Employment Standards TRIBUNAL

An appeal

- by -

Mission Bingo Association operating as Mission & District Bingo Association
("MBA")

- 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: Ib S. Petersen

FILE No.: 2001/581

DATE OF HEARING: October 22, 2001

DATE OF DECISION: October 31, 2001

DECISION

APPEARANCES:

Mr. William Campbell Mr. Francis Edwards	on behalf of MBA
Mr. Christopher Maddock	counsel, on behalf of Ms. Donna-Marie Thrustle
Ms. Adele Adamic Mr. Kevin Molnar	counsel, on behalf of the Director

OVERVIEW AND BACKGROUND FACTS

This is an appeal by Mission Bingo Association ("MBA") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on July 17, 2001. The Determination--headed "Determination (Notice of variance)" addressed to "Mission Bingo Association operating as Mission & District Bingo association"--purported to vary a Determination issued on January 25, 2001 against Mission & District Bingo Association ("MDBA").

The original Determination against the MDBA concluded that MDBA terminated Donna-Marie Thrustle ("Thrustle" or the "Employee") without just cause and that she, in the result, was entitled to compensation for length of service. The delegate disagreed that Thrustle was an independent contractor. The delegate held in the MDBA's favour with respect to a claim for minimum wages, statutory holiday pay and vacation pay. In any event, the Delegate concluded that Thrustle was entitled to $2,595.45 from MDBA.

MBA appealed the Determination against MDBA. Following a hearing on May 7, 2001, I issued a decision on May 16 confirming the Determination against MDBA (*Mission & District Bingo Association*, BCEST #D235/01). The decision may be summarized as follows:

1. MBA did not have standing to appeal the Determination;

2. in the alternative, because MBA was not authorized to represent MDBA, the latter had abandoned the appeal by failing to appear at the hearing; and

3. in the further alternative, even if I considered the representations made by MBA, I would still dismiss the appeal because it had failed to show that the Delegate erred.

The decision was made on the basis of the Determination which clearly identified MDBA as Thrustle's employer. No appeal was taken from this decision.

Following representations by the MBA and Thrustle, or their counsel, with respect to the issues as he saw them, the Delegate issued the Determination dated July 17, 2001, which is the subject of the appeal at hand. The Delegate defined the issues before him as whether MBA and MDBA "are the same entity" and whether a "technical irregularity has occurred." He considered evidence available to him, the positions of the parties, and found in favour of Thrustle, namely that MBA and MDBA "are the same entity."

The basis for his Determination appears to have been the following:

1. MBA continued to use the name MDBA on Thrustle's "independent contractor" agreement.

2. MDBA's name was on her termination notice.

3. Both documents, referred to in items 1 and 2, were signed by individuals listed as directors of MBA.

4. MBA was notified of Thrustle's complaint and responded.

5. MBA appealed the Determination against MDBA and argued its position before the Tribunal.

6. Thrustle was paid from MBA's bank account. MDBA's bank account was opened with funds from MBA's account. There was some overlap with respect to the persons who had signing authority over the accounts.

The Delegate concluded:

> "This was not a case of an associated corporation or the sale or transfer of assets. MBA was Thrustle's employer and is responsible for any outstanding wages.
>
> ... The evidence indicates that Thrustle was en employee of the MBA, the MBA was informed of Thrustle's allegations, MBA had an opportunity to respond to those allegations and exercised its right of appeal. Thrustle was an employee of the MBA and natural justice was served.
>
> The only oversight in the Determination is that the style of cause ought to read the Mission and Bingo Association [sic.] operating as the Mission & District Bingo association. The Director contends that is a technical irregularity as contemplated in Section 123 of the Act...."

From the correspondence it appears that *prior* the issuance of the July 17, 2001 Determination, the Delegate collected funds from MBA's bank account and, I gather, refused to return those funds. On July 10, 2001, William Campbell ("Campbell"), the vice-president of MBA, wrote to

the Director [Ms. Stockton]--forwarded via fax--complaining, *inter alia*, that the Delegate had issued a "Third Party demand against the bank account of M&DBA and/or MBA." The letter noted that the Determination sought to be enforced was made against a different organization, namely, MDBA and demanded that the Delegate's letter be "rescinded." The Acting Director denied the request the following day. At the hearing, however, I was informed by MBA that the funds had been returned.

The above sets the stage for the appeal now before me.

ISSUES AND ARGUMENT

MBA challenges the conclusion that MBA and MDBA are the same. It says that my earlier decision recognized that MBA was not the employer and dismissed the appeal for that reason. MBA disagrees that amending the style of cause is a technical irregularity. MBA says that it was never Thrustle'e employer. She was employed by individual charities. It also says that if this is "a new determination, how could the decision be reached without Mission Bingo association being invited to participate...."

In his submissions to the Tribunal in response to the appeal, the Delegate argues that the

> "original Determination was upheld by Adjudicator Ib Petersen who appears to have recognized that Mission Bingo and the Mission and District Bingo Association (Mission and District Bingo [sic.] are the same entity..."

The evidence set out in the July 17, 2001 Determination supports the conclusion that MBA and MDBA are the "same organization." Moreover, the substantive issues of Thrustle's complaint have been adjudicated and wages are owed. Under Section 86 of the *Act*, the Director has the power to vary the style of cause of the original Determination. This, says the Delegate, is the sort of technical irregularity for which Section 123 of the *Act* was drafted. The Delegate says that the only issue before me is whether MBA and MDBA are the same entity.

At the hearing, the Director was represented by counsel. Counsel argues that the basis for the power to amend a determination is somewhat broader than Sections 86 and 123. Counsel argues that it is not unusual for the Director to amend a determination against a person not named in the initial determination. It is sometimes difficult to ascertain an employer's identity because persons are "not eager to come forward" and face liability. The Director should be able to amend a determination to take into account "new information." Counsel argues that this is necessary for the "purposes of the *Act*." A determination that cannot be enforced does not meet the purposes of the *Act* (Section 2). Counsel pointed me to Sections 74 and 79. Section 79 empowers the Director to remedy a breach of the *Act*. The party added has the right of appeal. I was also directed to the Tribunal's decision in *Wally's Auto Body Ltd.*, BCEST #D519/01, for the proposition that the Director may amend a determination under Section 86, at least in

circumstances where a party has mislead the Delegate. The Determination before me is simply "a further and better Determination."

Counsel for Thrustle generally agrees with the Director's argument. Counsel also argues that I have the jurisdiction under the reconsideration provisions of the *Act* to resolve this matter by amending the name of the employer to read "Mission Bingo association also known as Mission and District Bingo association." In a submission to the Tribunal, dated October 11, 2001, counsel writes that Thrustle should not be required to "prove the findings of fact already made by Adjudicator Petersen in [his] written decision...." From the Respondent Thrustle's point of view the initial Determination (except the name of the Employer) is correct. Counsel also argues that MBA has not been deprived of a fair hearing because it in reality has been involved all along--not only in the appeal before me at the hearing--but in the initial Determination and appeal.

ISSUES

At the outset of the hearing, I outlined what I saw as the main issues before me:

1. Does the Director have the power to amend the Determination to change the name of the Employer after it has been confirmed by the Tribunal?

2. If the Director has that power, did the Delegate err in his determination that MBA is the same entity as MDBA and, thus, is the Employer?

The parties agreed that those were the issues. It was further agreed that it was not necessary to call evidence with respect to the first issue. In my view, I need not deal with the second issue.

In addition to these issues, there were a number of preliminary and procedural matters. These matters included the Appellant's ability to produce "new" evidence in support of its case on the second issue. From my reading of the file, much--if not all--of the documentation had not been produced with the appeal submissions. In any event, in view of the decision below, I am of the view that I need not deal with this aspect of the appeal.

PRELIMINARY MATTER

In the course of outlining the issues at the beginning of the hearing, I mentioned that there might be an issue as to whether or not I ought to hear the appeal at all. At that time, the Appellant did not object.

Well into the hearing, the Appellant also took the position that I was precluded from hearing and deciding the appeal because I had rendered the initial Decision. There was no argument in support of the motion.

Counsel for the Director opposed the motion. Counsel for Thrustle did not oppose my continuing to hear the appeal.

I do not agree that I am precluded from adjudicating the appeal. As I indicated to the parties, I do not intend to revisit the initial Decision. The case before me involves the implementation or enforcement of an earlier Determination.

ANALYSIS

Regrettably, there seems to be considerable disagreement or confusion between the parties with respect to the original decision in this matter. It is, in my view, not proper for me to expand on that earlier decision. It must speak for itself. I do note, however, that the decision was not appealed by any party, including the Director. Under Section 116 of the *Act*, "the Director or a party named in a decision of the Tribunal" may make an application for reconsideration.

The original Determination before me identified only MDBA as Thrustle's employer. That Determination was upheld for the reasons set out in my earlier decision. There was nothing in the decision, or indeed in the original Determination, to support a conclusion that MBA was Thrustle's employer. Following the two paragraphs, setting out my conclusions that MBA did not have standing and that it did not have authority to represent MDBA, the paragraph in my earlier decision dealing with the merits of the appeal states:

> "....even if I am wrong with respect to these conclusions, I would, nevertheless, still dismiss the appeal. There were a number issues arising out of the appeal: independent contractor status versus employee status, start of employment, hours worked etc. MBA did failed to show that the findings of the delegate were wrong. Essentially, MBA's position was that the delegate's findings were exaggerated and inflated but it was unable to provide any specific information to support its case. MBA also took issue with Thrustle's start date, which she had indicated to the delegate as being 1993. In the circumstances, the delegate might well have concluded that there was a continuing employment relationship. As well, MBA says that the delegate failed to consult it with respect to his investigation. On the evidence provided at the hearing, there was nothing to substantiate this."

I reiterate that what was before me was a Determination that MDBA was the employer and which did not in any way name MBA, either as the "real" employer or as an "associated" employer. While I do not doubt that some of the facts relied upon by the Delegate in his amended Determination, if true, could well support a conclusion that MBA is the "real" employer, I am surprised that the Delegate did not investigate and determine the employer's identity prior to issuing a Determination. The identity of the Employer, or other parties, is a fundamental aspect of any determination.

Although this point was not argued before me, I question the logic behind the Delegate's use of the "third party demand" under Section 89 of the *Act* to attach MBA's funds. That Section provides, in part:

> **89.** (1) If the director has reason to believe that a person is or is likely to become indebted to another who is required to pay money under a determination or under an order of the tribunal, the director may demand in writing that the person pay to the director, on account of the other's liability under the determination or order, all or part of the money otherwise payable to the other person.

The use that provision would seem to indicate that there are two entities, one of whom is indebted to the other, or, in the context of this case, that MBA is indebted to MDBA--which may be the case, though I hasten to add that there is nothing before me to support such a finding--and that the delegate is collecting funds from MBA to satisfy the Determination, upheld on appeal, in favour of Thrustle. This process would be one way to justify the collection of funds. However, from the correspondence on file, in particular a letter from the Delegate, dated July 6, 2001, it is clear that the Delegate proceed on the basis that MBA were one and the same and thus was the employer and that the amendment of the original determination was simply a technical irregularity. As noted above, at the time of the hearing, the funds had been returned to MBA and I do not propose to comment further on the propriety of this action.

The thrust of the Director's argument is that the power to amend a determination is based on something broader than the powers under Section Sections 86 and 123, namely the purposes of the *Act*. A determination that cannot be enforced does not meet the purposes of the *Act* (Section 2). Counsel for Thrustle adopted this argument.

Presumably, what this argument means, in the context of this case, is that "new information" has come to the Director's attention regarding the identity of the Employer. This "new information"--and the extent to which this information was not available at the time of the initial Determination is not clear to me--entitles the Director to amend the initial Determination, which found that MDBA owed Thrustle, as an employee, some $2,595.45. The logic of the argument seems to be that the initial Determination is unenforceable against MDBA and, therefore, Thrustle will not be paid the money she is owed.

I do not accept this argument. In my opinion, the identity of a party is a fundamental aspect of any Determination. A Determination is enforceable in the same manner as a judgement of the Supreme Court of British Columbia (Section 91). Serious consequences flow from those enforcement powers. Obviously, it is important that determinations can be enforced and that employees owed money can be paid. All the same, that does not empower the Director to collect money for employees from persons who were not legally parties to the complaint, investigation and determination. The fact, if, indeed, it is a fact, that money cannot be collected from MDBA does not, *per se*, justify amending the Determination. I disagree that the Legislature intended to provide the Director with such powers.

Insofar as it is a part of the argument before me--counsel for the Director did not expressly address it--I disagree with the Delegate's argument that varying the original Determination to reflect that "Mission Bingo Association operating as Mission & District Bingo association" as the employer, is a mere technicality for which Section 123 was drafted. In my opinion, the Delegate is simply wrong. The identity of a party is not a mere technicality. I echo the views of the Adjudicator in *470999 B.C. Ltd. et al.*, BCEST #D042/99:

> "Before considering the grounds of appeal raised by the appellants, a preliminary concern arises in respect of one of the Determinations in this appeal. As indicated above, the third Determination, while it is addressed to Swan-Wood and indicates in its preamble that the Director had decided that she was a director/officer of the associated corporations, is issued against Wood. In my view, that Determination is a nullity. It cannot stand as a Determination made against Wood because it is legally vexatious. There is already a Determination made against Wood and this is a duplication of proceedings relating to him. It cannot stand as a Determination against Swan-Wood because it does not name her. There is a provision in the *Act* that salvages proceedings from being nullified by technical irregularities. That provision reads:
>
> > *123. A technical irregularity does not invalidate a proceeding under this Act.*
>
> However, this error is not a technical irregularity. *Failing to identify the correct person to whom a Determination is directed is a substantive matter*. It is not like using "Ltd." instead of "Inc." when naming a corporate person in a Determination. That kind of error would be a technical matter. *In this kind of case, naming a completely different person than the person intended to be named has the potential to mislead the "true" object of the Determination into a false belief about the need to appeal that Determination*. ... " (emphasis added)

In this case, I am of the view that MBA would be seriously prejudiced if this Determination were to stand. I do not doubt that MBA was afforded a reasonable opportunity to respond to the limited issues raise by the Delegate in the investigation that preceded the Determination subject of this appeal. However, it would not be in a position to deal with the merits of Thrustle's claim. I do not agree that MBA can be said to have participated from the outset. From that standpoint alone, the appeal must be upheld and the Determination cancelled and set aside.

I am of the view, as well, that the Director cannot amend the Determination after the Tribunal has issued its decision. The Delegate's submissions to the Tribunal relies on Section 86 of the Act which provides that the Director "may cancel or vary a determination." To my knowledge this issue has not been before the Tribunal before. Earlier cases have dealt with the situation where a determination is varied after the appeal has been filed. In *Devonshire Cream Ltd.*,

BCEST #D122/97, the Tribunal followed reasoning of the Federal Court of appeal in *A.G. of Canada v. von Findenigg* (1983), 46 N.R. 547, and noted:

> ... the Legislature could not have intended Section 86 of this *Act* to be used as a mechanism by the Director to interfere with Devonshire Cream's appeal rights or with the exercise by this Tribunal of its appellate functions under Section 108(2) of the *Ac*t. Once an appeal is filed, it is too late for the Director to exercise her jurisdiction under Section 86; such a limitation is implied by the presence of other provisions of the *Ac*t, including the right to appeal under Section 112 and the appeal powers of this Tribunal under Section 108(2) to "decide all questions of fact or law arising in the course of an appeal or review". Counsel impugned the motives of the Director in the decision to alter the earlier Determination but I find that the timing, alone, regardless of the motivation, invalidated the Director's actions. Only with the approval of the appellant to withdraw the appeal could the Director then proceed with the exercise of her powers under Section 86 once an appeal was filed. Counsel says that the Director could make minor changes to a Determination such as a correction of a clerical error, but I disagree. Once the appeal is filed, all jurisdiction ceases under Section 86."

In my opinion, this applies all the more after a determination has been confirmed by a decision of the Tribunal. The process established by the statute is a "two-tier" process. At the first stage, determinations may be appealed to the Tribunal as a matter of right (Section 112). At the second stage, decisions of the Tribunal may be subject of applications for reconsideration. Section 116 of the *Act* provides for reconsideration of Tribunal decisions and orders. An application for reconsideration should succeed only where there has been a demonstrable breach of the principles of natural justice, where there is compelling new evidence not available at the original appeal, or where the adjudicator has made fundamental error of law. The Tribunal has emphasized that it will use the power to reconsider with caution in order to ensure finality of the Tribunal's decisions and efficiency and fairness of the system (*Zoltan Kiss* (BCEST #D122/96; *Milan Holdings Inc.*, BCEST D#313/98, reconsideration of BCEST #D559/97). If the Director was authorized to amend determinations, as she saw fit, the appeals process contemplated by the *Act* would be rendered meaningless.

Counsel for the Director cited *Wally's Auto Body*, *above*. In that decision, the Adjudicator stated in the penultimate paragraph:

> "17 I would add the following. The Director has the authority, under Section 86 of the Act, to vary a Determination. While I do not speak for the Director, the opportunity may still exist for further discussion concerning the merits of the complaint. If it is obvious that the investigating officer has been misled by the complainant, it is likely that he would wish to know that."

In my view, this case does not stand for the proposition suggested.

These conclusions do not mean that Thrustle is left without remedy. On the evidence before me at the original hearing and set out in the original Determination, I noted that:

> .... I do not accept that the Employer [MDBA] ceased to exist in or around 1996. It may have been struck from the register of societies. However, the Employer carried on business. As mentioned above, it operated bank accounts, paid the individuals who provided the services, including Thrustle, and was a signatory to the "independent contractor" agreements with Thrustle. As well, it purported to terminate Thrustle's employment in June of 2000. The *Society Act* provides that Part 9 of the *Company Act* generally applies to societies that have been struck. Section 260 of the *Company Act* provides that the liability of directors, officers and members of a society continues as if it had not been struck. *In my view, it would appear, therefore, that the liability in the instant case would rest with the directors, officers and members of the Employer*. (Emphasis added)

For some reason, not entirely clear to me, it appears that the Delegate decided not to proceed against MDBA and the persons involved in its operation.

ORDER

Pursuant to Section 115 of the Act, I order that Determination in this matter, dated July 17, 2001, be cancelled.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal