

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Harold Schneider, Lyle Regier and Eugene Harry also known as Gene Harry operating as
Fuel Management Systems International Inc.
("FMSII")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE N_{O.}: 1999/165

DATE OF H_EARING: July 14, 1999

DATE OF D_ECISION: July 28, 1999

DECISION

APPEARANCES

for Lyle Regier	In person
for the individuals	In person
for the Director	No one appearing

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "Act") by Lyle Regier ("Regier") of a Determination that was issued on March 4, 1999 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Regier was one of three individuals operating an entity identified as Fuel Management Systems International Inc. ("FMSII") and as such was an employer for the purposes of the Act and was responsible, along with two other individuals, Harold Schneider ("Schneider") and Eugene Harry ("Harry"), for the unpaid wages of two former employees, Richard Tyrwhitt ("Tyrwhitt") and Kenneth McCrory ("McCrory"). Harry has also appealed the Determination and that appeal has been addressed in BC EST #D315/99.

Regier says the Director was wrong to conclude that he was an employer for the purposes of the Act.

ISSUES TO BE DECIDED

The issue raised by the appeal is whether Regier has met the burden of persuading the Tribunal that the Determination ought to be varied or canceled because the Director erred in fact or in law in concluding that he was an employer for the purposes of the Act.

FACTS

The Determination sets out the following findings of fact:

1. Fuel Systems marketed and sold diesel technology that DTS Diesel Tech Systems Inc. ("Diesel Tech") manufactured.
2. Fuel Management is not a registered company in the province of British Columbia. Diesel Tech is a registered company in the province of British Columbia (copy of the corporation search is attached).
3. On April 21, 1998, Eugene Harry signed an agreement stating he assumed the position of President and CEO of Fuel Management on April 20, 1998 (copy enclosed).
4. On August 7, 1998, Eugene Harry resigned as President and CEO of Fuel Management.
5. During a telephone conversation on February 11, 1999 Mr. Harry advised that while he was acting as President and CEO of Fuel Management he secured a bank loan for the company.

6. Eugene Harry acknowledges wages are owed to both complainants.
7. The wages that are outstanding to the two complainants were earned during the period Eugene Harry was acting as President and CEO of Fuel Management.
8. Harold Schneider and Lyle Regier are Directors and Officers of DTS Diesel Tech Systems Inc.
9. Harold Schneider acknowledges wages are owed to both complainants and that he is responsible for the payment of those wages
10. Harold Schneider terminated Kenneth McCrory on August 11, 1998 (copy of termination letter enclosed).

Based on the above findings of fact, the Determination makes out the following analysis:

Section 1 of the Act defines an employer as:

“employer” includes a person

- (a) *who has or had control or direction of an employee, or*
- (b) *who is responsible, directly or indirectly, for the employment of an employee*

The use of the word “includes” means that the definition is to be given a broad interpretation, and further, means that the definition itself is not exhaustive.

Harold Schneider and Lyle Regier approached Eugene Harry and offered him the position of President and CEO of Fuel Management and an agreement was signed to that effect on April 21, 1998. Prior to this agreement Harold Schneider and Lyle Regier were responsible for the daily operation of Fuel Management. Additionally, after Mr. Harry resigned as president it was Mr. Schneider that terminated Kenneth McCrory. I cannot find any evidence to indicate that at any time did Mr. Schneider or Mr. Regier cease their involvement in Fuel Management. In fact, Mr. Schneider acknowledges his indebtedness for payment of the outstanding wages.

The Determination concludes “from the above information” that “Fuel Management was operated” by Schneider, Regier and Harry.

The hearing of this appeal revealed the following additional facts:

1. It is not entirely correct to say the Fuel Management “marketed” diesel technology “developed” by Diesel Tech. While not a great deal turns on this point for the purposes of this appeal, Diesel Tech was set up as the provincial corporate vehicle through which a number of individuals, including Schneider and Regier, were developing an idea that would reduce fuel emissions from diesel burning engines. Fuel Management was intended to market and distribute any resulting technology that was produced by Diesel Tech. In the initial stages the function of Fuel Management included facilitating testing and approval of the idea from regulatory agencies and setting up a network of potential customers. The idea never got past the initial stages and by mid-August, 1998 the plan and the structure implemented to facilitate the plan had collapsed. During the relevant time there is no doubt the Diesel Tech and Fuel management were operationally and functionally integrated.

2. Diesel Tech was registered as a company in the province on April 1, 1997. Regier is named as a director and officer of that company.
3. Fuel Management Systems International Inc. ("FMSII") was, during the relevant time, a corporation registered in the State of Washington. Regier testified that he was not a Director or Officer of that corporation at any time.
4. Following the signing of the April 21, 1998 agreement, under which Harry assumed the position of President and CEO of FMSII, Harry and one other individual signed incorporation documents for a provincial company named FMSI Fuel Management Systems, Inc. That company was registered in the province on July 7, 1998. Regier was not a director or officer of that company.
5. Although McCrory was paid wages from the accounts of several companies or entities, including FMSII, Fuel Management, Diesel Tech and its counterpart in the United States, Diesel Tech Systems, Inc., there was only one company, Diesel Tech, that had a payroll account and all wages and deductions were recorded on that payroll.
6. Regier testified his responsibility in the plan was to raise funds to be used to develop and market the idea.
7. There was evidence that a line of credit, which was applied for but canceled by Harry before his resignation in August, was resurrected and drawn down by Regier and has been the subject of legal action between Harry and Regier. Regier testified that none of the money drawn down on that line of credit was applied to the business or expenses of Fuel Management.

What is absent in both the facts provided at the hearing and those set out in the Determination are facts showing Regier was involved in the day to day operation of Fuel Management. While the Determination states that Schneider and Regier were involved in the day to day operation of Fuel Management before Harry was appointed President and CEO of Fuel Management, that assertion is not borne out by the evidence. There are no facts that link Regier to the hiring of any employees, to participating in or providing input on operational decisions or creation of company policy, either generally or specifically related to the employment of employees, to supervising or managing employees, to authorizing the expenditure of company funds or to the termination of employees. According to McCrory, Regier was never involved in the day to day operation of Fuel Management. Before Harry accepted the appointment as President and CEO of Fuel Management in April, 1998, Schneider and his brother Bernie Schneider ran the day to day operations of the business. It was Bernie Schneider who hired McCrory.

ANALYSIS

The *Act* is remedial legislation and, as such, should be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects, see *Machtinger v. HOJ Industries Ltd.* (1992) 91 D.L.R. (4th) 491 (S.C.C.) and *Helping Hands v. Director of Employment Standards* (1995) 131 D.L.R. (4th) 336 (B.C.C.A.).

An analysis of the issue raised by this appeal must begin with the definition of "*employer*" in Section 1 of the *Act*

"employer" includes a person

- (a) who has or had control or direction of an employee, or

- (b) *who is responsible, directly or indirectly, for the employment of an employee;*

It is correctly noted in the Determination that the definition of “*employer*” in the *Act* is inclusive and while the definition is often criticized as being too open ended to be very useful, it is normally a simple matter to identify the employer. Some situations, however, require a more detailed analysis of the relationship and of the parties involved. In such cases, the Tribunal has adopted an approach that addresses the language and the purposes of the *Act*.

Upon analysis, I cannot find the necessary support for the conclusion made by the Director in this case. The basis for the conclusion that Regier is an employer for the purposes of the *Act* seems to be based on two findings of fact: first, he was a director and officer of Diesel Tech; and second, he signed the April 21 agreement under which Harry was appointed President and CEO of Fuel Management. These facts, however, fall short of the objective of the analysis, which is to establish elements of control or direction of an employee or identify direct or indirect responsibility for the employment of an employee. The fact that Regier was a director or officer of Diesel Tech is, in the absence of any conclusion under Section 95 and 96, a fact unrelated to the employment relationship that has been found in this case. Regier’s signature on the April 21 agreement is an insufficient foundation upon which to establish employer status for the purposes of the *Act* because it does not point to either control or direction of an employee or to direct or indirect responsibility for the employment of an employee. There are several potential reasons why Regier’s signature is on the April 21 agreement, including that the agreement contemplated issuing Harry 100,000 performance shares in Diesel Tech Systems, Inc. as part of the total consideration.

If there was some other basis or reason for the conclusion made by the Director, it is not apparent from the Determination¹. The appeal succeeds.

ORDER

Pursuant to Section 115 of the Act, I order the Determination dated March 4, 1999 varied to exclude any reference to Regier and to cancel the Orders made against him.

David Stevenson
Adjudicator
Employment Standards Tribunal

¹It should be noted that subsection 81(1)(a) requires that a Determination include the reasons for it.