

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/221

DATE OF DECISION: October 29, 2003

DECISION

SUBMISSIONS

Andrew P. Mayer	Counsel for Astrolabe Marine Group Ltd. and AstroPrint Inc
Petrina Bosiak	on behalf of herself
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 August 12, 2002, Petrina Bosiak filed a complaint with the Employment Standards Branch alleging that she had been not been paid wages and commissions for work performed as sales and marketing manager for AstroPrint. Ms. Bosiak also contended that she was owed \$1,750 in respect of NSF cheques.

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

The Director's delegate concluded that Astrolabe, AstroPrint and 564460 had contravened s. 17 and 18 of the Act in failing to pay wages to Ms. Bosiak. The delegate also determined that Ms. Smith was owed wages, vacation pay and interest in the total amount of \$9,927.46.

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 Ms. 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 Ms. Bosiak was an employee of Astrolabe or AstroPrint.

Astrolabe and AstroPrint contend that they are not associated companies for the purpose s. 95, and that Ms. Bosiak was not an employee of Astrolabe or AstroPrint. The appellants contend that Ms. Bosiak, along with her husband, Michael Bosiak, was either a partner in a business venture that included Majes.tech, Astrolabe and Barry D. Smith & Company operating as Minuteman Press, or that she was an independent contractor.

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.

Michael Bosiak, Ms. Bosiak’s husband is the sole director of Majes.tech Multimedia Inc. (“Majes.tech”) which provided independent print brokerage services to Minuteman Press, a print franchise owned by Barry Smith, through Barry D. Smith & Company Ltd. Ms. Bosiak worked with Mr. Smith on a part time basis at Minuteman. There is some suggestion that in April, 2002, Mr. and Mrs. Bosiak had some discussions regarding a new print business. The appellants contended there was an agreement to enter into a joint venture agreement, with all three parties sharing any profits. Mr. Smith and Mr. and Mrs. Bosiak denied that any such agreement existed. However, there is some evidence that Mr. Bosiak agreed to sell his customer list to AstroPrint. In any event, the fact is that Mr. Gagne changed the name of a company he controlled, Horseshoe Bay Marine Group Inc., to Astroprint Inc. effective May 16, 2002. There is no evidence that a joint venture agreement was ever entered into.

Barry Smith was hired as general manager of AstroPrint and Astrolabe on June 1, 2002. (see *Astrolabe and Astroprint and Smith* BC EST#D302/03)

Ms. Bosiak alleged that she was hired as marketing manager for AstroPrint and negotiated her rate of pay with Mr. Smith, and worked from June 3, 2002 until August 21, 2002 at a salary of \$2,500 per month plus commissions. She contended that she brought her own customers from Majes.tech and some from her work at Minuteman, and that they were invoiced by AstroPrint.

Ms. Bosiak said that she worked for AstroPrint at Astrolabe’s offices in downtown Vancouver, with AstroPrint providing the office support services and equipment.

Ms. Bosiak reported that she attended meetings with Mr. Gagne on his instructions, and that some of those meetings took place at AstroPrint’s Sechelt offices.

Ms. Bosiak received one cheque from Astrolabe dated June 15, 2002 in the amount of \$1,250.00, but was unable to cash it due to insufficient funds. The cheque is identified as being for “contract sales”. She contended that she later received a replacement cheque payable to Majes.tech in the amount of \$1,500.00 which represented a \$1,200 payment of wages for her, and \$300 for a third individual.

Ms. Bosiak also provided the delegate with a copy of her business card identifying her as sales and marketing manager for AstroPrint, a job description and her contract of employment. The contract of employment, dated and signed June 1, 2002, is between Astrolabe and AstroPrint and Ms. Bosiak. It states that the agreement is a contract for the position of marketing manager and that Ms. Bosiak is to be paid \$2,500.00 per month plus commissions. It is signed by Mr. Smith as the general manager of AstroPrint/Astrolabe.

AstroPrint contended that Ms. Bosiak was not an employee, but an independent contractor as a partner in a business venture that included Majes.tech, Minuteman and Astrolabe. It contended that the day to day operations were managed by Mr. Smith along with Ms. Bosiak. It further submitted that she was not subject to supervision by either Mr. Smith or Mr. Gagne.

AstroPrint also submitted that there was no intention that Ms. Bosiak act as an employee, and that the contract of employment did not reflect the actual business relationship between the parties. Mr. Gagne reported that Ms. Bosiak presented the agreement to him on two occasions in June and that he refused to sign it without changes, and that Mr. Smith had no authority to enter into an employment relationship with Ms. Bosiak. Mr. Gagne advised the delegate that the first cheque issued to Ms. Bosiak was to cover debts, and was not intended to be for wages.

Mr. Gagne also provided the delegate with a letter dated August 21, 2002. The letter, addressed to Mr. and Mrs. Bosiak, states that, on April 1, 2002, there was a verbal agreement between Astrolabe, Majes.tech and Minuteman to create a company to known as AstroPrint, and that, because the negotiations to create the company had broken down, AstroPrint and Astrolabe wished to terminate any association with Majes.tech and its principals.

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 operated, and that Astrolabe was, along with 564460, the insured party for the vessel Bruno Gerussi.

The delegate concluded that Ms. Bosiak was an employee of Astrolabe and AstroPrint as of June 1, 2002. She examined Ms. Bosiak's duties in light of a number of tests, and concluded that she was an employee, rather than an independent contractor. The delegate noted that, although the appellants acknowledged Mr. Smith's signature on the employment contract, it contended that Mr. Smith had no authority to enter into an employment contract with Ms. Bosiak. The delegate concluded that Mr. Smith did have such authority, and that an employment relationship was created.

The delegate dismissed Ms. Bosiak's claim for expenses, concluding that they did not fall within the definition of wages under the Act. She also concluded that Ms. Bosiak was entitled to commission wages according to the contract, and preferred the evidence of Ms. Bosiak in this respect.

The delegate concluded that Ms. Bosiak 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 Ms. 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.

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 repeated submissions made to the delegate in the first instance.

The appellants further contend that the delegate failed to find that Ms. Bosiak, either in her personal capacity or with Mr. Bosiak, through Majes.tech, was a joint venture partner in the AstroPrint business, and that such failure constitutes an error in fact and law. 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 Ms. Bosiak was either a joint venture partner in AstroPrint through Majes.tech, or as an independent contractor.

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

Further, the appellants assert that, in all cases but one, payments were made to Majes.tech, not Ms. Bosiak in her personal capacity, and that there is insufficient evidence to conclude that Mr. Gagne exercised control over Ms. Bosiak in the operation of AstroPrint. It asserts that Mr. Gagne did not have any experience in the commercial print business.

Ms. Bosiak contends that she was never a principal of Majes.tech. She also claimed that Mr. Smith approached Majes.tech to determine whether it was interested in establishing a print shop in Sechelt. Majes.tech was to sell its client list and Ms. Bosiak was to become the sales manager. Ms. Bosiak also submitted that Mr. Smith had the authority to enter into contracts, which was evidenced by several letters signed by Mr. Smith, and dated July 15, 2002, relating to hiring third parties as employees. Ms. Bosiak notes that these letters were provided to the delegate by Mr. Gagne for the purpose of arguing that Minuteman merged with AstroPrint, but at no time did he say that Mr. Smith had no authority to enter into those contracts.

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 am unable to find that the appellants have discharged that burden.

Associated Corporations

I do not accept the appellants' assertions that AstroPrint and 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 Ms. Bosiak 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 find no grounds to conclude that the delegate erred in finding that Ms. Bosiak was an employee.

In a parallel decision involving Astrolabe and AstroPrint's appeal against the delegate's determination with respect to a complaint by Mr. Smith, I concluded that Mr. Smith was an employee of the appellants. (Astrolabe, *infra*)

Based on my conclusion that Mr. Smith was hired as a general manager for AstroPrint, I find that he had the authority to negotiate and enter into contracts of employment on AstroPrint's behalf. I note that, in his September 26, 2003 letter of reply to Ms. Bosiak's complaint, Mr. Gagne acknowledged that Mr. Smith had the authority to enter into leases on AstroPrint's behalf, and that he relied on July 15, 2002 letters signed by Mr. Smith relating to contracts of employment with third parties other than Ms. Bosiak, for which he was not apparently disciplined. There is no evidence Mr. Smith's authority was limited. I accept that the contract of employment represented a meeting of the minds of Ms. Bosiak, and AstroPrint, as represented by Mr. Smith.

I am fortified in this conclusion having regard to the cheque Mr. Gagne issued to Ms. Bosiak on June 15, 2002. The cheque, which is in the amount of \$1, 250.00 specifies that the funds are for contract sales rather than a debt, as alleged by Mr. Gagne. This payment is consistent with the terms of the agreement entered into two weeks earlier.

Furthermore, there is no evidence of any joint venture agreement being entered into.

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 that date.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal