

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/220

DATE OF DECISION: October 29, 2003

DECISION

SUBMISSIONS

Andrew P. Mayer	Counsel for Astrolabe Marine Group Ltd. and AstroPrint Inc
Michael Bosiak	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.

Michael Bosiak filed a complaint with the Employment Standards Branch on August 12, 2003, alleging that he had not been paid for work performed as Astrolabe's Vice President, Market & Finance between June 1, 2002 and August 21, 2002. Mr. Bosiak also claimed he was entitled to expenses and revenue from the sale of a customer list.

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

The delegate concluded that Astrolabe, AstroPrint and 564460 had contravened s. 17 and 18 of the Act in failing to pay wages to Mr. Bosiak. The delegate determined that Mr. Smith was owed wages, vacation pay and interest in the total amount of \$9,358.50. The delegate did not address Mr. Bosiak's claim for the purchase price of his customer list.

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. Bosiak.

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. Bosiak was an employee of Astrolabe or AstroPrint.

Astrolabe and AstroPrint contend that they are not associated companies for the purpose s. 95, that Mr. Bosiak was not an employee of Astrolabe or AstroPrint, and that he did not act in the capacity of Vice President Marketing and Finance. Rather, AstroPrint and Astrolabe contend that Mr. Bosiak was a joint venture partner in AstroPrint, along with Astrolabe and Barry D. Smith & Company operating as Minuteman Press. (see also BC EST #D302/03)

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. Bosiak was the sole director of Majes.tech Multimedia Inc. (“Majes.tech”). Majes.tech provided independent print brokerage services to Minuteman Press, a commercial print franchise owned by Barry Smith, through Barry D. Smith & Company Ltd.

In March or April, 2002, Mr. Gagne, Mr. Bosiak and his wife Petrina, and Mr. Smith met to discuss the formation of a new printing company. The appellants contend that Mr. Bosiak and his wife, as principals of Majes.tech, were, along with Mr. Smith and Astrolabe, partners in a joint venture to establish a commercial printing business, and that each entity was to share profits equally. AstroPrint contended that 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.

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

Mr. Bosiak alleged that he worked at the Minuteman location on contract to Astrolabe from April 2000 until May 31, 2002, although the parties had no written agreement. Mr. Bosiak alleged that, beginning June 2, 2002, he worked exclusively for Astrolabe at its location in downtown Vancouver from approximately 9:30 a.m. until 5:30 p.m. Monday to Friday and that he did so until August 21, 2002.

Astrolabe provided the delegate with copies of six cheques made payable to Majes.tech dating from April 26, 2002 to July 3, 2002. Astrolabe contends that, because payments were made to Majes.tech, not Mr. Bosiak, no employment relationship was contemplated. Mr. Bosiak advised the delegate that he was paid by cheque, and at times, in cash, although he could not indicate how much cash he was paid, or when those payments were made. Mr. Bosiak claimed that wage payments made after June 1, 2002 were made out to Majes.tech to avoid a 5 day hold on his bank’s personal account. Astrolabe contended that the payments represented advances on profits, payments for expenses or advances on loans. Astrolabe contended that Mr. Bosiak’s suggestion that the cheques were not made payable to him personally to avoid a 5 day hold were not credible.

Mr. Bosiak alleged that he worked under the direction of the Vice President of Marine Operations, Barry Smith, and negotiated his rate of pay with him.

Mr. Bosiak provided the delegate with copies of three of his Astrolabe business cards. One of those cards indicated that Mr. Bosiak was associated with Astrolabe, but did not identify his job title or position with the company. The second identified Mr. Bosiak as Astrolabe's project director, and the third identified him as Vice President, Marketing and Finance. Mr. Bosiak was also issued a security card for Astrolabe's downtown office.

Mr. Bosiak advised the delegate that Astrolabe provided him with office equipment, including a desk and 2 computers, and that he was responsible for obtaining office supplies, including a photocopy machine. The delegate contacted the copy machine company. A representative advised her that Astroprint made an application, under Mr. Gagne's name, to lease a copy machine.

Mr. Bosiak alleged that Mr. Gagne required him to attend meetings and evaluated his performance. He was told by Mr. Gagne not to get involved in the print business. Mr. Bosiak also alleged that he was directed to establish an accounting system with the bookkeeper, who was hired by Mr. Gagne.

The delegate contacted the representative of a company in Edmonton who confirmed that he had a meeting with Mr. Bosiak and Mr. Gagne on July 24, 2003, and that, in his view, Mr. Bosiak was Mr. Gagne's employee, and an employee of Astrolabe.

Astrolabe contended that AstroPrint began operations on or about June 2, 2002 and that Mr. Bosiak worked from the AstroPrint offices in Sechelt seeking print business. Astrolabe also contended that Mr. Bosiak used AstroPrint facilities to wind down Majes.tech operations.

Mr. Bosiak contended that, while Mr. Gagne did not provide day to day supervision, if any guidance was necessary in making decisions, Mr. Gagne would have been contacted.

AstroPrint advised the delegate that, in mid-August, Mr. Gagne and Astrolabe became concerned with the poor performance of Astroprint, and its ability to generate profits so that funds for the Bruno Gerussi's engines would be available when needed. It stated that Mr. Gagne decided to cease the operation of the printing business. On August 21, 2002, AstroPrint sent a letter to Majes.tech principals terminating its relationship with them.

On September 16, 2002, Ms. Bosiak wrote a letter to Astrolabe/AstroPrint indicating that "...the relationship between Majes.tech and its principals could not come to an agreement and therefore the relationship is terminated..."

Astrolabe contended that Mr. Bosiak was a joint venture partner in AstroPrint and that he was not subject to direction and control or discipline by either Mr. Gagne or Mr. Smith. It further submitted that Mr. Bosiak provided his own tools to perform marketing work, including the Majes.tech customer list, that, although Mr. Bosiak was entitled to share in any profits derived from the business venture, there were none. Astrolabe contended that Mr. Bosiak was an independent print broker or independent contractor, and was only entitled to receive payment based on a percentage of the print business secured for AstroPrint. Astrolabe and AstroPrint contend that this does not constitute an employment relationship.

Mr. Bosiak provided the delegate with a draft employment agreement between himself and Astrolabe for the position of project manager commencing June 1, 2002 at a rate of \$3,500 per month. The draft is unsigned and undated.

Mr. Gagne denied that he exercised any direction or control over Mr. Bosiak, and that there was never any intention that Mr. Bosiak was to be an employee.

After reviewing the evidence, the delegate concluded that Astrolabe, AstroPrint and 564460 were associated for the purpose of s. 95 of the Act. She noted they were owned and operated by the same individual, and that AstroPrint and Astrolabe operated from the same Vancouver location and shared the same telephone and fax numbers. She also noted that Astrolabe provided start up capital for AstroPrint, and was to share in the profits of the business venture. She further noted that 564460 owned the vessel that Astrolabe intended to operate, and that Astrolabe was, along with 564460, the insured party for the vessel Bruno Gerussi.

The delegate concluded that Mr. Bosiak was an employee of Astrolabe and AstroPrint as of June 1, 2002. She found that it was not impossible for cheques written in June 19 and July 3 were payable to Majes.tech in order to avoid a 5 day hold placed on Mr. Bosiak's personal bank account.

The delegate also examined Mr. Bosiak's duties in light of a number of tests, and concluded that he was an employee, rather than an independent contractor. The delegate noted that Astrolabe failed to respond to the allegation that Mr. Bosiak was under the control of Mr. Gagne or Astrolabe. She noted that, although Astrolabe asserted that Mr. Bosiak provided his own tools, she noted that Mr. Bosiak worked out of the Astrolabe offices in Vancouver, and was provided with business cards and an office access card.

The delegate also concluded that there was insufficient evidence to establish that Majes.tech was one of the partners in the business venture. She noted that Astrolabe did not respond to the issue of whether Mr. Bosiak was entitled to wages for work performed.

The delegate determined that Mr. Bosiak was an employee and 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. Bosiak 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.

Mr. Bosiak’s submissions did not relate to the issues under appeal, and I have not referenced them.

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 law in failing to find that Mr. Bosiak, either in his personal capacity or with Petrina Bosiak, through Majes.tech, 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 purpose of s. 95.

The appellants submit that the evidence, including letters and notes from Ms. Bosiak, one dated September 16, 2002, addressed to Astrolabe/AstroPrint indicating that Majes.tech provided materials used in the AstroPrint operation in Sechelt, and further, that the relationship between Majes.tech and Astrolabe was terminated, supports the argument that Majes.tech was a joint venture partner in the AstroPrint business.

The appellants further assert that evidence provided to the delegate supports a finding that Mr. Bosiak was either a joint venture partner in AstroPrint through Majes.tech, or as an independent contractor.

The appellants further submit that Mr. Bosiak’s evidence that he is an employee is not credible, and that delegate erred in concluding that he was. Astrolabe argues that Mr. Bosiak cannot derive income in the form of employment income to replace income from a failed business venture.

The appellants submit that the delegate made other factual errors, including a finding that, simply because Mr. Bosiak used the offices and services of Astrolabe and AstroPrint he was an employee. It asserts that he used the offices in the capacity of joint venture partner.

Further, the appellants assert that there is insufficient evidence to conclude that Mr. Gagne exercised control over Mr. Bosiak in the operation 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 the parties, all experienced business people, have not assisted either the Branch nor the Tribunal by so poorly documenting their relationships and activities, leaving it to the public bodies to decipher the true meaning of what occurred.

She submits that there was no evidence of a joint venture agreement.

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, some of which involve the issues arising in this appeal.

Counsel for the Director further submits that the principal documentation provided by the employer 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 find that the appellants have discharged that burden in part.

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 s. 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 conclude, in light of all of the evidence, that the delegate erred in concluding that Mr. Bosiak was an employee.

Mr. Bosiak, as counsel for the Director notes, provided little evidence in support of his claim. In my view, the evidence he did provide was so inconsistent and lacking in credibility that it cannot be concluded that he was an employee.

Mr. Bosiak acknowledged that he provided independent contracting services to Astrolabe through his company Majes.tech from April 2000? until the end of May 2002. Although Mr. Bosiak contended he was an employee commencing June 1, 2002, Astrolabe issued three cheques after that date to Mr. Bosiak's company, Majes.tech. Mr. Bosiak's assertion that the cheques were made out in Majes.tech's name in order to avoid a 5 day hold in his personal account is simply not credible. Mr. Bosiak provided no satisfactory explanation as to why cheques would be issued in his company's name one full month after he became an employee.

Mr. Bosiak's complaint to the Branch was for wages in the amount of \$4,000.00 per month, yet, in support of his complaint, he provided an unsigned, undated draft employment agreement that suggests that he was to be paid \$3,500 per month. Mr. Bosiak did not explain this inconsistency. Furthermore, Mr. Bosiak acknowledged that he received payments in cash, but did not remember when, or how much. In my view, there is insufficient evidence to conclude that the appellants agreed to hire Mr. Bosiak as an employee, or that, if they did, there was a meeting of the minds on the rate of pay. I also note Mrs. Bosiak's September 16, 2002 letter to Astrolabe and AstroPrint speaks to a relationship between Majes.tech and Astrolabe, rather than an employment relationship. As the delegate notes, Mr. Bosiak is an experienced business person. His failure to provide better evidence in support of his assertions, or explain these discrepancies undermines his claim.

In his complaint, Mr. Bosiak sought recovery of the purchase price of a customer list. This suggests that Mr. Bosiak did enter into an agreement with AstroPrint to sell Majes.tech's client list. The claim in this respect represents a failed commercial transaction rather than a claim for wages.

Finally, Mr. Bosiak contended that he had negotiated his employment agreement with Mr. Smith. Mr. Bosiak provided no corroboration of this assertion from Mr. Smith. Although Mr. Smith also filed a complaint for wages against Astrolabe and AstroPrint, there is no explanation as to why Mr. Smith did not, or could not, confirm this evidence.

One of the few documents provided by Mr. Bosiak was a copy of three business cards. I note that Mr. Bosiak worked at the offices of Minuteman Press. It was possible for Mr. Bosiak to print his own business cards. I would place little weight on this evidence.

The evidence from a representative of a third company about his impression of Mr. Bosiak's position with Astrolabe is an insufficient basis to conclude that an employment relationship existed.

In my view, although there is some evidence suggesting that an employment relationship was created, on a balance of probabilities, I am unable to agree with the delegate's conclusion. In my view, the evidence does not support an employment relationship.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated June 23, 2003 be varied as follows. The Determination that Mr. Bosiak was an employee of Astrolabe and /or AstroPrint is cancelled.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal