

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 -

Neuro-Power Health Systems Inc (“Neuro-Power”) –and- Neurobionics
Health Centres Inc. (“Neurobionics”) –and- Lloyd Skaalen (“Skaalen”) –
and- Francoise Brunet (“Brunet”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: John L. McConchie

FILE NO.: 97/157; 97/158; 97/159

DATE OF DECISION: July 31, 1997

Act;

4. Whether the Director's delegate incorrectly calculated Dr. Sidhu's wages.

FACTS

Neuro-Power was incorporated in early 1995. The purpose of the company was to provide rehabilitation services for *neurophysiologically impaired* people. Mr. Skaalen and Ms. Brunet were originating shareholders, along with Paul Sarnier. Sarnier ceased to be a shareholder in early 1996. He was replaced by Pierre Gagnan and Philippe Souvestre on the Register of Members. By the end of January, 1996, Souvestre had the largest individual shareholding with a small majority of outstanding shares held.

Skaalen and Brunet ("the Directors") became Neuro-Power's Directors on February 26, 1996. Skaalen remains a Director. Brunet has now resigned her Directorship. Within a month, Neuro-Power had engaged its first employee, Dr. Englehart. The term "employee" is used here because this is how Neuro-Power and Dr. Englehart described their relationship in a four page *Memorandum of Agreement* signed March 25, 1996 (Dr. Englehart's "Engagement Agreement"). The Memorandum set out the essential terms of Dr. Englehart's employment. The parties agreed on a salary of \$100,000 per annum. The first two months of salary were to be deferred. The deferred salary was to be paid out in the three months which followed.

Shortly after the company began its operations, it became apparent that clients were not taken by the name *Neuro-Power*. The Directors decided to form a new company called *Neurobionics*. In his testimony, Mr. Skaalen gave credit to Dr. Englehart and Dr. Sidhu for their contribution to finding the new name. Neuro-Power ceased operations on July 4, 1996. This was the same day that the incorporation for the new company, Neurobionics, was completed.

In the meantime, Neuro-Power had hired Dr. Sidhu, another homeopathic physician. Dr. Sidhu began work with Neuro-Power in April, 1996 on a part-time basis. Eventually, he also signed a Memorandum of Agreement describing his terms as an "employee" (Dr. Sidhu's "Engagement Agreement"). However, since the agreement was signed on August 16, 1996 it was signed with Neurobionics as the Employer. The Agreement makes reference to Dr. Sidhu's work from April 1, 1996 to August 14, 1996, describing it as a period embracing the "establishment of the Company". The Agreement detailed Dr. Sidhu's specific employment terms and described a regimen of part-time work which would become full-time once the company needed the additional services.

Prior to Dr. Sidhu's written agreement, and about one month after the incorporation of Neurobionics, the two "employees" and Neuro-Power each signed further agreements (the "Termination Agreements"). The Termination Agreements for Dr. Englehart and Dr. Sidhu were identical. They read as follows:

"Letter of Contract Termination

Re: Memorandum of Agreement – dated 27 March 1996
Employment of [Dr. John Englehart, N.D. (US)] [Dr. Harjot Sidhu, D.H.M.S.]

For good and valid business reasons Neuro-Power Health Systems Inc. ceased to offer health care services as of 5 July 1996; therefore it is necessary to terminate the aforementioned employment agreement as at 14 August 1996.

The Company and its directors acknowledge their obligation to compensate the employee at the agreed salary for the entire period of employment to and including 31 July 1996; however, without further revenues, Neuro-Power Health Systems will be unable to pay the outstanding deferred salary in cash or any other form of assets.

In lieu, the directors of Neuro-Power Health Systems Inc. promise to use their best efforts to cause a new company in the health care business to engage the employee and to cause

that company to issue a number of shares deemed to be satisfactory to the employee. The employee recognizes that those shares may not at date of issue be of equivalent value to that which was owed by Neuro-Power Health Systems Inc. and that there is no guarantee that they will ever be of equivalent value; nonetheless, such shares represent an opportunity for growth in value as the new company flourishes with the assistance of the employee's entrepreneurial spirit and resolve to make it happen.

In consideration of the foregoing, the undersigned employee acknowledges this notice of termination and agrees to abandon his claim against Neuro-Power Health Systems Inc. and its directors to accrued but unpaid salary."

The Termination Agreements were signed by the two complainants and by Ms. Brunet on behalf of Neuro-Power. In his testimony, Skaalen agreed that the agreements were signed in difficult circumstances. Neuro-Power did not have the money to pay the complainants. He testified that he told the complainants that unless they were willing to sign, their services would have to be terminated. On the same date, Neurobionics issued letters to Dr. Englehart and Dr. Sidhu confirming that that company would issue to them 49,000 and 41,000 shares respectively.

Drs Englehart and Sidhu finally resigned from their service with Neurobionics on November 7, 1996. No shares had been issued by that time. In fact, no shares had been issued as of the date of the Determinations on February 19, 1997. When asked about the delay in his direct examination, Mr. Skaalen pointed to instructions to his lawyers in December, 1996 to issue the shares. He agreed that these instructions came well after the two complainants had left Neurobionics but observed that there was no pressing need to issue the shares as the promise had been made and the actual issuance of the shares was merely an administrative act. Ms. Brunet also testified and recalled that she had had a discussion with Neurobionics' lawyer at the time of the execution of the Termination Agreements in which she was advised to issue the shares to the complainants at the same time as other contemplated share issues. This meant some delay but would help in reducing unnecessary expenses.

Both witnesses, Skaalen and Brunet, testified about the difficulties faced by Neuro-Power and Neurobionics in attempting to carry on the business. There was simply no cash to satisfy their obligations to Drs. Englehart and Sidhu. They thought that the complainants understood this when they signed the agreements dated August 16, 1996.

It was agreed that Dr. Sidhu had received all wages earned while in the employment of Neurobionics, and so had no claim to wages against that company. It was also agreed that Dr. Englehart was owed the sum of \$10,000 on account of unpaid wages owed by Neurobionics. There was no agreement about his claim as against Neuro-Power.

Dr. Englehart and Dr. Sidhu participated in the proceedings and cross-examined witnesses. They professed satisfaction with the state of the evidence and declined to give testimony.

DECISION

The burden in these proceedings is on the appellants to show on a balance of probabilities that the Determinations (or any of them) ought to be varied or cancelled. I will deal with each of the issues raised by the appellants in their turn.

1. Section 95 – Associated Companies

Section 95 of the *Employment Standards Act* provides that the Director may treat two or more entities as one person for the purposes of this *Act*:

95. 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.

The appellants acknowledge the important roles of Mr. Skaalen and Ms. Brunet in the Companies but argue that, under law, it is the same ownership in two corporations that is considered decisive in determining “control.” The evidence shows that Dr. Philippe Souvestre held more than half of the shares in Neuro-Power but none in Neurobionics. His majority shareholding in Neuro-Power gave him the authority to name the Board of Directors. He had no such power in Neurobionics. Clearly, they say, the companies were not under the same control.

This argument misconceives the nature of Section 95. As the adjudicator in *Adrenalin III Sports Ltd.*, BCEST #D110/97 said: “Ownership and financial control are an important part of assessing common control and direction but common ownership is not necessary for a finding of common control or direction. It is enough to show that businesses, trades and/or undertakings are in practice run by a person or group and in that regard, control need not be perfectly overlapping.” Here, the evidence was clear that Mr. Skaalen and Ms. Brunet were in effective control of the Companies. Although the shareholdings in the two companies were not identical, Neurobionics was merely a new form of Neuro-Power. It was incorporated to deal with the lack of client acceptability of the name *Neuro-Power*.

The Directors appeared as well to treat the two companies as if they were the same entity. Dr. Sidhu’s employment agreement of August 16, 1996 was entered into with Neurobionics but spoke of his involvement as early as April 1996 in the context of the “establishment of the Company”. Ms. Brunet signed the Termination Agreements committing Neuro-Power to make best efforts to have the new company issue shares and also signed the letters from the new company, Neurobionics, committing to the issuance of the shares. She was able to take on these two tasks because, along with Skaalen, she effectively controlled the actions of both companies.

This ground of appeal fails.

1. Whether Dr. Englehart and Dr. Sidhu were partners and not employees of the Companies

The appellants argued that Dr. Englehart and Dr. Sidhu were not employees but were instead partners. They acknowledged that the contracts setting out the terms of engagement of the two complainants spoke of them as “employees”. However, they argued that, at least in Dr. Englehart’s case, his lawyer had had the defining role in constructing the final language of the agreement. If the complainants were truly employees, then the contracts would have been illegal in that they purported to permit the deferral of payment of wages. This is not permitted under the *Act*. The lawyer for the complainants must be taken to have known this. This is evidence that the true character of the relationship was one of partnership.

Further evidence of the intention to create a partnership arrangement, say the appellants, is found in the Termination Agreements and the letters from Neurobionics confirming the intention to issue shares to the complainants. Shareholders are often looked upon as partners in the enterprise.

This ground for appeal must be rejected. It is of course true that the characterization placed by the parties on their relationship is not decisive. The parties may wish to characterize the relationship between them as one of partnership, client/contractor, or employment, but the acid test will be in what the parties actually do. Here, the evidence does not serve to upset the parties’ own characterization of the relationship as being one of employment. Put differently, the appellants led no evidence which casts doubt on the finding of the Director’s delegate.

The role of Dr. Englehart's lawyer in constructing the agreement is not material. In a case involving alleged coercion by the employer, evidence that the employee was legally advised might be critical. In this proceeding, Dr. Englehart is taking a position consistent with the terms of his Engagement Agreement. He says that he was an employee of Neuro-Power and Neurobionics. Were he seeking instead to establish that he was a partner, the primacy of his own lawyer's involvement might be a relevant fact tending to impair his credibility.

The Termination Agreements do not support a claim that the relationship was intended to be one of partnership. The Termination Agreements set out a method of compensating the employees for accrued but unpaid wages through the issuance of shares. They did not purport to change the fundamental nature of the relationship to one of partnership. Had the Termination Agreements been implemented (later discussion), the complainants would have been employees of Neurobionics with shareholdings in that company.

Finally, the Companies cannot hold up the illegality of the Engagement Agreements as evidence that their true nature was intended to be one of partnership. This is merely conjecture; the argument has no support on the evidence.

The appellants have not met their onus to show that the Determination is in error on the characterization of the services of Drs. Englehart and Sidhu.

2. Whether the wage claims of Dr. Englehart and Sidhu against Neuro-Power were settled between Neuro-Power and the complainants and hence were beyond the reach of the *Act*

The appellants hold up the Termination Agreements as binding settlements with both complainants. It is the case that on the face of the agreements, the complainants agreed to abandon both their employment with Neuro-Power and all claims to unpaid salary. It is also the case that they did so in unusual circumstances; Mr. Skaalen agreed in his testimony that he had told the complainants that they must sign the agreements or lose their employment.

For our purposes, we can simplify the analysis by saying that, in the Termination Agreements, the complainants released their rights to accrued but unpaid salary for the a promise by Neuro-Power that its directors would "use their best efforts to cause a new company in the health care business to engage the employee and to cause that company to issue a number of shares deemed to be satisfactory to the employee." [Emphasis added]

The circumstances in which the Termination Agreements were signed causes serious suspicion about their enforceability. However, putting that issue aside, this aspect of the appeal can be resolved by reference to a simple evidentiary point. That point is that Neuro-Power did not fulfil its end of the bargain. Its fundamental promise was to make best efforts to cause the new company to issue a number of shares deemed to be satisfactory to the employee. It did not fulfil this promise.

There are two elements to this promise. The first is that Neuro-Power would make best efforts to cause the new company to issue the shares. There was no evidence in this proceeding that Neuro-Power carried out this promise. In fact, it made no apparent efforts at all to cause Neurobionics to issue the shares until well after the two complainants had finally terminated their employment contracts. Since the shares were never issued, it is a matter of speculation only whether the complainants would have found their number to be satisfactory. They appeared to have made no complaint when advised by Neuro-Power in August, 1996 about the numbers of shares committed by that company to each complainant. However, the shares were not issued. By the time of their departure from the company, it is doubtful that they would have found the same number of shares to be satisfactory. By the time of this hearing, it is hard to conceive of a number of shares in Neurobionics which would have satisfied either complainant. Since the shares were not issued, the condition that the employees must be satisfied with their number was never broached. The settlement was therefore never implemented.

Neuro-Power cannot hold up the Termination Agreements as a bar to a claim for unpaid wages when it has

not met its part of the bargain. The agreements were never implemented. This ground for appeal fails.

3. Whether Dr. Sidhu's wages were incorrectly calculated by the Director's delegate

The appellants argued that Dr. Sidhu's unpaid wages were overstated by the Director's delegate. In his testimony, Mr. Skaalen presented single-page, hand-written document (Exhibit 10) which was a 1996 Calendar form from an organization called "Blueline". On the calendar, he had written various dates and times purporting to be a record of Dr. Sidhu's hours. Skaalen testified that he had received the information contained in the time entries from Dr. Souvestre, one of the former shareholders of Neuro-Power. Dr. Souvestre, he said, was responsible for the activities of the complainants and for keeping records of their service. He had reviewed the records prepared by Dr. Souvestre and was satisfied that they were complete. However, Dr. Souvestre was not called to testify. No original records were produced in the evidence. Exhibit 10 was the sum total of the evidence on this point.

An employer has a statutory obligation to maintain proper payroll records. More to the point, there is an onus on a party seeking to challenge a Determination on wages to establish that the Director's calculations are incorrect. One of the most important activities of the Director's delegates is to examine payroll records and make decisions about unpaid wages. When a party wishes to challenge the Determination on appeal, it must adduce credible, reliable evidence to support its assertion.

This was not accomplished by the appellants in this case. This ground of the appeal fails.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determinations which were the subject of these appeals be confirmed.



John L. McConchie
Adjudicator
Employment Standards Tribunal

JLM:jm