

An appeal

- by -

596773 B.C. Ltd. operating as Chisel Media
("Chisel Media")

- 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

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2004A/204

DATE OF DECISION: January 12, 2005

DECISION

SUBMISSIONS

Kalan Milley on behalf of 596773 B. C. Ltd.

Graham Jickling on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by 596773 B. C. Ltd. operating as Chisel Media (“Chisel Media”), pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued October 6, 2004.

Larry Colcy filed a complaint with the Director alleging that Chisel Media failed to pay him all wages owing. Following a hearing, the Director’s delegate determined that Chisel Media contravened Sections 18 and 58 of the *Act*, and Ordered that it pay \$6,152.27 in wages and interest to the Director on behalf of Mr. Colcy. The delegate also imposed a \$500 administrative penalty on Chisel Media for the contravention.

Chisel Media alleges that new evidence has become available that was not available at the time the Determination was made. It claims that it is “involved in a legal action that puts its solvency in question”, and seeks to relieve the directors of personal liability for wages owed.

The appellant did not seek an oral hearing, and I have determined, based on the submissions of the parties, that the matter can be adjudicated based on their written submissions.

ISSUE

Is there new and relevant evidence available that was not available at the time the Determination was made that would have led the delegate to a different conclusion?

FACTS AND ARGUMENT

Mr. Colcy was employed with Chisel Media, a media production company, as a project manager from May 15, 2003 to July 31, 2003. Mr. Colcy filed a claim for unpaid wages.

The sole issues before the delegate were whether there was an employee/employer relationship between the parties, and, if there was an employment relationship, who the employer was. Chisel Media did not dispute the amount of Mr. Colcy’s claim.

Following a hearing on June 28, 2004, the delegate determined that Mr. Colcy was an employee of Chisel Media, and received his direction primarily from Mr. Milley, one of its directors. Given that there was no dispute as to Mr. Colcy’s time worked, rate of pay or balance payable, the delegate issued a Determination based on calculations using those amounts. In his determination, the delegate noted that

directors and officers could be required to pay wages owed to employees and the total administrative penalty amount.

In his appeal submission, Mr. Milley does not take issue with the delegate's conclusions on Chisel Media's liability. Rather, he says that he "will not be held personally responsible for the total or any part of the amount payable as outlined in the Determination".

Enclosed with Mr. Milley's appeal is a petition for a receiving order filed in the Supreme Court of British Columbia (in Bankruptcy) on October 21, 2002, filed on behalf of Starnet Communications Canada Inc. Mr. Milley says that he did not provide evidence that Chisel Media's solvency was in question at the hearing because he was unaware that directors could be held personally responsible for unpaid wages until he received the Determination.

Mr. Milley seeks to have the Tribunal "recognized that any responsibility for the amount due will not fall upon the Directors of 596773 B.C. Ltd."

The delegate says that Mr. Milley's concerns are "premature" as there has been no determination issued against the Directors of Chisel Media.

ANALYSIS

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- (a) the director erred in law
- (b) the director failed to observe the principles of natural justice in making the determination;
or
- (c) evidence has become available that was not available at the time the determination was being made

In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- (b) the evidence must be relevant to a material issue arising from the complaint;
- (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
- (d) the evidence must have high potential probative value, in the sense that , if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

The petition provided by Mr. Milley is not new evidence. It was filed in court well before the date of the hearing, and, had Mr. Milley felt it to be relevant, he ought to have provided it to the delegate at the

hearing. Mr. Milley says that he only came to appreciate its relevance once he discovered he could be held personally liable for Mr. Colcy's wages.

I accept that the document is credible. However, I am not persuaded that it would have led the delegate to a different conclusion on the issues of whether Chisel Media was the employer, or whether the wages determined owing to Mr. Colcy were accurate. Indeed, Mr. Milley does not dispute these conclusions.

The new information is only relevant in the event Chisel Media, the corporate entity, is unable to satisfy the Determination. At that time, the delegate may issue a subsequent Determination against the directors personally. That has not yet occurred. Section 96 of the Act provides that a director or officer of a corporation at the time wages of an employee are earned is personally liable for up to 2 month's wages for each employee unless the corporation is in bankruptcy. The issue of Chisel Media's solvency may be addressed if and when the issue of the directors' liability arises.

I dismiss the appeal.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination dated October 6, 2004 be confirmed in the amount of \$6,652.27, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal