Employment Standards TRIBUNAL

An appeal

- by -

J.F. Ventures Ltd. & J.F. Bioenergy 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: John E.D. Savage

FILE No.: 2005A/113

DATE OF DECISION: August 30, 2005

DECISION

SUBMISSIONS

John Flottvik	for J.F. Ventures Ltd. & J.F. Bioenergy Inc.
Roger Mawdsley	for himself
Joy Guilbault	for the Director of Employment Standards

OVERVIEW

1. This is an appeal based upon written submissions by J.F. Ventures Ltd. and J.F, Bioenergy Ltd. (the "JF Companies") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against a Determination of the Director of Employment Standards (the "Director") dated May 26, 2005.

2. In the Determination appealed the Director found that Roger Mawdsley ("Mawdsley") was an employee and entitled to regular wages of $13,300, annual vacation pay of $600, interest in the amount of $416.38. The Director found contraventions of Section 17 and Section 18 of the *Act* and imposed administrative penalties totaling $1000.

3. The Director found that the JF Companies were associated corporations pursuant to section 95 of the *Act*.

4. The JF Companies appeal arguing that the Director erred in law in making its findings.

5. The JF Companies take issue with the finding that Mawdsley was an employee arguing that (1) the Director should have taken notice of an earlier decision of a "Coverage Officer" of the Canadian Customs and Revenue Agency that Mawdsley did not have insurable or pensionable employment as an employee under a contract of service, (2) the Director should have considered the findings of this Tribunal in certain previous decisions regarding Mawdsley, (3) the Director should have disregarded the evidence of one of the witnesses, and (4) evidence is now available that was not available at the hearing in the form of a statement from the appellant's bookkeeper.

6. The JP Companies also assert that the Director erred in law in finding J.F. Bioenergy Inc. and J.F. Ventures Ltd. to be associated companies under section 95 of the *Act*.

7. The Tribunal received the original submission from the JF Companies initiating the appeal dated July 4, 2005, a submission from Mawdsley dated July 21, 2005, and a submission from the Director dated July 25, 2005. The Tribunal invited the JF Companies to make a final reply submission by August12, 2005 but none was received.

ISSUE

8. The issues in the appeal are as follows:

    1. Did the Director err in law in finding Mawdsley to be an employee of the JF Companies?

2. Did the Director err in law in finding that the JF Companies are associated companies for the purpose of section 95 of the Act?

LEGISLATION

THE EMPLOYMENT RELATIONSHIP

9. The question of whether Mawdsley was an employee turns on the meaning of the terms "employee" and "employer" as defined in the *Act*. The term "employee" is defined in section 1 as follows:

> *"employee" includes*
>
> *(a) a person, including a deceased person, receiving or entitled to wages for work performed for another,*
>
> *(b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,*
>
> *(c) a person being trained by an employer for the employer's business,*
>
> *(d) a person on leave from an employer, and*
>
> *(e) a person who has a right of recall;*

10. The term "employer" is defined in section 1 as follows:

> *"employer" includes a person*
>
> *(a) who has or had control or direction of an employee, or*
>
> (b) who is or was responsible, directly or indirectly, for the employment of an employee;

RECEIPT OF NEW EVIDENCE

11. One of the grounds of appeal under the *Act*, subsection 112(1)(c), concerns the reception of new evidence:

> 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 being made.*

ASSOCIATED CORPORATIONS

12. Under the *Act* two or more corporations may be associated where the provisions of section 95 are satisfied. Section 95 provides as follows:

> *95 If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,*

> *(a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one employer for the purposes of this Act, and*
>
> *(b) if so, they are jointly and separately liable for payment of the amount stated in a determination, a settlement agreement or an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.*
>
> *1995, c. 38, s. 95; 2002, c. 42, s. 53; 2003, c. 65, s. 9.*

ANALYSIS

THE EMPLOYMENT RELATIONSIP

Res Judicata and Issue Estoppel

13. The JF Companies argue that the Director should have taken cognizance of a determination by a coverage officer of CCRA that Mawdsley was not entitled to insurance or pension benefits. The JF Companies filed as an exhibit in these proceedings a copy of letter ruling by a coverage officer dated July 8, 2004 addressed to JF Bioenergy Inc.

14. The letter is said to be in response to a request from the Department of Human Resources and Skills Development Canada ("HRSDC") "for a ruling regarding the insurability of Roger Mawdsley's employment". The short letter gives brief reasons and says that "based on the information obtained from the worker and the payer" the services rendered by Mawdsley "were performed as an independent contractor for his own business". The ruling is said to be subject to appeal.

15. The response of the Director is simply that the information was considered but not found determinative. The Determination does not refer to the ruling. Mawdsley argues that the "preliminary findings" of the HRSDC investigation are not relevant to the Director because the two agencies have different criteria for decision making and employ different methodologies. In any event, the HRSDC investigation, he says, is incomplete and is still ongoing.

16. In my opinion, the Director was not bound by this ruling if the doctrines of *res judicata* and issue estoppel do not apply.

17. The doctrine of *res judicata* is an exclusionary rule of evidence. If the requirements of the doctrine are met, the party against whom the issue was decided in the earlier litigation cannot proffer evidence to challenge that result. The doctrine operates to admit into evidence at the second proceeding the judicial determination of the relevant issue in the earlier proceeding. The earlier determination is not then merely admissible; it is determinative of the issue: Spencer-Bower, Turner and Handley, *The Doctrine of Res Judicata*, 3rd Edition (1996) at 9, Lange, *The Doctrine of Res Judicata in Canada*, 2nd Edition, (2004) at 10.

18. It is not merely the ultimate issue in the adjudication that is admissible and binding, but all issues of fact or law that were essential to the earlier conclusion: *R. v. Sweetman*, [1939] O.R. 131 (C.A.) per Masten, J.A., at page 131.

19. The leading authority on the doctrine of issue estoppel in Canada is the decision of the Supreme Court of Canada in *Angle v. Minister of National Revenue* (1974), 47 D.L.R. (3d) 544 (S.C.C.) where Dickson, J. for the majority described the basis for its application as follows:

> …(1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

20. Issue estoppel is applicable to decisions rendered by administrative tribunals: *Raison v. Fenwick* (1981), 120 D.L.R. (3d) 622 (B.C.C.A.).

21. I turn, then, to the three legal criteria that must be decided before an issue estoppel arises.

Has the same question been previously decided?

22. The question before the Coverage Officer was whether there was insurable employment under the *Employment Insurance Act R.S.C.* 1996, Chap. 23. That question involves the interpretation of "employer", "employment", "insurable employment", and various sections of the *Employment Insurance Act*, especially section 5. Under the *Employment Standards Act* the definitions of "employer" and "employee" fall to be considered. Definitions under both statutes are inclusive, not exclusive.

23. Although there may be differences in the formulation of these concepts in the statutes, and differences in the process of characterization brought about by such differences, these differences do not necessarily give rise to a different question: *Rasanen v. Rosemount Instruments Ltd*., (1994), 112 D.L.R. (4th) 683 (O.C.A.). In my opinion the question of whether Mawdsley was an employee or independent contractor under either statute is, in pith and substance, the same issue in the circumstances of this case.

Is the ruling of the Commission a final judicial decision?

24. The scheme under the *Employment Insurance Act* is that the Employment Commission on application through its coverage officer makes a determination on entitlement. Such a ruling can be appealed to a statutory tribunal, the board of referees. A decision of the board of referees can be further appealed to an umpire.

25. The procedure which gives rise to an initial ruling by the Commission is set out in section 48 of the *Employment Insurance Act*:

> 48. (1) No benefit period shall be established for a person unless the person makes an initial claim for benefits in accordance with section 50 and the regulations and proves that the person is qualified to receive benefits.
>
> (2) No benefit period shall be established unless the claimant supplies information in the form and manner directed by the Commission, giving the claimant's employment circumstances and the circumstances pertaining to any interruption of earnings, and such other information as the Commission may require.
>
> (3) On receiving an initial claim for benefits, the Commission shall decide whether the claimant is qualified to receive benefits and notify the claimant of its decision.

26. At this stage there is no provision for a hearing which is in contrast to circumstances on appeals from decisions of the Commission to the Board of Referees.

27. Subsection 115(2) sets out the grounds of appeal from decisions of the Board of Referees. This provision makes it clear that the Board of Referees is required to act judicially and apply the principles of natural justice:

> (2) The only grounds of appeal are that
>
> (a) the board of referees failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) the board of referees erred in law in making its decision or order, whether or not the error appears on the face of the record; or
>
> (c) the board of referees based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

28. Indeed, this tribunal has found that decisions of the Board of Referees are subject to the application of the doctrine of *res judicata*: Re *Polycryl Manufacturing (1998) Inc.*, BC EST # D360/01. In my opinion, however, the same reasoning that applies to decisions of the Board of Referees does not apply to rulings by coverage officers of the Commission.

29. As noted by Lange in *The Doctrine of Res Judicata in Canada*, supra, "The decision must be a 'judicial' decision" (p.84). In *New Brunswick (Executive Director of Assessment) v. Ganong Bros. Ltd.*, [2004] N.B.J. No. 219 the New Brunswick Court of Appeal explicated that requirement as follows:

> 46. Note, that the second precondition requires that the prior decision be judicial. A tribunal decision so qualifies provided that the following two conditions are met: (1) the administrative body issuing the decision is capable of receiving and exercising adjudicative authority; and (2) as a matter of law, the decision was required to be made in a judicial manner. The latter condition requires that the tribunals adjudicative decisions be based on findings of fact and the application of an objective legal standard to those facts: see Danyluk at para. 35.

30. In my opinion the ruling of the Coverage Officer is not a judicial decision subject to the doctrine.

31. There was no evidence before the Delegate on whether the ruling was final, although I note that an unappealed judicial decision is final in the requisite sense. In any event, as I have found that the ruling is not a judicial decision this element of the test is not satisfied.

Are the parties to the judicial decision the same?

32. While an employer has an interest in rulings of the Commission at this stage it is not a party to the decision in any conventional sense. The Commission is charged with investigating a claim and making a ruling on it pursuant to section 48 of the *Employment Insurance Act.*

33. While the investigation by the Commission may include input from the employer there is no statutory recognition of the employer as a party at this stage whereas an employer is a party to an appeal before the Board of Referees: sections 78-83, *Employment Standards Regulation* SOR/96 322.

34. In my opinion a ruling by a coverage officer of the Commission is an investigative administrative act without judicial character and without parties. In the circumstances, the ruling of the Commission does not create an issue estoppel.

Employee or Independent Contractor

35. The JF Companies assert that the Director erred in finding Mawdsley to be an employee and not an independent contractor. In coming to this conclusion the Delegate considered and applied the definition of "employee" contained in the Act and considered and applied a variety of common law tests: the "four-fold test", the "specific results test", the "organizational or integration test" and the "permanency test".

36. The Delegate made the following findings:

> 1. The JF Companies exercised control over Mawdsley through periodic meetings, dialing communications surrounding daily activities, assessing priorities to tasks, and assigning tasks;
>
> 2. While Mawdsley worked from home that was because the company was without funds to pay for office space. Business cards were provided for Mawdsley and showed Mawdsley as CEO of JF Bioenergy Inc. Cards were paid for by the JF Companies. Information on the company website was displayed in such a way as to indicate that Mawdsley was an employee;
>
> 3. Mawdsley performed work that was an integral part of the business and not an ancillary part of the business. While Mawdsley's main duty was initially to find funding for the company his duties included obtaining permits and licences, attending trade shows, attending meetings on behalf of the company, and day to day operations;
>
> 4. The relationship between Mawdsley and the JF Companies was of a permanent nature;
>
> 5. Mawdsley did not have any chance for profit or risk of loss. Mawdsley did not have an investment in the company that he would stand to lose if the company became insolvent and did not have responsibility to pay for expenses incurred;
>
> 6. Mawdsley did the work normally performed by and employee.

Having made these findings is there any error of law apparent in the Determination?

37. This Tribunal has treated with caution the traditional common law tests for determining whether an individual is an employee. The shortcomings of these tests have been commented upon in 6*71122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 (S.C.C.) and *Wolf v. Canada*, 2002 F.C.A. 96. (F.C.A.). In making the Determination the Director must apply the statutory definition, which should be given a broad and liberal interpretation reflecting the remedial nature of the legislation: *Fenton v. Forensic Psychiatric Services Commission* (1991) 56 B.C.L.R. (2d) 170 (C.A.).

38. The statutory definition of "employee" casts a somewhat wider net than do the common law tests in defining "employee": *Project Headstart Marketing Ltd.*, BC EST # D164/98, *C.A. Boom Engineering (1985) Ltd.*, BC EST # D129/04. The fourfold test and other traditional common law tests are less helpful

in determining the role of master and servant in modern workplaces as noted by this Tribunal in *Re Kelsey Trigg*, BC EST # D040/03:

39. While there is no magic test, the total relationship of the parties must be examined, with a view of determining "whose business is it?" Thus, the overriding test is whether the complainant "performed work for another".

40. The Delegate after reviewing the statutory definition and various common law tests concluded as follows:

41. No single test is used as a determining factor. All aspects have to be considered together and the relationship between the parties must be viewed in its entirety.

42. In my opinion the Delegate did not err in law in interpreting or applying the statutory definition of "employee" in finding Mawdsley to be an employee and not an independent contractor.

Weight of Evidence

43. The JF Companies argue that the Delegate should have discounted the evidence of McQuinlan because he was not "actively involved in the daily business affairs of the Appellants". The evidence of McQuinlan is cited in the decision as follows:

44. McQuinlan stated 'money is most likely outstanding to Mawdsley, but that Flottvik has the control over payment of wages, and has to be the one that clears up this debt'. Flottvik is the one that kept all of the employee records, he had very little to do with this. He feels that Mawdsley was an employee of JF group.

45. McQuinlan confirms that some monies had been given to Mawdsley along the way, and that he was not aware of when this happened or how much was given. McQuinlan directed me to discuss this complaint with Flottvik, as he was the one who had control over all of this and over Mawdsley.

46. From the decision of the Delegate it is apparent that he was aware of that McQuinlan had a lesser involvement than Flottvik with Mawdsley through McQuinlan's own statements. The weight to be given to the evidence of McQuinlan was a matter for the Delegate and does not raise any question of law.

Consideration of Previous Tribunal Decisions Regarding Mawdsley

47. Mawdsley's employment by a previous employer was subject to a prior decision of this Tribunal in *Re Probed Medical Technologies Inc.*, BC EST # D453/02 reconsidered by BC EST # RD030/03. The JF Companies argue that the Director erred in law by not reviewing and disregarding the findings of this Tribunal in this previous case. The Director says that the case was considered but is distinguishable. Mawdsley repeats this position.

48. The previous decision of the Tribunal found that the Director had not erred in finding Mawdsley to be an employee of Probed Medical Technologies Inc. but varied the decision of the Director to award Mawdsley minimum wage for the hours worked instead of the salary he claimed. The Tribunal found that Mawdsley could not rely on the provisions of a proposed contract of employment in that case because the

terms of that contract were based on an unfulfilled condition. Upon reconsideration the decision was confirmed.

49. In this case the analysis of the Delegate in his Determination commenced with a prior period of employment with the same employer. Mawdsley commenced employment with the JP Companies in September 2002.

50. Mawdsley had a contract of employment during the period commencing March 2003 and was paid $5,000 monthly according to its express terms. Mawdsley was laid off for a six month period from July 2003 to February 2004 although he was expected to be recalled. Indeed, John Flottvik wrote a letter to Mawdsley providing an expected date of recall of November 1, 2003. The letter said "I look forward to having you resume employment with JF Bioengery Inc. later this year". Because of the length of the layoff the Delegate found, however, that the contract did not apply when the new employment commenced February 2004.

51. The Delegate noted that the JF Companies submitted a ledger showing that Mawdsley was owed $5,000 in wages for the months of February, March and April of 2004, or a total of $15,000. The JF Companies also submitted the ROE as did Mawdsley that showed Mawdsley had insurable earnings for this period for $15,000. In this case the Delegate preferred the evidence of Mawdsley and the documentary evidence to the assertions of the JF Companies witness. The JF Companies sought to discredit the ROE on the basis that it was completed under Mawdsley's direction.

52. In my opinion while the factual circumstances in *Re Probed Medical Technologies Inc.*, BC EST # D453/02 has some similarities to the situation in this case, in critical respects it differs and is properly distinguishable. In this case (1) there was an operative signed contract of employment that specified the salary for a prior period, (2) the employee was laid off but expected to be recalled to his employment, and was recalled in the same position, and (3) the records of the employer indicate that the previous salary was reinstated (although not paid) once the employment resumed.

53. In my opinion the Delegate did not err in law in finding that wages were owed in the amount of $5,000 per month.

RECEIPT OF NEW EVIDENCE

54. As part of his case before the Delegate Mawdsley filed a copy of his Record of Employment which was marked as an exhibit. The position of Flottvik before the Delegate was that "Mawdsley fraudulently completed his own Record of Employment, and forced the bookkeeper to sign it".

55. With the appeal documents the JF Companies filed a letter dated July 4, 2005. The letter addressed to "To Whom It May Concern" reads as follows:

> I have been asked to provide a letter further to a telephone conversation regarding the Record of Employment for Mr. Mawdsley. Mr. Mawdsley instructed us to enter the information we did regarding his wages. There was never a contract of any other documentation provided. Mr. Mawdsley at the time was the person in charge of operations based on the information we were provided. We had no reason to question his directions, and he was quite adamant that we provide the documents the way we did.
>
> I trust this is satisfactory. If you have any further questions, please contact Mr. John Flottvik.

56. The JF Companies seek to admit this as "Evidence that was not available due to amounts owing for bookkeeping services is attached in the form of a letter from the Appellant's bookkeeper concerning the ROE and journal entries for wages".

57. Mawdsley argues that the letter is unhelpful, except, perhaps, that on the point that it confirms that he was "the person in charge of operations". Moreover, he says, that Flottvik was present at the meeting with the bookkeeper when the Record of Employment was requested and agreed with it being issued.

58. The reception of new evidence is authorized by Subsection 112(1)(c) in limited circumstances. This Tribunal has established the test for the reception of new evidence in a number of cases including *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03. The Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

> 1. the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
>
> 2. the evidence must be relevant to a material issue arising from the complaint;
>
> 3. the evidence must be credible in the sense that it is reasonably capable of belief; and
>
> 4. the evidence must have high potential probative value, in the sense that, if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

59. In this case the only explanation offered why this evidence was not previously submitted is because the bookkeeper was unpaid. In my opinion that explanation does not indicate that due diligence was exercised.

60. An appeal to the Employment Standards Tribunal is not an opportunity to present additional evidence that should have been presented to the Delegate investigating the complaint. An appeal to the Tribunal is a limited appeal, directed towards curing errors of law in the adjudication of the complaint, breaches of natural justice in the hearing of complaints, or to curing defects in the proceeding where new evidence becomes available to a party: *Re Alano Club of Chilliwack*, BC EST # D094/05.

61. Moreover, the evidence falls far short of having significant probative value. As Mawdsley notes, the letter indicates that he was in charge of operations, an employment function. While Mawdsley apparently directed that the information be recorded as instructed, the bookkeeper also notes that there was "no reason to question his directions". The evidence on its own, or when considered with other evidence, could not, in my opinion, have led the Director to a different conclusion on the material issue.

62. In any event, in my opinion the letter should not be admitted in evidence.

ASSOCIATED CORPORATIONS

63. The written submission of the JF Companies asserts as a ground of appeal that the Director erred in law in finding that JF Bioenergy Inc. and JF Ventures Ltd. are associated corporations pursuant to s.95 of the Act. The submission is succinct and does not elaborate on that position.

64. Mawdsley in his submission notes that the original contract of employment specifies that both JF Ventures and JF Bioenergy Inc. are named as the employer.

65. In considering whether two companies should be associated pursuant to section 95 decisions of this tribunal have identified four separate requirements: (1) there must be more than one corporation, individual, firm, syndicate or association, (2) each corporation or entity must be carrying on a business, trade or undertaking, (3) there must be common direction or control, and (4) there must be some statutory purpose in treating the entities as one employer: *Re Monchelsea Investments Ltd*., BC EST #D315/97, reconsideration dismissed BC EST # RD513/97.

66. The Delegate found that:

1. Both companies are engaged in the sustainable renewable energy business in Abbotsford B.C.;

2. John Flottvik is the sole Director/Officer of one company and a Director and Officer of the other company;

3. John Flottvik is the President of both companies;

4. Both companies are named as the employer in the employment contract dated March, 2003;

5. Both companies have the same business address;

6. One company was established to market the other company, while the assets that are being marketed are held by the second company.

67. I note that in an affidavit forming part of the record dated June 18, 2004 Flottvik attests that both companies "…are developing a machine that turns waste wood, manure and other forms of waste into energy through the conversion of the waste…", and although Mawdsley drafted the contract of employment he, in 2003, had "…signed an employment contract with the Plaintiff on behalf of JF Bioenergy and JF Ventures…."

68. As noted earlier, when Mawdsley was laid off from his prior employment it was contemplated that he would be recalled and that is what occurred.

69. The Delegate in her Determination concluded that there was common direction and control of the corporate entities and a statutory purpose to the association. In my opinion the Determination does not disclose any error of law by the Delegate.

ORDER

70. For the reasons given above and pursuant to Section 115(a) of the *Act*, the appeal is dismissed and the Determination dated May 28, 2005 is confirmed.

John E. D. Savage
Member
Employment Standards Tribunal