

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 -

Bernardi Humidors Ltd. and Acry Tech Plastics Inc.
associated entities pursuant to Section 95 of the *Employment Standards Act*
("Acry Tech")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 2000/510

DATE OF DECISION: January 02, 2001

DECISION

OVERVIEW

The appeal is pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) and by Acry Tech Plastics Inc. (which I will henceforth refer to as “Acry Tech” or “the appellant”). Acry Tech appeals a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on December 23, 1999. In that Determination, Acry Tech and Bernardi Humidors Ltd. (“Bernardi”) are found to be under common control and direction and, pursuant to section 95 of the *Act*, they are treated as one person and the employer of Andrea Fage and Alan Fage (“the Fages” or “the employees”). The companies are ordered to pay the Fages \$5,757.52 in wages and interest.

The appeal was late. It fell to me to decide whether the Tribunal should extend the time limit for the appeal pursuant to section 109 (1)(b) of the *Act*. I decided to that it was appropriate to do so. [See *Bernardi Humidors Ltd. and Acry Tech Plastics Inc.*, BCEST No. D141/00].

The focus of this decision is the appeal itself. Acry Tech, on appeal, claims that the employees were employed by Bernardi, not Acry Tech, and the Determination is said to be in error because Acry Tech and Bernardi were never under common control and direction but are in fact separate companies.

ISSUE TO BE DECIDED

Does the appellant show that the Determination ought to be varied or cancelled for reason of an error or errors in fact or law?

FACTS AND ANALYSIS

The employees were paid by Bernardi. But according to the Determination, there is a statutory purpose to treating Bernardi and Acry Tech as a single person and the employer, pursuant to section 95 of the *Act*, and that is collecting wages that the Director cannot collect from Bernardi. And, according to the delegate, the companies have common directors and a common location, employees and finances were subject to common direction, and the businesses were “integral to each other in that they produced components of the same products”.

The appeal was filed by Malcolm Williams of Acry Tech. The appeal is rather wide ranging but Acry Tech is, in the main and in essence, claiming that it did not employ the Fages, and the Director is not entitled to treat Bernardi and Acry Tech as one person under the *Act* because the companies were not subject to common control and direction.

It is not disputed that Andrew Bernardi owns a portion of Acry Tech and is a director of the company. It is not disputed that Acry Tech manufactured acrylic products for Bernardi, although, it says, not exclusively; that Acry Tech manufactured its products in the same building as Bernardi manufactured its products; nor that Williams served as Bernardi’s shop floor

supervisor and therefore provided the Fages and Bernardi's other employees with a measure of direction.

The appeal was late and, as such, the Tribunal had first to decide whether it should extend the time limit for the appeal or not. That task fell to me. In *Bernardi*, cited above, I outlined the appeal as follows:

“As I understand it, Williams is claiming that the Determination is wrong for the following reasons,

- Bernardi and Acry Tech are actually separate business entities;
- the employees did not work for Acry Tech, but Bernardi alone;
- while Bernardi had Acry Tech supply it with various acrylic items, Bernardi was not Acry Tech's only source of business;
- Williams is not a director of Bernardi;
- Williams himself was employed by Bernardi;
- Andrew Bernardi, the owner of Bernardi, helped Williams set up Acry Tech and, in return for doing so, was given part ownership of Acry Tech, but he did not control Acry Tech or direct its operations in any important way;
- Williams did not control or direct the business that is Bernardi beyond providing shop-floor supervision.”

I decided that,

“The evidence before me does not establish that the employees did in fact work for both companies, although that may have been the case. I am not provided with evidence which clearly shows that the companies were just parts of a business whole or under common control.”

And I went on to say that,

“It may be that Bernardi and Acry Tech are parts of the same business whole and/or under common control and direction and that there is reason to consider the two companies as one and the same for the purposes of the *Act* but the Determination does not make that absolutely clear to me. Williams has raised sufficient doubt in my mind regarding the Determination and the status of Acry Tech that it would I think be unfair to deny him his appeal for the sole reason that he was late in filing it by a day or two.”

By letter dated July 20, 2000, the Tribunal invited written submissions on the merits of the appeal.

The delegate has only this to say in regard to the appeal,

“In paragraph D of the employer’s appeal, he explains the reasons why Mr. Fage was terminated but does not comment on the process he took, as an employer, to prove just cause (see Page 4 in the Determination).

In paragraph F (last sentence) of the employer’s appeal, he questions the validity of the records submitted by the Fages. When the Director examined the calendar submitted by the Fages they appeared to have been kept contemporaneously as the hours did appear to be recorded at the time. Also, in the absence of the employer’s records the Director made her decision based on the employees’ records.

Andrea Fage’s response, dated March 1, 2000, has already addressed most of the remaining points raised by Mr. Williams.”

The Tribunal is not told what Williams had to say on the matter of whether the employer had just cause to terminate Alan Fage but it is not important to deciding whether there was common control and direction. And it is unimportant that Williams questions whether a calendar record is a reliable record. He is not admitting to being the employer, acting as the employer, or saying that Acry Tech is the employer. As I read the appeal, Williams is only being helpful. He is doing his level best to convey all of what he knows of matters, which is considerable, he being Alan Fage’s immediate supervisor and Williams having operated his own business, Acry Tech.

The Tribunal did not receive a submission from Andrea Fage dated March 1, 2000. It has received two submissions from Fage, one dated February 14, 2000 and a second which is dated September 23, 2000. In the first submission, Fage claimed that Williams was introduced by Andrew Bernardi as “his partner”, that he told her that he was using his own personal VISA to make Bernardi’s payroll, and that they both performed work for Acry Tech. She also stated that “It was everyone’s (the staff) belief that it was one company with two names.” In the September submission, Fage goes on to say, “I don’t know how the companies were made up on paper but I do know that Andrew and Buzz (Bernardi and Williams) were partners in both companies. It was evident in the way that the companies were run.” Absent some proof of that, however, it is only to suggest that Bernardi and Acry Tech were under common control and direction. And I find that neither the delegate, nor the Fages, submit evidence which confirms what is alleged by the employees.

I find that there in fact no evidence of a partnership, common directors, common financial or organizational control, and production which was completely or even largely integrated. Bernardi and Acry Tech had only one director in common, Andrew Bernardi. There is not evidence to establish that he had a majority interest in Acry Tech as well as Bernardi. Williams did provide Bernardi’s employees with direction but that was as shop floor supervisor. There is no evidence to show that he made important personnel decisions. Acry Tech rented floor space from Bernardi: That is the extent to which the companies had a common location. And Acry Tech manufactured acrylic products for Bernardi but had other customers. It was not exclusively engaged in producing parts of humidors for Bernardi or some other business entity.

DECISION

The employees were paid by Bernardi. The only way that Acry Tech can be held accountable as the employer is through section 95 of the *Act*.

Section 95 of the *Act* provides the Director with a means of piercing the corporate veil. It allows the Director to look beyond what is “ownership” in the strict legal sense of the word and, hold accountable for wages, all parts of what is a business whole, should any one part of the business be unable to pay the wages.

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.

It follows from the wording of section 95, that different businesses, trades or undertakings cannot be treated as one person and the employer pursuant to section 95 unless there is,

- more than one corporation, individual, firm, syndicate or association;
- each of the entities must be carrying on a business, trade or undertaking;
- there must be common control or direction; and
- there must be some statutory purpose for treating the entities as one person and the employer.

The question in this case is, Were Bernardi and Acry Tech under common control and direction? If they were, the Director may treat the companies as one person and the employer, and collect from Acry Tech wages which Bernardi has been found to owe the Fages.

Acry Tech, in appealing the Determination, has provided a detailed description of how the two companies were run and the nature of the arrangements between them and their owners. It objects to the Determination in a number of ways, only some of which I have identified in quoting parts of *Bernardi*. The Director has not addressed and contested what is, in the main and in essence, Acry Tech’s appeal. The Fages indicate that they believe that the two companies were, in effect, one and the same, but evidence is not produced which shows that Andrew Bernardi and Malcolm Williams were partners or that Bernardi and Acry Tech had common control and direction. And, as noted above, I am led to believe that the delegate errs in respect to a number of important facts.

I find that, as matters are presented to me, there is not sufficient reason to treat Bernardi and Acry Tech as one person and the employer pursuant to section 95 of the *Act*. There is not clear evidence of common financial or organizational control. Andrew Bernardi was the only director that the companies had in common and I am not shown that he in any way had control of Acry Tech or that it was he that was directing that company's affairs. It is not shown that Bernardi was controlled and directed by Williams. It is merely shown that Williams had a minor supervisory powers in respect to Bernardi. It is also not shown that Acry Tech's production was completely or even largely integrated with that of Bernardi.

The Determination is accordingly varied.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated December 23, 1999 be varied. The employer is not Bernardi Humidors Ltd. and Acry Tech Plastics Inc. but Bernardi Humidors Ltd. alone. It is Bernardi Humidors Ltd. that is ordered to pay Andrea and Alan Fage \$5,572.59.

LORNE D. COLLINGWOOD

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal