Employment Standards
TRIBUNAL

An appeal

\- by -

Anderson's Engineering Ltd. & 444983 B.C. Ltd.
(appeal by 444983 B.C.Ltd)
(the "appellant")

\- 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: Kenneth Wm. Thornicroft

FILE No.: 2001/469

DATE OF HEARING: September 21, 2001

DATE OF DECISION: October 3, 2001

DECISION

APPEARANCES:

James G. Trant, Barrister & Solicitor — for 444983 B.C. Ltd.

Kevin Molnar, I.R.O. — for the Director of Employment Standards

OVERVIEW

This is an appeal filed by 444983 B.C. Ltd. (the "appellant") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on May 30th, 2001 (the "Determination"). This appeal was filed jointly with an appeal by Mr. Duncan M. Anderson ("Anderson") of a separate section 96 determination issued against Mr. Anderson on June 1st, 2001.

The Director's delegate determined that the appellant and Anderson's Engineering Ltd. ("Anderson's Engineering") were "associated corporations" as defined by section 95 of the *Act* and, accordingly, were jointly and severally liable for $38,150.61 in unpaid wages (including compensation for length of service, vacation pay and recovery of unremitted union dues) and interest owed to seven former Anderson's Engineering employees. The bulk of the monies owed under the Determination (approximately 90%) represents compensation for length of service. It seems clear that none of the seven complainants received any prior written notice of termination, or payment of compensation for length of service in lieu of such written notice, although there is a *bona fide* dispute with respect to unpaid vacation pay and unremitted union dues.

The employer of record, Anderson's Engineering, entered bankruptcy on or about November 28th, 2000; the appellant is not in bankruptcy nor am I aware of any pending insolvency involving the appellant. The trustee in bankruptcy for Anderson's Engineering is the firm Barnes, Kissack, Henfrey & George (the "trustee"). The trustee was served with the Determination but has not filed an appeal.

The 444983 B.C. Ltd. and Anderson appeals were heard together at the Tribunal's offices in Vancouver on September 21st, 2001. Mr. Trant appeared as counsel for both the numbered company (the appellant in this matter) and Mr. Anderson (the appellant in E.S.T. File No. 2001/470). These reasons for decision address only the appeal of the numbered company; I am issuing, concurrent with this decision, separate reasons for decision in the Anderson appeal.

Although the appellant and the Director were represented at the appeal hearing, none of the seven complainant employees, despite being given notice of the appeal hearing, appeared before me. Neither the appellant nor the Director submitted any *viva voce* evidence although each made extensive oral submissions that supplemented their previously-filed written submissions. I have also considered the brief written submissions that were filed by some of the employees.

ISSUES ON APPEAL

In a letter dated June 20th, 2001, appended to the notice of appeal, legal counsel for the appellant set out the following reasons for appeal (these grounds are common to both this appeal and the Anderson appeal):

> It is respectfully submitted that the Director erred in the following respects.
>
> 1. Failing to abide by principles of natural justice by neglecting and/or refusing to provide particulars of the Complainants' claims sufficient to allow the Appellants to answer the case against them.
>
> 2. Failing to disclose the information in his possession relating to the Complainants' claims.
>
> 3. Abusing his discretion by acting on inadequate material and without sufficient evidence.
>
> 4. Failing to properly investigate the Complainants' claims and failing to conduct a hearing to receive evidence on unclear or contradictory information.
>
> 5. Making errors on the face of the record both of law and mixed fact and law in interpreting the limited material received by him.

FINDINGS AND ANALYSIS

I do not find any of the first four grounds of appeal--which are largely interrelated both factually and legally--to be meritorious. However, I am not satisfied, based on the material before me, that a section 95 order was properly issued in this case. Further, there does appear to be some legitimate reason to question the Determination insofar as the matters of vacation pay and union dues are concerned.

I will address each of these matters in turn.

The delegate's investigation

The delegate contacted the appellant by letter dated March 12th, 2001 (directed to the attention of Mr. Anderson) and clearly indicated that he was considering a section 95 declaration with respect to Anderson's Engineering and the appellant. The appellant was asked to "provide any or all records pertaining to the position of 444983 B.C. Ltd. and its relationship with Anderson's Engineering Ltd." by no later than 12 noon, March 27th, 2001. In addition, the delegate provided his direct telephone number should Mr. Anderson have any "further concerns". Mr. Anderson replied by letter dated March 19th, 2001 but did not submit the requested information regarding the relationship, if any, between the two companies.

The delegate wrote to the appellant once again, on March 27th, 2001, and provided further particulars about the information required including "the nature of both businesses", "how the businesses are operated and by whom", "ownership of both businesses, ownership of all physical assets, degree of integration of operations, financing arrangements of both businesses, directors and officers of both businesses and who gave day to day direction of all employees of both businesses". This latter information was to be delivered to the delegate by April 30th, 2001 and once again the delegate invited Mr. Anderson to contact him if he (Anderson) had any "further questions".

Mr. Anderson, on behalf of the appellant, replied by way of a letter dated April 24th, 2001 but that response did not, in my view, constitute an adequate response to the delegate's previous requests for information. Although the appellant does not appear to have been under any legal duty (in the absence of a section 85 demand--the material before me shows that such a demand was only issued to Anderson's Engineering) to provide a detailed response to the delegate's various requests (and it did not do so prior to the issuance of the Determination), I am nonetheless satisfied that the Director's delegate fully complied with the dictates of section 77 in this case.

It appears to me that the delegate was endeavouring to conduct an investigation into the possible application of section 95 and, so far as he was able to do so, Mr. Anderson, on behalf of the appellant, did what he could to delay, or possibly even derail, that investigation. In the end, the delegate did what he could with the limited information available to him.

While there was nothing, in my view, improper about the delegate's investigation, it still must be determined whether or not section 95 was correctly applied in this case.

Associated Corporations

Since the appellant was not the employer of record, its liability depends on whether or not the Director's delegate (who was not, I should point out, Mr. Molnar) correctly applied section 95 in this case. Section 95 provides as follows:

> **Associated corporations**
> 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 delegate's findings (at page 3 of the Determination) in regard to section 95 are reproduced below:

> On the issue of associated corporations, a corporate registry search of Anderson's Engineering Ltd. and 444983 B.C. Ltd. indicated that Duncan M. Anderson to be [sic] the sole director/president of both companies. Both companies are located at the same address. Records indicate that the director of both companies also owes [sic, owns?] the property. The ER claims that the relationship is that of tenant/landlord and neither company have [sic] direction or control over the other...
>
> The fact that the numbered company controls the property, as per the letter from Duncan M. Anderson, and has the same address and director as Anderson [sic] Engineering Ltd. and is owed [sic, owned?] by the director of both companies. The sole purpose of the numbered company is to separate the property from Anderson's Engineering, however both are intertwined by virtue of their location and ownership. I have determined that both companies are associated in accordance with Section 95 of the Act.

Anderson's Engineering operated a fire-truck manufacturing plant. As noted, the employees were carried on Anderson's Engineering's payroll. There is no evidence before me of any sharing of either manpower or equipment between Anderson's Engineering and the appellant, nor is any such assertion set out in the Determination. The Determination states that "the sole purpose of the numbered company is to separate the property from Anderson's Engineering", however, the evidence before me unequivocally shows that the property where Anderson's Engineering formerly carried on its manufacturing operations is not owned by the appellant but, rather, by Mr. Anderson personally.

Although Mr. Anderson--in his April 24th, 2001 letter to the delegate--indicated that there was a landlord-tenant relationship between the two companies, that appears to have been an erroneous assertion as there is no evidence before me to corroborate it (for example, a lease or cancelled rent cheques). The property was, and is, owned by Mr. Anderson in his personal capacity and I have not been apprised of any mortgage, assignment of rents or any other instrument that would indicate that the appellant has either a legal or a beneficial interest in the property. Despite the foregoing situation, however, the uncorroborated submission before me was that (for whatever reason), Anderson's Engineering paid rent to the appellant rather than to Mr. Anderson personally.

It may be that Mr. Anderson--in his personal capacity--could be the subject of a section 95 declaration as between himself and Anderson's Engineering but that is not what is set out in the Determination. It may also be that, in fact, there is a sufficient interrelationship between the two companies to justify a section 95 declaration. However, the *only* allegations set out in the Determination (at page 3) in support of the section 95 declaration are the following:

- Duncan M. Anderson is the sole director/officer both Anderson Engineering and the appellant;
- Anderson Engineering and the appellant have the same registered and records office address (a Langley law firm);
- Duncan M. Anderson is the registered owner of the property where Anderson Engineering carried on its fire-truck manufacturing business;
- the appellant "controls the property".

From the above facts, the delegate concluded that "the sole purpose of the numbered company is to separate the property from Anderson's Engineering, however, both are intertwined by virtue of their location and ownership".

It bears repeating that Mr. Anderson, in his personal capacity, is not being "associated" with Anderson's Engineering pursuant to section 95. The fact that the two companies use the same law firm address as their registered and records office (as would, I suspect, hundreds of other companies), cannot be determinative.

Further, the documentary evidence before me does not support the assertion that the appellant and Anderson's Engineering were in a "landlord-tenant" relationship at the time the various employees' wage claims crystallized or, indeed, at any other time. There is no evidence before me that the appellant is the beneficial owner of the property where Anderson's Engineering carried on its business or that the appellant has any legal interest in the property (say, by virtue of an assignment of rents or a mortgage). I am not aware of any evidence that would suggest that the two companies, in concert, carried on a fire-truck manufacturing business or, indeed, any other common business enterprise.

In sum, I am not satisfied that the assertions contained in the Determination, standing alone, support a section 95 declaration with respect to Anderson's Engineering and the appellant. Nevertheless, the situation between the two companies is unclear and, to some degree, Mr. Anderson's own assertions to the delegate about rent payments and a landlord-tenant relationship created some of the ambiguity.

In my view, the interrelationship between the appellant, Anderson's Engineering and Mr. Anderson himself has not been fully explored. To some extent, Mr. Anderson's failure to fully cooperate with the delegate's investigation has hindered a full and complete understanding of the situation. I note that Mr. Anderson did not appear before me (nor was he obliged to do so) in order to provide relevant evidence and thus I am in no better position than was the delegate to assess the true relationship between the parties.

In light of the above, I am of the view that the most appropriate order would be to refer the section 95 issue back to the Director for further investigation.

Vacation pay and remittance of union dues

As noted above, the bulk of the monies payable under the Determination consists of compensation for length of service. I have nothing before me that would call into question the employees' respective entitlements on that account. However, I do have before me a letter from one of the employees', Ms. Wiens, who was also Anderson's Engineering's office manager. She maintains that the employees' accrued vacation pay was paid on their last pay cheque and that their union dues were properly remitted to the union. She also says that Anderson's Engineering's payroll records did not reflect these payments because her employment was terminated (due to the bankruptcy) prior to her updating the employer's payroll records.

I am unable to determine, based on the information before me, whether the employees' received all of their accrued vacation pay or if their union dues were properly remitted to the union. Accordingly, these matters can also be addressed during the Director's further investigation.

ORDER

Pursuant to section 115(1)(b) of the *Act*, I order that the following issues be referred back to the Director for further investigation:

1. The section 95 declaration; and

2. The employees' claims for vacation pay and recovery of unremitted union dues.

In all other respects, the Determination is confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal