

An appeal

- by -

Esther Briner, a Director or Officer of World Hockey Association Corp.
(“Briner”)

- 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 (as amended)

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2007A/132

DATE OF DECISION: January 16, 2008

DECISION

SUBMISSIONS

Esther Briner	on her own behalf
Amanda Clark Welder	on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Esther Briner, a Director or Officer of World Hockey Association Corp. (“Ms. Briner”) of a Determination that was issued on September 21, 2007 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Ms. Briner was a director/officer of World Hockey Association Corp. (“WHA”), an employer found to have contravened provisions of the *Act*, and was personally liable under Section 96 of the *Act* for an amount of \$18,631.86.
2. In this appeal, Ms. Briner says the Director failed to observe principles of natural justice in making the Determination. Ms. Briner also says there is evidence available which was not available when the Determination was made. Ms. Briner seeks to have the Determination against her cancelled.
3. Ms. Briner does not seek an oral hearing on the appeal.
4. The Tribunal has a discretion whether to hold a hearing on an appeal and if a hearing is considered necessary, may hold any combination of written, electronic and oral hearings: see Section 36 of the *Administrative Tribunals Act* (“ATA”), which is incorporated into the *Employment Standards Act* (s. 103), Rule 16 of the Tribunal’s Rules of Practice and Procedure and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575. In this case, the Tribunal has reviewed the appeal, the submissions and the material submitted by all of the parties, including the Section 112 (5) record filed by the Director, and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

5. The issue in this appeal is whether the Director committed a reviewable error in finding Ms. Briner a director/officer of WHA.

THE FACTS

6. On April 25, 2007, the Director issued a Determination against WHA (the “corporate Determination”) in favour of four employees in the amount of \$20,637.66. The Director also issued administrative penalties in the amount of \$2000.00. The Determination was sent to WHA, with copies delivered to its registered and records office and to its listed directors and officers, including Ms. Briner.
7. The Determination was appealed under Section 112 of the *Act*, was considered by the Tribunal and was dismissed on August 12, 2007 in decision BC EST #D063/07.

8. The Determination indicates that an on-line search of search of the Registrar of Companies – Extra-Provincial Summary showed WHA was registered in British Columbia as an extra-provincial company on October 4, 2006. The foreign jurisdiction was listed as Florida; the date of incorporation in that jurisdiction was shown as September 19, 2003.
9. A search of the Florida Department of State, Division of Corporations, “Corporations Online” search (the “Florida Search”) indicated that “as of March 29, 2007, there were five directors/officers of WHA: William R. Smith, Robert M. Hull, Peter Young, Esther Briner and Rieghardt van Enter. The address listed for each of the directors/officers was address shown as the head office of WHA in British Columbia - #101, 5521 192 Street, Surrey. That address was the same as the address from which the WHA operated. The office had been closed before the issuance of the corporate Determination.
10. On March 29, 2007, the Director sent correspondence to WHA which included copies of documents acquired through the Florida Search. The correspondence requested submissions on the question of who were directors/officers of WHA. The Determination notes that the correspondence was confirmed as having been received by Mr. John Briner, Ms. Briner’s brother. Mr. Briner filed several submissions on behalf of Ms. Briner on whether she was a director/officer of WHA. In the first submission, April 3, 2007, he provided a copy of a document which was said to be a copy of Ms. Briner’s resignation from any position with WHA, including the position of director, dated 15 August 2006.
11. The Determination recites other information and evidence received by the Director during the complaint process on whether Ms. Briner was a director/officer of WHA. It is not necessary to restate all of that information and evidence in this decision, except to note that some of the information received and relied on by the Director was provided by Rieghardt van Enter.
12. The Determination contains an analysis of the information and evidence. In respect of the information provided by Mr. van Enter, the Director accepted it as being credible, stating: “There is no probable motive for his evidence not to be credible”. The Director did not accept the document dated 15 August 2006 that was proffered by Mr. Briner as Ms. Briner’s resignation as a director/officer of WHA on or about that date. The reasons for that conclusion are set out in the Determination. The Director found that Ms. Briner did not resign as a director/officer of WHA until April 20, 2007.

ARGUMENT

13. Ms. Briner reiterates the essential elements of the argument made to the Director during the complaint investigation: that she filed a resignation dated August 15, 2006 from any position with WHA, including director; the September 18, 2006 filing in Florida State was made without her consent, signature or authorization; that Mr. van Enter is mistaken in his recollections about when he and Ms. Briner resigned and they should be given little weight as there was no communication between Ms. Briner and Mr. van Enter in and around January, 2007; that Ms. Briner had good reason to resign her positions with WHA; and she confirmed her resignation in documents filed in Florida State on or around April 20, 2007.
14. The Director says Ms. Briner is doing little more in this appeal than restating her case to the Tribunal, and the Tribunal has consistently said that is not a proper use of the appeal process. The Director says the new evidence provided by Ms. Briner does not satisfy the conditions set out by the Tribunal for accepting such evidence on appeal.

15. In her final reply, Ms. Briner raises for the first time the argument that under Florida law, the delivery of a written resignation at the records and registration office of the corporation is all that is required to make a resignation effective.

16. **ANALYSIS**

17. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

112. (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

(a) the director erred in law:

(b) the director failed to observe the principles of natural justice in making the determination;

(c) evidence has become available that was not available at the time the determination was made.

18. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to show an error in the Determination under one of the statutory grounds. In particular, and in the context of one of the grounds raised in this appeal, the burden of showing the Director failed to comply with principles of natural justice in making the Determination is on Ms. Briner (see *James Hubert D'Hondt operating as D'Hondt Farms*, BCEST #RD021/05 (Reconsideration of BCEST #D144/04)).

19. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law (see *Britco Structures Ltd.*, BC EST #D260/03). The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];

2. a misapplication of an applicable principle of general law;

3. acting without any evidence;

4. acting on a view of the facts which could not reasonably be entertained; and

5. adopting a method of assessment which is wrong in principle.

20. I shall first to consider whether the new evidence that Ms. Briner has submitted with the appeal should be accepted and considered by the Tribunal.

21. The Tribunal has taken a relatively strict view of what will be accepted as new, or additional, evidence in an appeal, indicating in several decisions that this ground of appeal is not intended to be an invitation to a dissatisfied party to seek out additional evidence to supplement an appeal if that evidence could have been

acquired and provided to the Director before the Determination was issued. The Tribunal has discretion to allow new or additional evidence. In addition to considering whether the evidence which a party is seeking to introduce on appeal was reasonably available during the complaint process, the Tribunal considers whether such evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it is reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination (see *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03 and *Senor Rana's Cantina Ltd.*, BC EST #D017/05).

22. I first note that the appeal submission does not identify what is the new evidence which is being submitted. Ms. Briner has not taken issue with the perception of the Director that it consists of three matters: an assertion that Ms. Briner never acted in any capacity as a director or officer of WHA, that she never attended board meetings or signed documents; that she had several reasons for resigning; and that Mr. van Enter, contrary to his recollection and statement to the Director, had signed a document consenting to act as Secretary and a Treasurer of WHA in September 2006.
23. What is apparent is that all of this information was available at the time the Determination was being made. In any event, the fact that Ms. Briner never acted as a director or officer is legally irrelevant to her liability under Section 96; the test is not a functional one where the person is listed as a director or officer in the corporate records: see *Lucille M. Pacey, a Director or Officer of Mosaic Technologies Corporation*, BC EST #D121/04.
24. Whether Ms. Briner had reasons to resign is not determinative of whether she did resign. This evidence is not probative. Similarly, I do not view the evidence showing Mr. Van Enter had signed a consent to be an officer of WHA as being particularly probative of whether Ms. Briner was a director/officer of WHA. The fact there is no document signed by her consenting to act as a director or officer, might have some probative value if there were such consents signed by each of the other directors listed in the corporate records, but there is not.
25. The new evidence sought to be introduced into this appeal does not meet the due diligence and probative value elements of the conditions for admission and I do not accept it on this appeal.
26. There is also another reason for not accepting this evidence. The conclusion that Ms. Briner is a director/officer of WHA is predominantly a finding of fact, based on the listing of Ms. Briner as a director/officer in the corporate records of WHA and an assessment of whether there exists any cogent and credible evidence showing the corporate records are inaccurate. As indicated above, the Tribunal has limited authority over appeals based on challenges to findings of fact. In respect of the alleged resignation, the conclusion of the Director is not inconsistent with other decisions of the Tribunal which have held that an apparently timely but uncorroborated resignation is not sufficient to rebut the presumption founded on corporate records: see for example *Leonard W. Hester, a Director or Officer of A.K.A. Rhino Prepress and Print Inc.*, BC EST #D287/02. In that decision, the Tribunal included the following statement, at page 4:

The Registrar of Companies' records may be presumptively relied on by the Director--see *Wilnofsky*, BC EST # D106/99. It then falls to the person identified in those records as a director or officer to show, by clear and cogent evidence, that the Registrar's records are inaccurate (*Michalkovic*, BC EST # RD047/01). I am not satisfied, on a balance of probabilities, that Mr. Hester has met his evidentiary burden in this latter regard. There is absolutely no corroborative

evidence before me with respect to Mr. Hester's assertion that he lawfully resigned his office on February 14th, 2001.

27. A fair reading of the Determination is that Ms. Briner did not, as a matter of fact, provide sufficiently cogent evidence to outweigh the presumption created by her being listed as a director/officer of WHA and the other evidence which both supported the conclusion generated by that presumption and did not support her alleged resignation.
28. Nothing in this appeal has persuaded me that the decision made by the Director concerning Ms. Briner's liability under Section 96 is based on an error of law. Rather, the decision is based on an analysis and weighing of information provided to and acquired by the Director during the investigation.
29. On the stipulated ground of appeal: that the Director failed to observe principles of natural justice in making the Determination, I am not persuaded that any such failure has occurred. Clearly, it is not a breach of principles of natural justice for the Director to have accepted some evidence and not other evidence in reaching the decision.
30. Ms. Briner has raised a final point in her reply to the Director's submission: that under Florida law, the delivery of a written resignation at the records and registration office of the corporation is all that is required to effect a resignation. That may be so, but the Director found no evidence that Ms. Briner had delivered a written resignation to the registered or records office of WHA in or around August 15, 2006.
31. For the above reasons, the appeal is dismissed.

ORDER

32. Pursuant to Section 115 of the *Act*, I order the Determination dated September 21, 2007 be confirmed in the total amount of \$18,631.86.

David B. Stevenson
Member
Employment Standards Tribunal