

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-

Carrie Sindia, a Director or Officer of William Moore operating as R. Moore
Contracting Ltd.
(the Appellant)

-of a Determination issued by-

The Director of Employment Standards
(the Director)

ADJUDICATOR: Hugh R. Jamieson

FILE NO.: 99/50

DATE OF DECISION: April 7, 1999

DECISION

OVERVIEW

This appeal was brought by the Appellant on February 4, 1999, against a Determination by the Director dated January 7, 1999, wherein, pursuant to Section 96 of the *Employment Standards Act* (the “*Act*”), the Appellant was found to be liable, as a director or officer of R. Moore Contracting Ltd. (the Employer), to an amount of \$9,949.94, being wages owing to a David J. Harrison. The basis for the appeal is the claim by the Appellant that having resigned her directorship on August 1, 1995, she was not a director or an officer of the Employer at the relevant time when the wages in question were earned. The Tribunal decided that this appeal could be disposed of without an oral hearing.

ISSUES TO BE DECIDED

The primary issue here is whether the Appellant was a director or an officer of the Employer at the time the wages in question were earned. A secondary procedural issue also arises as to whether the documentary evidence presented by the Appellant is “new evidence” which is not normally acceptable at the appeal level.

FACTS

On November 6, 1997, the Director issued a Determination pursuant to Section 79 of the *Act* to the effect that William Moore operating as R. Moore Contracting Ltd., owed wages in the amount of \$9,949.94 to a Mr. David J. Harrison.

On January 7, 1999, the Director issued the Determination that is under review here, holding the Appellant, as a director or officer of the Employer, personally liable for the said amount of wages under Section 96 of the *Act*.

On February 4, 1999, the Appellant filed this appeal denying liability on the grounds that she had resigned from the position of director of the Employer on August 1, 1995. The Appellant relies on attached documentation to corroborate this statement of resignation. This includes a signed and witnessed receipt of the transfer of twenty (20) Class A shares from the Appellant to William Moore. This document is dated August 1, 1995. Also attached is a Province of British Columbia Company Act Form 10 and 11 entitled “NOTICE OF DIRECTORS”. In the body of this form it is indicated that the Appellant ceased to be a director of the Employer on August 1, 1995. This form is dated August 1, 1995 and is purportedly signed by the President/Secretary of the Employer.

In response to the Appeal, the Director submitted that there was nothing on record at the Registrar of Companies showing that the Appellant had resigned her directorship when the January 7, 1999 Determination was issued. In this regard, the Director relied on an attached copy of a BC

ONLINE: CORPORATION SEARCH dated August 27, 1997, which lists the Appellant as one of four directors of the Employer. The Director also notes that this search was conducted some two years after the Appellant claims to have resigned.

ANALYSIS

The relevant provisions of Section 96 of the *Act* read:

“ 96 (1) A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months’ unpaid wages for each employee.”

In accordance with those provisions and, considering that the Appellant is listed as a director of the Employer in the company records for the relevant time period when the wages owing to Mr. Patterson were earned, there can be no question about the Director’s justification for the issuance of the Determination in the name of the Appellant. The question now is, does the production of the purported transfer of shares and the notice of cessation of directorship documents carry enough weight to call for a cancellation of the Determination? Or, asked another way, does the fact that the Appellant was registered as a director on the official company records at the time when the wages owed were earned, constitute sufficient evidence to ground a finding of liability?

Looking at other situations where director status has been at issue, it seems that the Tribunal has in fact relied solely on the formal recording of director status with the Registrar of Companies as grounds for confirming Section 96 liability, see - *Parmjit S. Padda*, BC EST #D268/98. In that case however, there was apparently no evidence submitted to the contrary by the appellant like there is here.

In an other matter, the Tribunal effectively said that to be named in the official company records at the Registrar of the Companies is not a prerequisite for a finding of director status and liability under Section 96. In *Frank Folino*, BC EST #D261/98; it was found that a person was a director and carried Section 96 liability notwithstanding that he was not named as a director or officer in the company records. There, after adopting the definition of “director” from the *Company Act*, Adjudicator Thornicroft said the following:

“director includes every person, by *whatever name he is designated, who performs the functions of a director;*
(*emphasis added*)”

....

“The key point is not whether an individual is formally named in the corporate records as an officer or director, but rather, whether that person exercises the typical functions, tasks, or other duties that a corporate director or officer would, in the usual course of events, exercise (see *G. Elmitt Construction Ltd., v. Kaplan* (1992) 1 C.L.R. (2d) 219; see also *Penner and Hauff*, BC EST #D371/96, *Kovacs*, BC EST #D076/97; *Okraintz*,

BC EST #D354/97"

(BC EST #D261/98 at page 4)

Taking that approach, with which I agree, if I accept that it is not necessary to be recorded in the official company records as a director to have liability under Section 96, then the flip side surely has to be that being recorded as such may not be sufficient in itself to establish liability. If registration as a director or officer is merely token and there is no accompanying exercise of typical director or officer tasks, duties or functions, liability under Section 96 may not exist (see for example *David and Ron Wilinofsky* BC EST #D106/099).

Dealing briefly with the acceptability of the documentary evidence that has surfaced in the appeal, it is almost trite to say that in keeping with its well-established practice, the Tribunal does not normally allow parties to an appeal to present evidence or raise issues that were not raised or presented to the Director during the investigative stage of the proceedings, see *Tri-West Tractor Ltd.*, BC EST #D268/96. In these situations however, it seems to be the practice, and quite properly so in my opinion, to issue determinations for director or officer liability solely on the strength of the official company records at the Registrar of Companies. This, of course, means that in many instances there will have been no pre-determination opportunity for the alleged director or officer to dispute liability. From the gist of the Director's response to this appeal and also from what is indicated in the Determination itself, I have to assume this is what transpired here.

In these circumstances, the documentary evidence that has surfaced in this appeal cannot be characterized as "new evidence" as contemplated in *Tri-West Tractor Ltd.*, *supra.*, as this is probably the first chance the Appellant has had to cast doubt on the Determination. Therefore, in the interests of natural justice, these documents simply cannot be ignored or dismissed out of hand.

On the other hand though, the mere filing of unvalidated documents is certainly not enough to counter the inference of director or officer status to be drawn from the official records upon which the Director relied when issuing the Determination. Of course, my difficulty in respect to all of this lies in my inability to test the validity of the Appellant's claims in the absence of sworn testimony.

Having taken all of the foregoing into account, I see no alternative in the circumstances, but to refer the matter back to the Director for further investigation. This will provide an opportunity to check the validity of the documents in question and enable the necessary information to be gathered regarding the Appellant's involvement or lack thereof in the Employer's affairs during the relevant period. The *bona fides* of the Appellant's claim to have distanced herself from the Employer's operations back in 1995, can then be accepted or rejected.

ORDER

Pursuant to Section 115 of the *Act*, the Determination dated January 7, 1999, is hereby referred back to the Director for further investigation.

Hugh R. Jamieson
Adjudicator
Employment Standards Tribunal