Employment Standards TRIBUNAL

An appeal

- by -

Stallion Group Inc. (An Alberta Corporation)
("Stallion")

- 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.: 2016A/104

DATE OF DECISION: October 26, 2016

DECISION

SUBMISSIONS

John Cook on behalf of Stallion Group Inc. (An Alberta Corporation)

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Stallion Group Inc. ("Stallion") has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on June 27, 2016. In that Determination, the Director found that Stallion had contravened sections 18, 58 and 21 of the *Act* in failing to pay wages to four employees. The Director ordered Stallion to pay the amount of $50,945.97 representing wages, annual vacation pay and interest. The delegate also imposed four administrative penalties in the total amount of $2,000, for a total amount payable of $52,945.97.

2. Stallion appeals the Determination, contending that the delegate failed to observe the principles of natural justice in making the Determination. Stallion also says that evidence has become available that was not available at the time the Determination was made.

3. This decision is based on Stallion's written submissions, the section 112(5) "record" that was before the delegate at the time the decision was made and the Reasons for the Determination.

FACTS AND ARGUMENT

4. Stallion is a property development company incorporated in Alberta. It is not registered in British Columbia.

5. In the fall of 2015, in anticipation of purchasing a development property in Donald, British Columbia, (the "Donald Crossing Project") Stallion opened an office in Golden and engaged a number of individuals to assist with a number of aspects of the project, including setting up and renovating an office and engaging with prospective investors and other third parties. After the project failed to materialize, four individuals filed complaints under the *Act* alleging that they were owed wages: Kelly Mason, who worked as an office manager from October 5 to March 8, 2016; Larry Nolin, who worked as a construction manager from October 1, 2015 until February 29, 2016; Brian Kelley, who worked as a journeyman carpenter from November 10, 2015 until January 27, 2016; and Gordon Coulombe, who worked as a labourer from November 10, 2015 until January 27, 2016.

6. The delegate conducted an investigation into the complaints. At issue before the delegate was whether the complainants were employees or independent contractors, and if they were employees, whether they were owed wages.

7. As Stallion does not appear to challenge the delegate's conclusion with respect to Ms. Mason's status as an employee, I have only briefly set out the facts as they relate to her, with more extensive recounting of the evidence of the remaining three complainants.

8. Ms. Mason was initially hired as Stallion's office manager. Her title was later changed to project manager. Ms. Mason was asked to set up a business plan; establish the administrative and financial operations and benefits package, and manage records so a bookkeeper could do the payroll. Mr. Cook instructed her to complete certain tasks and she was given signing authority on company bank accounts. Ms. Mason said that

Mr. Cook referred to her and the other complainants as his "employees" or his "staff." Ms. Mason attempted to set up a payroll account but was unable to do so until Stallion obtained a GST number. When she was about to obtain the number, Mr. Cook informed her that Stallion's lawyer was attending to that. No GST number was ever obtained. Mr. Cook also instructed Ms. Mason to set up a benefits package for each of the other complainants. Although she did the preparatory work, Mr. Cook did not make the necessary arrangements to obtain the package.

9. In February, Ms. Mason became concerned about being paid when creditors started calling and a number of cheques were returned for insufficient funds, including one to her for her wages. Mr. Cook asked Ms. Mason to personally pay for various office supplies and, on one occasion, for a catered lunch for prospective investors. She was never reimbursed in full for these expenses. On March 9, 2016, Ms. Mason asked Mr. Cook for payment of her wages for February and her out-of-pocket expenses before she would do any additional work. Mr. Cook asked her for the return of company records and advised her not to return to the office. The delegate found Ms. Mason to be an employee and ordered Stallion to pay wages, including out of pocket expenses paid on Stallion's behalf, of $20,144.27. As noted, Stallion does not dispute the delegate's conclusions in this regard.

10. Mr. Nolin's evidence was that on October 1, 2015, Mr. Cook hired him to be a construction manager or foreman because Mr. Cook had no experience on large construction projects and, on Mr. Nolin's recommendation, also hired Mr. Kelley and Mr. Coulombe. Mr. Cook asked Mr. Nolin if he would work on a contract basis, but Mr. Nolin said he would only work as an employee. They agreed on an hourly rate of pay and Mr. Nolin gave Ms. Mason his social insurance number and other personal information. Mr. Cook informed him that he would receive a benefits package. Mr. Cook also told him that he would receive gross wages until the payroll was set up and Stallion would "eat" the statutory deductions. Mr. Nolin resigned on March 1, 2016, because he had not been paid since January 25, 2016 and Mr. Cook would not return his calls.

11. Mr. Cook informed the complainants that he expected the project would get started at the end of October, but that until it was up and running, he would keep them busy with other work, including renovations to Stallion's office space. Mr. Kelley and Mr. Coulombe began working on the office renovations on November 10, 2015. Mr. Cook gave them a journal to record their hours of work. The complainants submitted their hours to Mr. Cook every couple of weeks. Because the payroll system was not yet established, Mr. Cook gave Mr. Nolin a lump sum and directed him to distribute the funds between himself, Mr. Kelley and Mr. Coulombe. Mr. Cook also told them he would be responsible for their statutory deductions as a bonus for them waiting for the project to start.

12. In late November or early December 2015, the Donald Crossing Project fell through and at a meeting in mid-December, Mr. Cook informed Mr. Nolin, Mr. Kelley, Mr. Coulombe and Ms. Mason that he was halting the office renovations until January 2016. In late December 2015 or early January 2016, Mr. Cook negotiated an agreement for another project (the "Larwill Property") and directed Mr. Nolin, Mr. Kelley and Mr. Coulombe to resume the office renovations. Those were substantially completed by January 27, 2016. After the completion of the renovations, Mr. Kelley, Mr. Nolin and Mr. Coulombe transferred their record of hours onto a form called "Stallion Payroll: Renovation Labour Expenses" which was submitted to Mr. Cook.

13. On or about the end of January 2016, Mr. Nolin, Mr. Kelley and Mr. Coulombe told Mr. Cook that if he did not have more work for them, they would seek work elsewhere. Mr. Cook informed them that the development would be starting soon and assured them that, until it did, he would keep them working on other projects such as erecting a barrier around the property and demolishing an old planer mill. However, the vendor of the Larwill Property did not want any alterations to the property until the purchase was completed. At the end of February 2016, the complainants again approached Mr. Cook for payment of their

outstanding wages and clarification about when they would get more work. Mr. Cook informed Mr. Kelley and Mr. Coulombe that he had no further work for them until the purchase of the Larwill Property was completed.

14. On February 29, 2016, Mr. Cook gave Mr. Kelley and Mr. Coulombe cheques that were identified as representing outstanding wages. The cheques were returned for insufficient funds. Mr. Cook refused to return Mr. Kelley and Mr. Coulombe's telephone calls and they did not receive any additional work. On March 1, 2016, Mr. Nolin resigned because he had not been paid since January 25, 2016, and Mr. Cook did not return his calls or attend pre-arranged meetings.

15. Mr. Nolin was given a company truck with a Stallion logo to drive. He used his own hand tools for office renovations but Mr. Cook purchased all the materials. From October 2015 until March 2016, Mr. Cook directed how Mr. Nolin's time was to be spent, including instructing him on the office renovations, showing the development property to potential investors and engineers, and going over development details with them. He was required to attend all meetings with Mr. Cook. Mr. Nolin provided Mr. Cook with a record of his hours of work, along with those of Mr. Kelley and Mr. Coulombe every couple of weeks. Mr. Nolin was asked to "bear with him" until payroll was set up. Mr. Cook offered Mr. Nolin shares in the company when the topic of payment was raised, but Mr. Nolin informed Mr. Cook that he wanted to be paid. Mr. Cook gave Mr. Nolin various sums of money in November 2015 and January 2016 and told to distribute the money amongst himself, Mr. Kelley and Mr. Coulombe. On or about February 29, 2016, Mr. Cook gave Mr. Nolin a Stallion cheque for $3,000 that was indicated to be "final payment." Mr. Nolin told Mr. Cook that he would not accept that amount in satisfaction of the money owed to him.

16. Mr. Kelley's evidence was that he was hired as a carpenter, and although Mr. Cook wanted him to work on a contract basis, Mr. Kelley told him he would only work as an employee. Mr. Kelley did not have his own company and did not work for anyone else while working for Stallion. Similarly, Mr. Coulombe said that he was hired by Mr. Cook to work as a labourer. He went to work with Mr. Kelley each day on projects for Stallion and worked for no one else.

17. The delegate also heard from a number of witnesses who had been hired or contracted by Mr. Cook to perform a variety of work and had not been paid.

18. Mr. Cook denied that the complainants had been hired as employees. He said that the company was in its pre-purchase and pre-development phase and had no assets, revenues, payroll number or WorkSafe BC account. Mr. Cook contended that he hired Mr. Nolin and Mr. Kelley on a contract basis solely to perform office renovations. He said that although he made commitments to their future employment, that employment would only begin once the project development started. Mr. Cook agreed that he inquired into group benefits but that he made a decision not to pursue that until the project became certain. Mr. Cook contended that he exercised no direction or control over how or when the office renovation work was done. He said that Mr. Nolin, Mr. Kelley and Mr. Coulombe set their own hours of work and supplied their own tools. He also said that they had the authority to hire others, and in fact subcontracted the electrical work. He argued that these three complainants could have taken on work for others if they chose to do so.

19. Although Mr. Cook agreed that Mr. Nolin, Mr. Kelley and Mr. Coulombe were supposed to be paid an hourly rate, he said that they did not report their hours of work to him; rather, Mr. Nolin provided a verbal account of amounts owing at irregular intervals based on a "flat fee for services rendered" basis.

20. Neither Mr. Cook nor anyone else from Stallion provided the delegate with any documentary evidence or business records.

21. In a May 19, 2016, preliminary findings letter, the delegate informed the parties that, based on the information provided to date, she had determined that the complainants were employees. The delegate offered the parties an opportunity to make a final response before she issued her Determination.

22. On June 10, 2016, David Brown, Stallion's counsel, responded to the delegate, asserting that Messrs. Nolan, Coulombe and Kelley were engaged as independent contractors and the delegate did not have jurisdiction to decide their complaints. Counsel's submission addressed the common law tests for determining employee-employer status, including the level of control Stallion had over the complainants, whether the complainants provided their own tools and equipment, whether the complainants could subcontract the work or hire assistants, the degree of financial risks taken by the complainants, and the nature of the payments to the complainants. Counsel did not address the statutory definitions of "employee" or "employer" or refer to any Tribunal jurisprudence in the submission.

23. After reviewing Stallion's response, the delegate concluded that the complainants were all employees and entitled to wages. Although the delegate noted, in a brief sentence, that the common law tests were subordinate to the statutory definitions, she did not make any further references to those definitions of "employee" and "employer" in her analysis. She found that the complainants were all promised long-term employment, that they were hired as employees and presented as such to third parties, and that Mr. Nolin was provided with a vehicle bearing a Stallion logo during the period of renovations. She found no evidence that the complainants worked for others. She determined the wages of the complainants based on their hours of work which they maintained on a contemporaneous basis.

Argument

24. It is difficult to ascertain the basis of Stallion's appeal. Attached to the appeal document is a copy of its counsel's June 10, 2016, letter to the delegate, as well as emails setting out a list of tools that Mr. Nolin, Mr. Kelley and Mr. Coulombe brought to the work site. In an email dated August 4, 2016, Mr. Cook asks for additional time to obtain "proof" that the three male complainants made "false claims" against Stallion, specifically, additional banking statements and letters from business people. Mr. Cook states that one of the claims was "fraudulent", that the renovation was not structural but, as I understand it, cosmetic, and that Mr. Coulombe did not work after January 6, 2016.

25. Also attached to the appeal is an email from a ReMax real estate agent who stated that when he showed Mr. Cook two condos in early February, Mr. Nolin and Mr. Kelley were in attendance, but he did not know what capacity they were acting. This document is virtually identical to an email that was referenced and enclosed in counsel's June 10, 2016, letter to the delegate.

26. Finally, also attached to the appeal are copies of what appear to be invoices for office furniture, electrical supplies and services.

ANALYSIS

27. Section 114(1) of the *Act* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the appeal if the Tribunal determines that any of the following apply:

> (a) the appeal is not within the jurisdiction of the tribunal;
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> (b) the appeal was not filed within the applicable time limit;
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> (c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;

(d) the appeal was made in bad faith or filed for an improper purpose or motive;

(e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;

(f) there is no reasonable prospect that the appeal will succeed;

(g) the substance of the appeal has been appropriately dealt with in another proceeding;

(h) one or more of the requirements of section 112(2) have not been met.

28. Section 112(3) of the *Act* provides that a party wishing to appeal a Determination must deliver that appeal to the Tribunal within 30 days of the date of the Determination, if the person was served by registered mail.

29. 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 being made.

30. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I conclude that Stallion has not met that burden.

31. In *JC Creations Ltd.* (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." I have considered the appeal under each of the statutory grounds of appeal.

Failure to observe the principles of natural justice

32. Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker. There is nothing in the appeal submission supporting this ground of appeal. I am satisfied Stallion was notified of the complaint and had full opportunity to respond to the allegations. Indeed, Stallion's counsel made an extensive submission regarding Stallion's position. I am not persuaded that the delegate failed to observe the principles of natural justice.

Error of Law

33. The Tribunal as 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 [in *Gemex*, the legislation was the *Assessment 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.

34. While I find no error in the delegate's ultimate conclusion, in my view, she ought to have assessed the status of the complainants under the definitions contained in the *Act* rather than applying the common law principles. As has been recently restated by the Tribunal in *Zip Cartage* (BC EST # D109/14) (Reconsideration application refused BC EST # RD005/15) the appropriate test for determining whether an individual is an employee is not determined by common law principles, but the application of the provisions of the *Act*:

> …it is counter-productive to spend a significant amount of time analyzing the relationship from the perspective of common law tests. It unnecessarily complicates the issue and invites appeals such as this one.

35. Similarly, in *Project Headstart Marketing Ltd.*, BC EST # D164/98, the Tribunal stated:

> . . . I need not even concern myself with the question of the status of the individuals in question under the common law in the face of the statutory definitions contained in section 1 of the *Act*. The *Act* casts a somewhat wider net than does the common law in terms of defining an "employee".

36. Section 1 of the *Act* defines the term "employee" to include, *inter alia*, a person "receiving or entitled to wages for work performed for another" and a person "an employer allows, directly or indirectly, to perform work normally performed by an employee". An "employer" is defined as including a person "who has or had control or direction of an employee", or "who is or was responsible, directly or indirectly, for the employment of an employee". The statutory definitions must be interpreted in light of the policy objectives of the *Act*. The Supreme Court of Canada made the following statement in *Machtinger v. HOJ Industries Ltd.* (1992), 91 D.L.R. (4th) 491 at 507, concerning Ontario employment standards legislation, that applies equally to the *Act*:

> . . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible, is favoured over one that does not.

37. The Tribunal has considered the issue of the status of an employee on many occasions. All decisions have made it clear that the definition of "employee" is to be broadly interpreted and that the common law tests for employment developed by the courts are subordinate to the definitions contained in the Act, see, for example, *Kelsy Trigg*, BC EST # D040/03, *Christopher Sin*, BC EST # D015/96, *Jane Welch operating as Windy Willows Farms*, BC EST # D161/05 and *North Delta Real Hot Yoga Ltd. carrying on business as Bikram Yoga Delta*, BC EST # D026/12. Furthermore, the inadequacies of those common law tests have been noted by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, and by the Federal Court of Appeal in *Wolf v. Canada*, 2002 F.C.A. 96. In *Kimberley Dawn Kopchuk* (BC EST # D049/05 (Reconsideration denied BC EST # RD114/05) set out the following test when considering the issue of whether or not an individual is an employee under the *Act*:

> The overriding test is found in the statutory definitions: that is, whether the complainant "performed work normally performed by an employee" or "performed work for another".

38. In my view, the evidence clearly demonstrated that the complainants performed work normally performed by an employee. They worked exclusively on behalf of Stallion at the direction of Mr. Cook, one of Stallion's principals. They took no financial risk and no opportunity for profit in the performance of their work. The business was clearly that of Stallion's, not the individual complainants'. Mr. Cook was responsible for engaging the complainants and directed the work they were to do. He permitted or instructed them to use

Stallion vehicles and introduced them as "employees." Furthermore, Mr. Cook issued cheques to each of the complainants which were identified as being for "wages."

39. I find no basis for this ground of appeal.

New Evidence

40. The Tribunal is given discretion to accept or refuse new or additional evidence. The Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. New or additional evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a Determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the Determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *Act*.

41. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:

> (a) 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;
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> (b) the evidence must be relevant to a material issue arising from the complaint;
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> (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
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> (d) 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.

42. The material submitted by Stallion appears to be largely identical to the material submitted during the investigation. Re-submitting it on appeal is of no assistance to Stallion, as an appeal is not an opportunity to re-argue the Complaint. The "new" material was clearly available at the time the delegate adjudicated the complaint. I also find that the invoices would not have led the delegate to a different conclusion on the issue of whether or not the Complainants were employees.

43. I find no basis for this ground of appeal.

44. I am not persuaded there is any reasonable prospect this appeal can succeed. The purposes of the *Act* would not be served by requiring the other parties to respond to it.

ORDER

45. Pursuant to section 115 of the *Act*, I order that the Determination, dated June 27, 2016, be confirmed in the amount of $52,945.97 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal