



An appeal

- by -

Stephen G. Funk

- and by -

Nick DiMambro and 518820 B.C. Ltd. operating as DiMambro & Associates

- 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.: 2005A/096

DATE OF DECISION: August 29, 2005

DECISION

SUBMISSIONS

Stephen J. Funk	on his own behalf
Ian J. Tindale	on behalf of 518820 Nick DiMambro
Theresa Robertson	for the Director of Employment Standards

INTRODUCTION

1. This matter comes back before me as a result of a “referral back” order [see section 115(1)(b) of the *Employment Standards Act*—the “*Act*”] that I issued on November 15th, 2004 (see Funk et al., BC EST Decision No. D195/04).
2. Stephen Funk (“Funk”), Nick DiMambro (“DiMambro”) and 518820 B.C. Ltd. (the “Numbered Company”) all appealed a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on May 18th, 2004 (the “Determination”). The Determination was issued following an investigation conducted by a Director’s delegate. Pursuant to the Determination, Mr. DiMambro and the Numbered Company were jointly ordered to pay their former employee, Mr. Funk, the sum of \$2,792.73 on account of unpaid wages and section 88 interest.
3. Although Mr. Funk’s appeal was filed within the statutory appeal period, the DiMambro/Numbered Company appeal was filed slightly less than two weeks after the governing appeal period expired. By way of written reasons for decision issued on August 31st, 2004, I extended the appeal period relating to the DiMambro/Numbered Company appeal (see BC EST Decision No. D150/04).

THE APPEALS

4. Mr. Funk alleged that the Director’s delegate erred in calculating his unpaid wage entitlement. Mr. Funk’s position was that the delegate erred in failing to credit him for all of the hours that he allegedly worked. I varied the Determination by deleting the delegate’s findings with respect to Mr. Funk’s working hours and referred that latter matter back to the delegate for a reasoned decision.
5. Mr. DiMambro and the Numbered Company appealed the Determination on the grounds that the Director’s delegate erred in law and failed to observe the principles of natural justice in making the Determination. I held that Mr. DiMambro raised a bona fide question regarding his status and, accordingly, I referred the question of Mr. DiMambro’s status back to the Director for further investigation.
6. I confirmed the Determination in all other respects. My formal order is reproduced below:

ORDER

Pursuant to section 115(1)(b) of the *Act*, I order that the matters relating to:

- i) Mr. Funk's unpaid wage entitlement (and, more specifically, his actual working hours); and
- ii) the question of Mr. DiMambro's status as an "employer"

be referred back to the Director for further investigation.

Pursuant to section 115(1)(a) of the *Act*, I order that the Determination be confirmed in all other respects.

THE DIRECTOR'S FURTHER INVESTIGATION

7. On March 21st, 2005, the Director's delegate sent separate letters to each of Messrs. Funk and DiMambro. The delegate advised Mr. Funk that she had recalculated his unpaid wages (including vacation pay) at \$5,391.36 (based on 76 8-hour days and 10 4-hour days) and also requested Mr. Funk to provide information regarding Mr. DiMambro's status and role with respect to the operations of the Numbered Company. In her letter to Mr. DiMambro, the delegate set out her revised unpaid wage calculation and asked Mr. DiMambro to provide further particulars regarding his duties and functions with the Numbered Company.
8. The Director's delegate subsequently prepared a report dated June 18th, 2005. In her June 18th report, the delegate dealt with both Mr. Funk's unpaid wage claim and Mr. DiMambro's status. The relevant portions of the delegate's report regarding Mr. Funk's unpaid wage claim are set out below:

On the matter of hours worked by Mr. Funk, neither party kept a record of hours worked each by Mr. Funk so I [originally] awarded Mr. Funk 4 hours pay on each day that there was some agreement that he was in attendance at the employer's business. I have re-interviewed [a former employee] who was employed by DiMambro & Associates for most of the time that Mr. Funk was employed. She confirmed that Mr. Funk, as well as she could recollect, worked all day everyday that she worked. She further stated that she believed he worked longer hours than she...[Another employee's] earlier statement was that she commenced work in April of 2002 and that Mr. Funk generally came in around 10 am and then worked the rest of the day. She also stated that, towards the end of his employment (April 12, 2002), Mr. Funk came in less often.

Although it was neither [the two employees'] responsibility to track Mr. Funk's hours, I have no reason to doubt the sincerity of their recollections. Therefore, based on their statements I have revised the calculation of wages owed to Mr. Funk as \$5,391.36 (76 days @ \$64 (\$8.00 an hour x 8 hours), from December 17, 2001 to March 29, 2002 and 10 days @ \$32.00 (\$8.00 an hour x 4 hours) from April 1 to 12, 2002. I have not calculated wages at 8 hours a day for the final 2 weeks of Mr. Funk's employment because, I am not satisfied that, based on [one of the employee's] statement, he was working 8 hours a day, every day.

I advised the parties of these calculations and requested submissions.

Mr. Funk has responded and requested that I add one extra day to the calculation because he recalled that he worked one extra day, April 15, 2002. He further suggests that I recalculate the wages owed at \$10.00 or \$12.00 [sic, per] hour. Since Mr. Funk's complaint stated that his last day of work was April 12 and, to my recollection, this is the first time he has suggested that he worked April 15, I have not included any hours for this day, nor am I prepared to make a finding with regard to overtime hours. As for the wage rate, my determination stated why I calculated wages at \$8.00 an hour and I see no reason to change this...

On the matter of wages, Mr. DiMambro objected to my review of the hours worked by Mr. Funk and objects to the calculation of wages, but did not offer any other evidence.

9. The relevant portions of the delegate's report regarding Mr. DiMambro's status are set out below:

With regard to the issue of the identity of the employer, during the investigation Mr. DiMambro alleged that the employer was [the Numbered Company], a company stricken from the corporate registry and a company that Mr. DiMambro said he was not a director or officer of at the time that Mr. Funk was employed...To date, the company does not appear to have been reinstated. Further, I note that Mr. DiMambro has registered another company "N. DiMambro & Associates (BC) Ltd.", incorporated on March 7, 2005.

At the time Mr. Funk was employed, Mr. DiMambro was operating and representing DiMambro & Associates...

In his submission Mr. [DiMambro] states that he may not oppose being named a "defacto" [sic] director of [the Numbered Company]. However, it would appear to be a futile exercise to name someone a "defacto" [sic] director of a corporation that was stricken from that registry and has not been re-instated, when that same person had to be removed as a director because of bankruptcy proceedings.

Other than Mr. DiMambro's use of "518820 BC Ltd." on some of his letterhead and cheques, there does not appear to have been any involvement by [the Numbered Company] in the day to day [sic] operations of the business or that Mr. DiMambro had any right to be using the 518820 name.

If I erred in naming the employer it was in accepting Mr. DiMambro's assurances that the company would be re-instated and in naming [the Numbered Company] as the employer at all. It would be a more accurate description to name the employer as Nick DiMambro operating as DiMambro & Associates.

10. On June 20th, 2005, the Tribunal's Vice-Chair wrote to the parties and requested their written submissions regarding the delegate's June 18th report. I now have before me submissions dated July 6th and 22nd, 2005 from Mr. Funk and a submission dated August 17th, 2005 filed by Mr. Ian J. Tindale on behalf of Mr. DiMambro.

THE PARTIES' SUBMISSIONS

Stephen G. Funk

11. Mr. Funk challenges the delegate's finding that he only be awarded 4 hours' pay for the last 10 days of his employment. He seeks an additional 4-hour "half-day" for Monday, April 15th, 2002 (a date that Mr. Funk says "he mistakenly failed to account for on my initial complaint"). Mr. Funk submits that his hourly rate should be fixed somewhere in the "\$10.00 to \$12.00 per hour pay range" and that he should be awarded "a minimum of one hour of overtime per day". Finally, he seeks "one full week as termination pay".

Nick DiMambro

12. Mr. Tindale, for Mr. DiMambro submits that the delegate failed to conduct a further investigation (or, at least, a proper reinvestigation) and challenges certain of the delegate's findings regarding Mr. Funk's actual working hours. With respect to the matter of Mr. DiMambro's status, Mr. Tindale advised that by way of a B.C. Supreme Court order issued on November 12th, 2003 the Numbered Company was restored to the Registrar of Companies. Finally, Mr. Tindale asserts that Mr. Funk was not an "employee" and relies on a ruling from Canada Customs and Revenue Agency.

FINDINGS AND ANALYSIS

13. At the outset, I wish to note that both parties raised arguments in their submissions with respect to issues that I have already determined or that were not otherwise properly before the Tribunal (both parties must be cognizant that the Tribunal is an appeal body, not a body with original jurisdiction). I confirmed the delegate's finding that Mr. Funk was an "employee" under the *Act* (see my November 15th, 2004 Reasons at page 8). I also noted (at pages 3-4 of my Reasons) that the question of whether Mr. Funk was entitled to any compensation for length of service was not properly before me.
14. With respect to Mr. Funk's unpaid wage entitlement, it would appear that both parties misunderstood my reasons for referring this matter back to the Director. I was not satisfied that the delegate made a calculation error or otherwise awarded Mr. Funk either too much or too little in the way of unpaid wages. I merely noted that the wage question had to be determined in the face of conflicting evidence and that, so far as I was concerned, the delegate simply did not explain how or why she arrived at the unpaid wage award that was initially issued in favour of Mr. Funk (see my Reasons at pages 5-6).
15. In her June 18th report, the Delegate has now set out her rationale for awarding Mr. Funk nearly \$5,400 in unpaid wages based on her assessment of the evidence of two independent witnesses. I am not prepared to now say that the delegate's findings regarding Mr. Funk's unpaid wage entitlement is not supported by a proper evidentiary foundation. As for the actual wage rate, the delegate originally concluded that there was no specific agreement between the parties regarding Mr. Funk's actual hourly rate; there still is, so far as I can determine, no credible evidence of a specific agreement. That being the case, I am satisfied that the delegate did not err in awarding wages based on the regulatory minimum wage rate and, for some days, the statutory daily minimum hour entitlement.
16. Mr. Funk's attempt to introduce new claims at this stage of the proceedings—e.g., an extra day's pay, overtime pay, compensation for length of service—is not, in my view, appropriate and, accordingly, I am dismissing those new claims. If Mr. Funk wished to advance a claim in regard to these items, he should have originally sought them in his complaint and, if the delegate dismissed such claims, he should have specifically appealed those matters to the Tribunal. In the result, I am confirming the delegate's finding that Mr. Funk is entitled to \$5,391.76 on account of unpaid wages (including 4% vacation pay). In addition, Mr. Funk is entitled to interest on this latter amount to be calculated pursuant to section 88 of the *Act*.
17. I now turn to the matter of Mr. DiMambro's status. The delegate ultimately concluded that Mr. Funk was employed by a proprietorship, namely, Mr. Nick DiMambro operating under the firm name "DiMambro & Associates". The delegate's finding in this regard appears to be supported by the evidentiary record before me. That being the case, the status of the Numbered Company (in terms of whether it has formally been restored) is entirely irrelevant. In that latter regard, however, I do note that the Numbered Company

does not yet appear to have been formally restored to the Corporate Register since there are still some outstanding issues—payment of fees, submission of annual reports etc.

ORDER

18. Pursuant to section 115 of the *Act*, I order that the Determination be varied as follows:
 - The order to pay made against the Numbered Company is deleted;
 - Mr. Nick DiMambro operating as “DiMambro & Associates” is ordered to pay Mr. Funk the sum of \$5,391.76 together with interest to be calculated in accordance with section 88 of the *Act*.
19. In all other respects, the Determination is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal