member
Employment Standards Tribunal