

An appeal

- by -

John Werner Hartloff and Donald James Peters operating as Artech Machine & Tool  
(“Artech”)

- 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

**TRIBUNAL MEMBER:** David B. Stevenson

**FILE No.:** 2004A/103

**DATE OF DECISION:** August 23, 2004

## DECISION

### SUBMISSIONS

John Hartloff	on behalf of Artech Machine & Tool
Simon Konte	on his own behalf
Joe LeBlanc	on behalf of the Director

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by John Werner Hartloff and Donald James Peters operating as Artech Machine & Tool (“Artech”) of a Determination that was issued on May 18, 2004 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Artech had contravened Part 8, Section 63 of the *Act* in respect of the employment of Simon Konte (“Konte”) and ordered Artech to pay Konte an amount of \$7070.29.

The Director also imposed an administrative penalty on Artech under Section 29(1) of the *Employment Standards Regulation* (the “*Regulations*”) in the amount of \$500.00. The total amount of the Determination is \$7570.29.

Artech says the Director “failed to comply with the principles of natural justice in the application of the law”. The appeal raises three arguments:

- (i) the Director erred in basing his decision on the relationship of Mr. Peters, one of the owners of Artech, to Konte’s previous employer, I.K. Tool & Die Ltd. (“I.K.”);
- (ii) the Director erred in finding I.K. had disposed of all or part of its business, or a substantial part of the assets of its business to Artech; and
- (iii) the Director erred in not finding that Konte’s employment with I.K. had ended and he started as a “new employee” with Artech.

The Tribunal has reviewed the appeal and the materials submitted with it and has decided an oral hearing is not necessary in order to decide this appeal.

### ISSUE

The issue in this appeal is whether Artech has shown there is an error in the Determination that allows or justifies the Tribunal’s intervention under Section 115 of the *Act*.

## THE FACTS

Konte was employed by Artech until July 15, 2003, at which time he was temporarily laid off from his job. When the temporary layoff became a termination for the purposes of the *Act*, Konte sought length of service compensation. Artech paid Konte one week length of service compensation. Konte claimed he was owed an additional seven weeks length of service compensation. That claim was denied by Artech and Konte filed a complaint with the Director. The Director unsuccessfully attempted to mediate the claim.

During the complaint process, the parties agreed the following issues were in dispute:

- whether the Director should dismiss Konte's claim under Section 76(3)(f) of the *Act* because the parties had resolved their dispute in a meeting in January 2003;
- whether the Director should dismiss Konte's claim under Section 76(3)(c) of the *Act* because it is vexatious and/or not made in good faith; and
- whether there was a disposition as contemplated by Section 97 of the *Act* between I.K. and Artech such that Konte's employment should be deemed continuous for the purposes of the *Act*.

On March 24, 2004, the Director held a hearing on the complaint at which Mr. Konte, on his own behalf, and Mr. Hartloff, on behalf of Artech, participated. The Director issued a Determination on May 18, 2004. The Determination sets out the respective evidence and positions of the parties, which I will briefly summarize:

- Konte commenced working for I.K. in July 1995;
- on January 17, 2003, Konte was advised by Mr. Peters that I.K. was ceasing operations, that a new company was commencing business and that Konte would have employment with the new company at the same salary and vacation pay rate as he had with I.K.;
- Mr. Peters was one of the owners of I.K.;
- Konte was told he would be a new employee of Artech;
- Konte reported for work with Artech on Monday, January 20, 2003 at the same location, at the same salary and doing the same job as when he worked at I.K.;
- Artech and I.K. agreed that Artech could use I.K.'s machinery in exchange for storing it in the shop while I.K. sought to sell it;
- Artech did not assume any of I.K.'s liabilities nor was it assigned any of its receivables;
- No money changed hands between Artech and I.K.;
- Konte is a shareholder in the company that owns and leased the business location to Artech;

- Artech, while still a tool and die shop, had changed the focus of its business from what I.K.'s business had been; and
- Konte was terminated because his wage rate was too high.

Artech argued that the complaint was vexatious and made in bad faith because Konte had been told in January that he was a new employee and that if he had outstanding issues from his employment with I.K. he should take them up with I.K. Artech also argued that Konte was angry because I.K., which was a company started by his father, had ceased to operate and Konte was no longer working for that company.

The Director found that Section 97 of the *Act* applied as Konte's employment was, in fact, continuous through the change from I.K. to Artech and there was a "disposition" within the meaning of Section 97 of the *Act* from I.K. to Artech.

In making the above findings, the Director specifically noted that Konte worked for Artech in the same capacity, at the same location and for the same rate of pay as he did for I.K. The Director rejected the argument that Artech should be considered a new business because, while still a tool and die shop, its product focus was quite different that what I.K.'s had been.

The Director was, apparently, not persuaded to exercise discretion under Section 76(3) of the *Act* to refuse to issue the Determination.

In this appeal, Artech has sought to introduce evidence that was not before the Director when the Determination was made. The Director has objected to new evidence being introduced in the appeal. The Director submits that the Tribunal has consistently held that a party may not bring forward new evidence on appeal that was available but not produced during the complaint process. That is not a completely accurate summary of the view of the Tribunal. The basis upon which the Tribunal will or will not allow fresh evidence in an appeal is summarized in a number of decisions and is somewhat different than described by the Director (see, for example, *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D171/03). Notwithstanding the difference, I find it is not appropriate to accept the additional evidence provided for three reasons: it appears this evidence was reasonably available to be provided to the Director during the complaint process and no explanation is given for failing to do so; the relevance of the evidence to the material issue in dispute is not shown; and, in any event, it is not shown the Director would have been led to a different conclusion on the material issue as a result of this evidence. In his reply to the appeal, Konte has also sought to introduce new evidence. For much the same reasons, that evidence is not accepted and has not been considered in assessing the merits of the appeal.

## **ARGUMENT AND ANALYSIS**

Artech argues the Director erred in basing the Determination on the relationship between a member of Artech ownership, Mr. Peters, also having been a shareholder of I.K. In reply, the Director says Artech has incorrectly characterized the basis for the Determination and that it was not based on any relationship between the involvement of Mr. Peters in I.K. and his involvement in Artech. Rather, the Director says the Determination was based on a finding that there had been a disposition of assets, within the meaning of the *Act*, from I.K. to Artech and that Konte was an employee of I.K. at the time of disposition.

The Director does, however, re-assert the fact that Mr. Peters was involved with both I.K. and Artech and was the individual who advised Konte on January 17, 2003 that Artech would be taking over the operation effective January 20, 2003. It was also Mr. Peters who told Konte he would have employment with Artech at the same wage rate and vacation pay rate as he had with I.K.

I have carefully read the Determination and do not accept that the basis for the decision was the relationship of Mr. Peters to I.K and Artech. I do not suggest the Director did not see some relevance in that relationship, but it is clear the decision was based on the finding of a disposition and the employment status of Konte with both I.K. and Artech through the disposition.

Next, Artech argues the Director erred in finding there was a disposition. Artech says all that happened was that I.K. left its equipment for use by Artech and that there were several valid reasons for doing that. In the appeal, Artech states:

I do not believe that any government has passed a law stating that any company or individual cannot leave their assets in the care of someone else, or if in doing so, it constitutes a sale.

In response the Director says the argument being made by Artech demonstrates a misunderstanding of the Determination. The Director says the Determination makes no mention of a “sale”. The finding made was that I.K. had “disposed” of its assets to Artech. In making that finding, the Director noted that the *Act* does not define “disposition”, used the definition of “dispose” found in Section 29 of the *Interpretation Act*, [RSBC 1996] ch. 238 and applied that definition to the circumstances. That definition reads:

29. *In an enactment . . .*

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

The Director has noted in the Determination that the definition encompasses a transfer by any method and the description of transfers that fall within the definition is inclusive, not exclusive. The Director reasoned that an arrangement such as existed in this case, where the owner of the equipment, I.K., agreed to give Artech the full use of the equipment in return for Artech “storing” that equipment is a type of transfer that is included in the definition.

I am not convinced the Director erred in law. Considering the remedial purpose of the *Act* generally and, more specifically, the statutory objective of Section 97 of the *Act*, I do not find the Director’s decision to be either unreasonable or incorrect (see *Lari Mitchell and others*, BC EST #D107/98 (Reconsideration of BC EST #D314/97))

Finally, Artech argues the Director erred in not finding Konte was a new employee of Artech. The validity of that argument, however, depends substantially on whether Section 97 of the *Act* applies. That provision says:

97. *If all or part of a business or a substantial part of the entire assets 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.*

Simply put, because there was a disposition, and Konte's employment continued through the disposition, then the *Act* deems his employment to be continuous even though his hiring by Artech may not have been part of "an arranged deal" between I.K. and Artech.

The appeal is dismissed.

### **ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated May 18, 2004 be confirmed in the amount of \$7570.29, together with any interest that has accrued pursuant to Section 88 of the *Act*.

---

**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**