Employment Standards TRIBUNAL

An appeal

- by -

Astrolabe Marine Group Ltd. and AstroPrint Inc.
("Astrolabe" and "AstroPrint")

- 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

ADJUDICATOR: Carol L. Roberts

FILE No.: 2003A/219

DATE OF DECISION: October 29, 2003

DECISION

SUBMISSIONS

Andrew P. Mayer	Counsel for Astrolabe Marine Group Ltd. and AstroPrint Inc
Barry D. Smith	on behalf of himself
Sharon Cott	on behalf of the Director of Employment Standards
Adele Adamic	Counsle for the Director of Employment Standards

OVERVIEW

This is an appeal by Astrolabe Marine Group Ltd. (Astrolabe) and AstroPrint Inc. (AstroPrint) pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued June 23, 2003.

On December 15, 2002, Barry Smith filed a complaint with the Employment Standards Branch claiming that he had been employed as vice president of marine operations for Astrolabe and general manager for AstroPrint from May 1, 2002 until September 30, 2002, and that he had not been paid wages or vacation pay for work performed after May 31, 2002.

The Director's delegate determined that Astrolabe, AstroPrint and 564460 British Columbia Ltd. (564460) were related companies for the purposes of s. 95 of the Act.

The delegate also concluded that Astrolabe, AstroPrint and 564460 had contravened s. 17 and 18 of the Act in failing to pay wages to Mr. Smith. The delegate determined that Mr. Smith was owed wages, vacation pay and interest in the total amount of $22,810.70.

This decision is based on written submissions by Andrew P. Mayer, Bernard & Partners, Barristers and Solicitors on behalf of AstroPrint and Astrolabe, Adele Adamic counsel for the Director of Employment Standards, and by Mr. Smith.

ISSUE TO BE DECIDED

At issue on appeal is whether the delegate erred in fact and law in

1. concluding that AstroPrint and Astrolabe and 564460 were related companies; and

2. determining that Mr. Smith was an employee of Astrolabe or AstroPrint.

Counsel for Astrolabe and AstroPrint contends that they are not associated companies for the purposes of s. 95. He also submits that Mr. Smith was not an employee of either Astrolabe or AstroPrint; rather, he argues that Mr. Smith provided consultancy services to Astrolabe through his company Barry D. Smith & Company Limited, and that he was a joint venture partner of AstroPrint.

FACTS

The MV Bruno Gerussi ("Bruno Gerussi") was constructed in 1995 by Astrolabe Industries Inc., a former company of Maurice Gagne. The Bruno Gerussi is registered to 564460, and is insured by both 564460 and Astrolabe. Astrolabe is a company in the business of vessel construction, with the intention of providing fast passenger ferry transportation using the Bruno Gerussi between the Sunshine Coast and Vancouver harbour.

Maurice Gagne is the sole director and officer of Astrolabe, 564460 and AstroPrint. Astrolabe and AstroPrint's head office are in the same Vancouver location, and share the same telephone and fax numbers.

Mr. Smith operated his own marine survey company, Barry D. Smith and Company (Vancouver) Ltd. ("Smith & Co."), which provided marine consulting services to Astrolabe from time to time between 1998 and 2002. Beginning in about March 2002, Smith & Co. provided consulting services to Mr. Gagne with respect to the re-installation of the Bruno Gerussi's engines and other vessel related matters. Astrolabe and AstroPrint contended that Smith & Co. was engaged to provide consulting services at a rate of $3,300 per month until the refit was complete or the company's services were no longer required. Although no written consulting agreement was ever entered into, Astrolabe issued nine cheques to Smith & Co. between March 26, 2002 and June 6, 2002, which were identified as being for consulting services.

Mr. Smith, through Barry D. Smith & Company Ltd., also operated a commercial print franchise, Minuteman Press, in New Westminster, B.C. Mr. Smith says the franchise was listed for sale in October, 2002, and sold on June 15, 2003. Minuteman provided printing services to Majes.tech Multimedia Inc. ("Majes.tech") Michael Bosiak was the sole director of Majes.tech.

Mr. Smith alleged that, on March 14, 2002, Mr. Gagne asked him to move to the Sunshine Coast to manage the Bruno Gerussi project, and that all of his costs would be covered. Mr. Smith contended that he would do so only as an employee, not as a consultant. Mr. Smith asserted that, on May 4, 2002, he prepared a description for his position of marketing manager for Mr. Gagne's review, and that Mr. Gagne agreed to the position description.

In March or April, 2002, Mr. Gagne, Mr. Smith and Mr. Bosiak and his wife Petrina met to discuss the formation of a new printing company. Astrolabe submitted that Mr. Smith approached Mr. Gagne with a view to establishing a commercial printing business. The appellants contend that Mr. Smith, in his capacity as owner of a Minuteman Press franchise, was a partner in a joint venture, along with Mr. and Mrs. Bosick, as principals of Majes.tech Multimedia Inc. and Astrolabe, to establish a commercial printing business, and that each entity was to share profits equally. AstroPrint contended that Mr. Smith was to contribute the commercial printing expertise, Majes.tech was to provide its client list and print brokerage services, and Astrolabe would provide the seed capital, provided that it was repaid when the engine for the Bruno Gerussi was ready for installation. It submitted that the business venture was to operate through a new corporate entity known as AstroPrint, and that the arrangement did not draw the application of the Act.

Mr. Smith contended that Mr. Gagne, who had no previous experience in the printing business, decided to open a print shop in the Gibson's area to supply printing products to Astrolabe and 564460, and that the purpose of the meeting was solely to discuss the purchase of Majes.tech's customer list. Mr. Smith denied there was any discussion about a joint venture either with him or with Mr. and Mrs. Bosiak at any time.

Mr. Gagne changed the name of a company he controlled, Horseshoe Bay Marine Group Inc., to Astroprint Inc. effective May 16, 2002.

Mr. Smith claimed that, while employed as Vice President of Astrolabe, he met with a number of suppliers to expedite the re-powering of the Bruno Gerussi, and introduced Mr. Gagne to several potential clients for the construction of new vessels. Mr. Smith stated that Mr. Gagne sent him to the Sunshine Coast to secure premises for both Astrolabe and AstroPrint operations, and that he arranged for the purchase, shipping and installation of the necessary print equipment. Mr. Smith said that he found the work for Astrolabe and AstroPrint too onerous, and that he advised Mr. Gagne that he would have to work full time effective May 1, 2002. He contended that Mr. Gagne agreed.

Mr. Smith advised the delegate, and the appellants did not dispute, that Mr. Gagne offered to provide him with low interest financing to assist him with the purchase of a house. Astrolabe made the down payment on Mr. Smith's property and paid his moving expenses to Sechelt. An Astrolabe cheque issued to Barry D. Smith & Co. on May 31, 2002 was identified as being for "move". Mr. Smith and his wife moved to Sechelt on June 1, 2002, and AstroPrint began operations on or about June 2, 2002. Mr. Smith managed AstroPrint's operations, including hiring several employees and engaging subcontractors.

AstroPrint issued three cheques to Mr. Smith personally between June 21, 2002 and August 29, 2002. Two of the three cheques, dated July 20, 2002 and August 29, 2002, were signed only by Mr. Smith, the third, dated June 21, 2002, was signed by both Mr. Smith and Mr. Gagne.

Astrolabe and AstroPrint contended that Mr. Smith continued to operate his marine consultancy business during the relevant period, and was not exclusively working for the appellants. In support of this contention, Astrolabe and AstroPrint submitted a fax dated September 30, 2002 from Rivtow Marine to Smith & Co.

On August 28, 2002, Mr. Smith submitted a proposal to Astrolabe for the position of Vice President – Marine Operations. Of the five page document, approximately half related to tasks associated with marine operations and equipment, the other half related to tasks associated with duties of a general manager with Astroprint. It concluded with a final section setting out Mr. Smith's remuneration, vacation and other benefits. Mr. Gagne signed the proposal on behalf of Astrolabe, subject to "both parties agreeing on a termination clause".

A separate addendum, also drafted by Mr. Smith, set out the commencement date of the agreement of June 1, 2002, and provided for a 30 day notice of termination. This document was not signed by either party.

Mr. Smith alleged he was engaged as an employee. He stated that he was required to attend meetings, and that his performance was evaluated by Mr. Gagne. He contended that goals and quotas were established by Mr. Gagne, and that fees for products provided by Astrolabe were set by Mr. Gagne.

Astrolabe denied that Mr. Smith was an employee of Astrolabe or Astroprint. It also denied that Mr. Smith acted as Vice President of Astrolabe or general manager for Astroprint. It contends that Mr. Smith provided consultancy services to Astrolabe with respect to the refit of the Bruno Gerussi, for which he was paid. Furthermore, Astrolabe and Astroprint contended that, because the "Bruno Gerussi" was never put into service before September 30, 2002, there was no requirement to employ Mr. Smith as Vice President - Marine Operations.

AstroPrint also contended that Mr. Smith was not subject to Mr. Gagne's direction or control, and that there was never any intention that he was to be an employee. It further contends that the tools and equipment used to provide consultancy services to Astrolabe or the Bruno Gerussi were provided by Smith & Co.

Astrolabe and Astroprint further denied that Mr. Gagne signed the August 28, 2002 proposal, and submitted that, in any event, it was subject to both parties agreeing on a termination clause which did not occur. Astrolabe also submitted that the proposal was drafted by Mr. Smith, and did not reflect the nature of the business relationship between Astrolabe/Astroprint and Smith & Co.

The appellants argued that Mr. Smith was a joint venture partner, not an employee of AstroPrint, and submitted two letters written by Mr. Smith as "general manager" on July 15, 2002 in support of this argument. The letters, which were on AstroPrint letterhead stated that "Minuteman Press merged with AstroPrint" in June, 2002.

AstroPrint says that, in mid-August, Astrolabe and Mr. Gagne became concerned with the poor business performance of AstroPrint and whether the funds for the Bruno Gerussi's engines would be available when needed. It says that Mr. Gagne decided to cease the operations of the Astroprint printing business. On August 21, 2002, AstroPrint sent a letter to Majes.tech principals terminating its relationship with them, and on September 26, 2002, Mr. Gagne removed Mr. Smith's signing authority on the bank account.

Astrolabe contended that its relationship with Mr. Smith did not fall within the jurisdiction of the Act.

After reviewing the evidence, the delegate concluded that Astrolabe, AstroPrint and 564460 were associated for the purposes of s. 95 of the Act.

The delegate reviewed Mr. Smith's duties in light of a number of tests, and concluded that Mr. Smith was an employee of Astrolabe and AstroPrint as of June 1, 2002. The delegate noted that Mr. Gagne's signature was on the employment proposal, despite his assertions to the contrary. The delegate found that the evidence established that Mr. Smith was an employee only until August 31, 2002, and determined that he was entitled to wages and vacation pay in the amount set out above.

ARGUMENT

I will set out arguments on each issue separately.

Associated Corporations

Astrolabe and AstroPrint ("the appellants") contends that the delegate erred in law and in fact in finding that Astrolabe, AstroPrint and 564460 were associated companies under s. 95.

The appellants submit that this section contemplates that the businesses, trades or undertakings are conducting their activities for a common or similar purpose. The appellants say that, because Astrolabe is in the business of vessel construction, and AstroPrint is a commercial print operation, the entities cannot be considered associated pursuant to s. 95. The appellants say that, even if Mr. Smith was found to be an employee of either Astrolabe or AstroPrint, which it denies, liability cannot flow from one company to the other.

The appellants further contend that there is no basis in fact or law for finding 564460, which is a "vessel owning company" to be associated with either Astrolabe or AstroPrint.

Further, the appellants say, the complaint was made against the appellants, not 564460, and the delegate's preliminary findings did not find 564460 to be an associated company. As such, the appellants say that 564460 was denied an opportunity to make submissions on this point in advance of the Determination.

Counsel for the Director submits that previous Tribunal cases involving companies formed and operated by Mr. Gagne demonstrate a pattern of behaviour that ought to be taken into consideration on appeal. Although counsel notes that a delegate must not demonstrate any bias during an investigation or in arriving at conclusions, she submits that, based on *Milan Holdings* (BC EST#D313/98), it is appropriate for a delegate to consider previous experiences with various firms.

The delegate contends that Mr. Gagne's dealings, outlined in *Astrolabe Marine Inc.* (BC EST #D525/97) ought to be considered.

Counsel for the director notes that Mr. Gagne controls all three of the corporate entities that the delegate found to be associated. She notes that he is the corporate director, senior officer and sole shareholder of all three companies, "with the unifying purpose of earning funds which can be used to further his marine ventures".

Employee or Partner

The appellants contend that the delegate erred in fact and law by failing to find that Mr. Smith, either in his personal capacity or through Minuteman Press, was a joint venture partner in the AstroPrint business. The appellants note that the delegate's preliminary findings in a related complaint brought by Petrina Bosiak were that Majes.tech, Minuteman, Astrolabe and AstroPrint were associated for the purposes of section 95.

The appellants submit that the evidence, including the letter from Mr. Smith stating that Minuteman Press merged with AstroPrint, supports a conclusion that AstroPrint was a joint venture established by separate business entities, and that Mr. Smith continued with AstroPrint as a partner, not as an employee.

The appellants further assert that evidence provided to the delegate supports a finding that Mr. Smith provided marine consultancy services to Astrolabe through an independent company, and the delegate's conclusion that he was an employee constitutes an error in law or fact.

The appellants further submit that the delegate erred in relying on Mr. Smith's employment proposal, dated August 28, 2002, because it was drafted by Mr. Smith, and was subject to the parties agreeing on a termination clause which was never done. The appellants concede that Mr. Gagne signed Mr. Smith's copy of the proposal, but not his own copy. In any event, the appellants submit that, at best, the parties contemplated an employer/employee relationship continuing after August, 2002.

The appellants submit that the delegate made other factual errors, including a finding that the contractual relationship between Mr. Smith and Astrolabe ended in May, 2002, that Mr. Gagne exercised control over Mr. Smith in the operation of AstroPrint, that Mr. Smith contributed only stock to the AstroPrint venture, not equipment, and the finding that, upon the sale of Minuteman assets, Mr. Smith became an employee of AstroPrint.

Counsel for the Director submits that, given the paucity of evidence submitted in this claim, the overall relationship of the parties, their circumstances and history must be used to give context to them. She submits that Mr. Smith was of the view he was an employee, which led him to draft the agreement as he did. Although the document was signed by Mr. Gagne subject to a termination clause, she argues that it reflected agreement of all other aspects of the document, and that there was no other evidence submitted to contradict that. She submits that there was no evidence of a joint venture agreement, and that documents relied on by Astrolabe show Smith's signature as manager, not an owner.

Further, counsel for the delegate submits that Mr. Gagne is well aware of the pitfalls of failing to clearly delineate his relationship with other parties given his past experience with the Branch.

Counsel for the Director further submits that the principal documentation provided by the employer in support of its position is self interested correspondence that cannot be relied upon.

ANALYSIS

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

(a) the director erred in law

(b) the director failed to observe the principles of natural justice in making the determination; or

(c) evidence has become available that was not available at the time the determination was being made

The burden of establishing that the Determination is incorrect rests with an Appellant. Having reviewed the submissions of the parties, I am unable to find that the appellants have discharged that burden.

Associated Corporations

I do not accept the appellants' assertions that AstroPrint, Astrolabe and 564460 are unrelated.

Section 95 of the Act provides as follows:

> 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 person 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 or in an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.

As noted by the Tribunal in *Invicta Security Systems Corp.* (BC EST #D349/96), the purpose of section 95 is to allow the director to

> pierce the corporate veil and look behind the legal structure, or form, of a business to the relationships of various entities that in reality comprise the substance of the business. There are four preconditions to an application of Section 95 to the circumstances of any matter before the director:
>
> 1. There must be more than one corporation, individual, firm, syndicate or association;
>
> 2. Each of these entities must be carrying on a business, trade or undertaking;
>
> 3. There must be common control or direction; and
>
> 4. There must be some statutory purpose for treating the entities as one employer

Each of the three companies were carrying on a business, trade or undertaking during the time relevant to the issues on appeal. That these were not the same business, or similar businesses, is not a necessary precondition to the Director's determination under section 95. (*Brunswick Avenue Holdings* BC EST #D705/01)

Each company had the same corporate director, shareholder and registered offices. Astrolabe and AstroPrint's head office were in the same location. They also submitted a common response to the claims and the Determination. In my view, there is a sufficient connection for the delegate to conclude that the businesses are under common control or direction.

I have also reviewed the decision of *Astrolabe Marine*. In that case, the complainant alleged that he had been hired as Vice President, Marketing and Sales, and that Mr. Gagne refused to put the relationship in writing, contending that he preferred to conclude arrangements with a handshake. Mr. Gagne's company, Astrolabe Marine, which was in the business of manufacturing marine vessels, denied the existence of an employment relationship, advancing arguments that the complainant, whose duties were to sell those vessels, was a contractor, not an employee. The Tribunal upheld the delegate's determination that the complainant was an employee.

One of the purposes of the *Act* is to ensure employees in the province receive the basic standards of compensation and conditions of employment (section 2). Section 95, which provides a remedy to employees for unpaid wages, is a part of the *Act*'s comprehensive enforcement scheme. As the Tribunal noted in *Invicta*, the enforcement provisions include the power of the director to make the one employer declaration for the purpose of facilitating the collection of wages owing under the *Act.*

I have considered the submissions of counsel for the Director regarding the Employment Standard Branch's history of collection attempts against Mr. Gagne's web of companies. In my view, there is a statutory purpose for treating the entities as one employer, given the similarities in the nature of the claims, Mr. Gagne, or his company's defence to the claims, and Mr. Gagne's history at the Branch.

I have also considered the submissions by counsel that, because 564460 was not originally named in the claim by Mr. Smith or the delegate's preliminary determination, it was denied an opportunity to respond to the claim.

One of the purposes of an appeal is to cure any defects that might have been made by the delegate. Counsel for 564460 could have made submissions on appeal about why it ought not be treated as one

person, along with Astrolabe and AstroPrint. It did not. I infer that 564460 would have made identical or similar submissions to the other companies if it had been given an opportunity to be heard, and find no reason, on the evidence provided, to disturb the delegate's finding on this issue.

The appeal on this ground is dismissed.

Employment Relationship

I also find no evidence to support the appellant's argument that the delegate erred in concluding that Mr. Smith was an employee.

The delegate reviewed the submissions of each party on the issue of whether Mr. Smith was an employee. The parties provided little documentation in support of their positions. The delegate was provided with corporate filings and copies of some letters, cancelled cheques and faxes. Most critically however, she was provided with a copy of an employment proposal which counsel for the appellants initially claimed that Mr. Gagne had not signed. When presented with a copy of a document with Mr. Gagne's signature, counsel acknowledged that Mr. Gagne had signed the document, but submitted that he had forgotten he had done so. Counsel submitted that the document had no effect since it was subject to the signing of a termination agreement, which never occurred.

The delegate found that, notwithstanding the purported conditions on signing, the document represented a meeting of the minds of the parties. She concluded that the signed employment proposal demonstrated the intent of the parties about the nature of the relationship, even though there was no subsequent agreement about the terms of termination. In light of all of the evidence, I am not persuaded the delegate erred in this conclusion.

There is no evidence to support the appellant's contention that Mr. Smith agreed to be a joint venture partner in AstroPrint. Mr. Gagne alone caused a change of name of one of his companies to AstroPrint in May, 2002. None of the other parties to this purported joint venture arrangement are listed as directors or shareholders. There is no evidence of any agreement about how any profits or losses were to be shared. There is no evidence Mr. Smith was presented as an owner or partner to third parties.

None of the three cheques submitted by AstroPrint establish that Mr. Smith was a joint venture partner. Furthermore, the evidence is that Mr. Gagne unilaterally removed Mr. Smith as a signing officer from the AstroPrint account on September 26, 2002. The decision to shut down the business was strictly Mr. Gagne's. This supports the delegate's conclusion that there was no joint venture agreement between the parties, and that Mr. Gagne directed and controlled the business.

It may be that Mr. Gagne had no experience in the printing business, and therefore, did not "direct" Mr. Smith in the day to day operations of the business. That, however, is not conclusive of an employment relationship. The *Act,* rather unhelpfully, defines an employee to include a person an employer allows, directly or indirectly, to perform work normally performed by an employee, and an employer as a person responsible, directly or indirectly, for the employment of an employee (section 1). The evidence is that Mr. Smith performed work normally performed by a general manager.

The evidence is that the parties agreed that Mr. Smith was to be an employee of both Astrolabe and AstroPrint upon a particular condition being met. That condition had no bearing on the apparent meeting of the minds of the parties as to Mr. Smith's status.

Finally, it is entirely irrelevant that Mr. Smith may have continued to provide marine consultancy services to third parties before September 30, 2002. Even if Mr. Smith was doing so, that does not negate an employment relationship.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated June 23, 2003 be confirmed, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal