

An appeal

- by -

542617 B.C. Ltd. And 572069 B.C. Ltd.
operating as Sears Indoor Clean Air Services
("SICA")

- 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: David Stevenson

FILE No.: 2001/273

DATE OF DECISION: June 26, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by 542617 B.C. Ltd. and 572069 B.C. Ltd. operating as Sears Indoor Clean Air Services (“SICA”) of a Determination that was issued on March 14, 2001 by a delegate of the Director of Employment Standards (the “delegate”). The Determination concluded that SICA had contravened Part 5, Section 45, Part 7, Section 58(1) and Part 8, Section 63(2) of the *Act* in respect of the employment of Jurgen Schmidt (“Schmidt”) and ordered SICA to cease contravening and to comply with the *Act* and to pay an amount of \$7,228.03.

The Determination found 542617 B.C. Ltd. and 572069 B.C. Ltd. to be associated companies pursuant to Section 95 of the *Act*. That finding has not been appealed.

In its appeal, SICA says the Determination is unfair to the small company and has created a flood of similar complaints. SICA also says the Determination was wrong to have found Schmidt was an employee for the purposes of the *Act*, as he was a director of 572069 B.C. Ltd., the corporate entity that owned 542617 B.C. Ltd., which was the corporate entity operating as Sears Indoor Clean Air Service. Finally, SICA alleges that another delegate, who had initially been involved in the investigation of the complaint, told a representative of SICA that Schmidt’s complaint would be dismissed.

ISSUE

The issue in this appeal is whether SICA has shown the Director erred in concluding Schmidt was an employee for the purposes of the *Act* or whether there is any other error in the Determination sufficient to justify the Tribunal exercising its authority under Section 115 of the *Act* to vary the Determination.

FACTS

SICA was a franchise operation providing furnace and duct cleaning services. The service provided involved attaching a truck mounted vacuum to the duct work in a house to remove dust and dirt from the heating system. Schmidt worked as an Inspector and estimator during the time he was with SICA.

The Determination contained a list of undisputed facts:

- Schmidt is listed as a corporate director of 572069 B.C. Ltd. with the Registrar of Companies.

- Schmidt was paid by commission.
- Schmidt was reimbursed for fuel and supplies he bought on his credit card.
- Schmidt owns a 5% share of [SICA].

The initial argument raised by SICA against the claim made by Schmidt was that he should not be entitled to the protection of the *Act* as he was a corporate director of 572069 B.C. Ltd.

ARGUMENT AND ANALYSIS

This Determination must be cancelled and the matter referred back to the Director. The reasons for this decision follow.

The Determination addressed the initial argument raised by SICA and considered Schmidt's entitlement to make a claim under the Act in the context of whether he was an employee or a director of 572069 B.C. Ltd.:

In order to determine whether Schmidt is entitled to the protections of the Act, I must consider whether he was an employee or a Corporate Director. For guidance, I turn to the definition of "employee" in section one of the Act and to the functional test set out in the Employment Standards Tribunal Decision of Penner and Huff (BC EST # D371/96).

The functional test assesses whether a person is carrying out the functions normally associated with those of a director or officer of a corporation. Consideration is given to such factors as deciding what to produce, who, where and how to produce it, to whom to sell it, and at what price. Such factors are indicative of a person who is a corporate decision maker and in control of the company. Conversely, an employee is not, ultimately, in control of the corporate destiny and is engaged in the sale of one's labour.

"employee" includes

- (a) a person, including a deceased person, receiving or entitled to wages for work performed for another.

The crux of this definition is that work is performed for another. If Schmidt is nothing more than an investor, and has no control over corporate decisions, he is an employee. If Schmidt carries [sic] out the function of a corporate director he is, in effect, performing work for himself.

The Determination found, on balance, that Schmidt did not perform the functions of a corporate director and was entitled to the protections provided an employee under the *Act*.

With respect, there was never any issue about whether Schmidt was an employee under the *Act*. Clearly he was. He performed work for wages. The proper, and the real, question the Director had to consider in the circumstances was whether Schmidt, as a director of a corporation, was entitled to claim employee rights under the *Act*.

For a period of time, it was the Director's policy not to pursue employment standards claims from directors and officers of a corporation for unpaid wages because officers and directors of corporations are personally liable for the payment of wages to employees. That policy was not based on any specific words in the *Act* or *Regulation*, but was grounded on the view that because a corporation is a legal entity, controlled by its directors and officers who make decisions about what the corporation will do and because the *Act* holds directors and officers personally liable for up to two month's unpaid wages, it would be improper to allow those same persons to stand with other employees in a statutorily preferred place. Had that policy been applied to Schmidt's claim, it would not have been investigated by the Director.

That policy, however, came under consideration by the Tribunal in *The Director of Employment Standards* (Re Mark Annable), BC EST #D559/98 (Reconsideration of BCEST #D342/98). The Tribunal concluded that the Director could not establish or sustain a policy that effectively disentitled certain employees from making a claim under the *Act*:

The Determination has the effect of amending the statutory definition of "employee" contained in the *Act*. The Tribunal is a creature of statute. Its powers are defined and limited by the *Employment Standards Act*. The legislation does not give the Tribunal power to decide fundamental issues such as who is entitled to pursue a claim for wages. It follows then, that we do not agree that the Director is empowered to do what the Tribunal cannot.

The Tribunal did not discount entirely the possibility that a corporate director, even one who falls within the broad language used to define an employee in Section 1 of the *Act*, might not be entitled to the protection provided generally to employees by the *Act* and *Regulation*. In its analysis, the Tribunal referred to an earlier decision of the Tribunal, *Re Barry McPhee*, BC EST # D183/97, and noted:

As the Adjudicator noted in *Barry McPhee*:

In spite of the above observations, the *Act* does not exclude the application of the normal concepts of the law of master and servant. In this context, Courts have stated partners cannot be employed by the partnership, any more than a person can be his own employee. This notion has also been extended to directors of companies, who, it has been decided, are not considered to be employees at common law unless they can prove an independent contract of employment. . . .

Despite the broad language used to define who is an employee, it is not a reasonable interpretation of that language, taking into account the scope, purposes and the over-all objectives of the *Act*, to conclude it is intended to embrace the controlling minds of the company. . . .

Further, the Adjudicator said:

I do not wish to be taken as saying a person who is an employer could never be an employee under the *Act*. But in such a case (as it is in this one), the onus would be on the person asserting the status of employee to show a clearly worded agreement establishing the employer/employee relationship, the authority by which the company is able to establish the relationship with that person, the services to be performed for the “salary” to be paid and the capacity in which the person is performing the services. It will be seldom a controlling mind of a company will be found to be an employee under the *Act*. . . .

Based on those comments, the Tribunal summarized the approach taken when faced with a claim by an employee who was also a director or officer of a corporation:

. . . . the Tribunal must carefully consider the context in which a company director or officer seeks to claim employee rights and must pay particular attention to the purposes and overall objectives of the *Act*.

Finally, The Tribunal directed the following approach:

It would be appropriate, in the Tribunal’s view, for the Director to have regard to the facts in each case, looking to issues of whether the employee/director was a controlling mind of the corporation, whether the directorship was merely for administrative convenience and whether the directorship was real or a sham.

That has not been done in this case. I might be able to infer from some of the comments found in the Determination that the Director would not perceive Schmidt to be a controlling mind of the company, but I prefer to leave that finding to the Director. Other matters contemplated by the decision of the Tribunal in *Re Mark Annable* have not been considered at all. The failure of the Director to consider these other matters may ultimately affect the final decision. I will not presume that. The Director has a greater familiarity with the circumstances of this file than I do at this stage and it is proper that the Director be allowed to give consideration to the complaint, applying the proper considerations.

Apart from what I have said above, I do not see any validity to the other grounds and arguments raised by SICA in this appeal. Those matters should be considered as having been dealt with on their merits and been rejected.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated March 14, 2001 be cancelled. This matter is referred back to the Director to review Schmidt's complaint in the context of the Tribunal's decision *The Director of Employment Standards BC EST # D559/98* (re Mark Graham Annable) supra.

David Stevenson
Adjudicator
Employment Standards Tribunal