

An appeal

- by -

Diana Robertson  
(“Robertson”)

- 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:** Kenneth Wm. Thornicroft

**FILE No.:** 2009A/145

**DATE OF DECISION:** February 12, 2010

## DECISION

### SUBMISSIONS

D. Brad Henry	Counsel for Diana Robertson
Roderick MacDonald	on his own behalf
Victor Lee	on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal filed by Diana Robertson (“Robertson”) pursuant to the provisions of subsections 112(1)(a) and (b) of the *Employment Standards Act* (the “*Act*”). Ms. Robertson appeals a Determination that was issued against her on September 23, 2009 (the “Determination”). The Determination, in the total amount of \$32,549.81, was issued under section 96(1) of the *Act* which provides as follows:

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.
2. Ms. Robertson says that the Determination should be cancelled or, alternatively, that the matter should be referred back to the Director of Employment Standards, because the Director’s delegate (the “delegate”) who issued it erred in law (subsection 112(1)(a)) and/or because there was a failure to observe the principles of natural justice in making the Determination (section 112(1)(b)). I shall more fully address Ms. Robertson’s grounds of appeal later on in this reasons, however, at this point her attack may be summarized as follows: the delegate erred in law by finding that she was, in fact, a director or officer of the corporation in question when the employees’ unpaid wage claims crystallized; there was a failure to observe the principles of natural justice since the delegate was, or appeared to be, biased against Ms. Robertson and, in any event, issued legally deficient reasons supporting the Determination.
3. I am adjudicating this appeal based solely on the parties’ written submissions and, in that regard, I have before me the several separate submissions filed by Ms. Robertson’s legal counsel, a brief submission from the delegate and another brief submission filed by one of the four respondent employees. I have also reviewed the section 112(5) “record” in this matter.

### FACTUAL BACKGROUND

4. Four former employees of R Group Communications Inc. (“RGC”) filed unpaid wage complaints against RGC and on October 3, 2008, a determination (the “Corporate Determination”) was issued in favour of the four employees in the total amount of \$47,155.37. The Corporate Determination was not appealed and the time for appealing it expired on November 10, 2008.
5. I understand that RGC has ceased normal business operations (it was a graphic design and marketing communications firm) and although, so far as I know, it is not formally bankrupt, it appears to be either insolvent or very close to insolvency. The firm closed down its office on June 27, 2008, and three of the complainants claimed unpaid wages (including compensation for length of service) up to that date. The other complainant’s employment ended on February 25, 2008, and his claim was limited to unpaid wages for his final pay period together with concomitant vacation pay and section 88 interest.

6. On December 19, 2008, the delegate issued a section 96 determination against Ms. Robertson. Ms. Robertson appealed that determination and on March 20, 2009, my colleague, Tribunal Member Stevenson, issued reasons for decision allowing the appeal (BC EST # D031/09). Member Stevenson declared the determination to be a “nullity” and then referred the entire matter of Ms. Robertson’s liability, if any, under section 96 of the *Act* back to the Director “with the expectation that reasonable efforts will be made to provide Mrs. Robertson with an opportunity to respond on all of the issues arising under Section 96 of the *Act*” (para. 37). The delegate received further submissions from Ms. Robertson and from three of the four original complainants and then issued the Determination that is now before me.

## ISSUES

### Error in Law

7. While Ms. Robertson concedes that she was, at one time, both an officer and director of RGC, she says that she was neither an officer nor a director, to use the language of section 96(1), “at the time the wages of an employee of the corporation were earned or should have been paid”. Ms. Robertson does not dispute the fact (now formalized by way of the Corporate Determination) that the four complainants are owed wages nor does she dispute that these wages were payable within 48 hours after the complainants’ employment ended (see *Act*, section 18) – *i.e.*, within 48 hours after June 27, 2008, for three of the complainants and within 48 hours of February 25, 2008, for the fourth complainant.
8. Ms. Robertson says that she resigned her directorship in 2004 but continued to exercise the functions of a corporate officer for a time thereafter. In her March 4, 2009, submission to the Tribunal (part of the record before me and submitted with respect to her earlier appeal of the first section 96 Determination issued against her) Ms. Robertson asserts: “Sometime in late 2006 I believe I resigned the formal, legal title of President although certainly I would have still have been seen as President by the employees and customers at that point” (para. 3). Ms. Robertson’s position appears to be that by the end of 2007 and, in any event, by no later than January 2008 she had fully ceased acting as an officer of RGC.

### Failure to Observe the Principles of Natural Justice

9. Ms. Robertson’s challenge to the Determination based on “natural justice” is grounded on two separate arguments. First, Ms. Robertson says after Member Stevenson cancelled the original section 96 Determination and referred the matter back to the Director, it should have been delegated to an entirely new delegate (the same delegate who issued the first section 96 Determination issued the Determination that is now before me). Ms. Robertson’s counsel says “there is both a reasonable apprehension of bias and an appearance of bias in the decision itself” (November 2, 2009, submission, page. 2). Second, Ms. Robertson’s counsel says that the Delegate’s Reasons for the Determination “are so deficient as to be no reasons at all” because the Delegate failed “to adequately address the issues of fact raised before him” (November 2, 2009, submission, page. 2).

## FINDINGS AND ANALYSIS

### Error in Law

10. The *Act* does not contain a definition of either a corporate “director” or “officer”. The Tribunal thus looks to the definitions contained in the *Business Corporations Act* for guidance when interpreting section 96 of the *Act*. Section 1 of the B.C. *Business Corporations Act* contains the following definitions of “director” and “senior officer” (there is no definition of “officer” in this statute):

“director” means,

- (a) in relation to a company, an individual who is a member of the board of directors of the company as a result of having been elected or appointed to that position, or
- (b) in relation to a corporation other than a company, a person who is a member of the board of directors or other governing body of the corporation regardless of the title by which that person is designated;

“senior officer” means, in relation to a corporation,

- (a) the chair and any vice chair of the board of directors or other governing body of the corporation, if that chair or vice chair performs the functions of the office on a full time basis,
- (b) the president of the corporation,
- (c) any vice president in charge of a principal business unit of the corporation, including sales, finance or production, and
- (d) any officer of the corporation, whether or not the officer is also a director of the corporation, who performs a policy making function in respect of the corporation and who has the capacity to influence the direction of the corporation;

11. The material before me includes records of several searches of the B.C. Corporate Registry concerning RGC. As of July 9, 2008, there were no directors listed and Ms. Robertson was recorded as RGC’s president and secretary as at January 19, 2008. The Corporate Registry records also include a “Notice of Change of Directors” filed on February 13, 2006, indicating that Ms. Robertson ceased to be a director and that her husband, David Robertson, was elected as RGC’s sole director. RGC’s Annual Report filed May 12, 2008 identifies Ms. Robertson as the corporation’s president and secretary.
12. The B.C. Corporate Registry records establish a rebuttable presumption that they actually reflect the status of the individuals identified in them. A person so recorded as a director or officer may rebut this presumption by proving, on the balance of probabilities, that the Corporate Registry records are inaccurate (for example, because the person resigned and the resignation documents were not properly processed or because the person was never properly appointed): see *Director of Employment Standards and Michalkovic*, BC EST # RD047/01.
13. It is important to note that a person may be a “senior officer” of a corporation even though not recorded as such in the corporation’s records provided they “[perform] a policy making function in respect of the corporation and [have] the capacity to influence the direction of the corporation”.
14. In this case, the complainants’ unpaid wage claims crystallized on or before the end of June 2008. A B.C. Corporate Registry records search conducted on July 9, 2008, indicated that Ms. Robertson held the offices of president and secretary. As noted above, Ms. Robertson says that she ceased to be an RGC officer sometime during 2007 and, in any event, by no later than early January 2008. The question that I must address is whether the delegate erred in determining that Ms. Robertson continued to act as a corporate officer as of the date when RGC ceased normal business operations (June 27, 2008).
15. Although the delegate had conflicting evidence before him, in my view, the delegate did not err in determining that Ms. Robertson was an RGC officer when the complainants’ wage claims crystallized. Ms. Robertson has, of course, a strong financial incentive to claim that she was no longer a corporate officer as of the end of June 2008. On the other hand, the complainants also have a strong incentive to claim that she was an RGC officer in June 2008 since their unpaid wage claims are not likely to be satisfied by RGC given its current status as a defunct operating company seemingly with few, if any, exigible assets available to general creditors.
16. In examining the conflicting evidence, I note that Ms. Robertson’s current claim that she ceased to be an RGC officer during 2007 and, in any event, by no later than January 2008, is inconsistent with an undated

letter she apparently delivered to RGC's lawyers on May 19, 2008 (appended to her legal counsel's January 6, 2010, submission) in which she states "effective September 2006, I ceased acting in the capacity of President for R Group Communications Inc.". Further, in that same letter Ms. Robertson asserts "that as of January 1, 2008, I was no longer an employee of R Group and currently act as a freelance contractor". This latter assertion stands in marked contrast to a letter dated March 3, 2008, from David Robertson (appended to Ms. Robertson's legal counsel's January 6, 2010, submission) in which he states that Ms. Robertson is the firm's "design and marketing director" and earns "\$4,400 per mo [\$52,800 per annum] till May/08". Thus, there is some basis for questioning Ms. Robertson's credibility.

17. The evidence before the delegate relating to Ms. Robertson's status also included the following:
- statements from the complainants to the effect that Mr. David Robertson had little, if any, real role in the firm's day to day management and operations;
  - statements that Ms. Robertson, up until the time the firm ceased normal business operations, personally undertook many key organizational duties including preparing budgets, approving expenditures, negotiating the firm's lease (which she personally guaranteed), hiring and supervising staff (including drafting their employment contracts), approving staff compensation, negotiating with creditors, suppliers and Revenue Canada, and signing company cheques;
  - statements that Ms. Robertson prepared departing employees' records of employment;
  - an RGC's marketing brochure in use in 2007 described Ms. Robertson as being responsible for the firm's "strategy and creative direction";
  - e-mail communications in April 2008 that evidence Ms. Robertson giving directions to RGC staff; and
  - an April 4, 2008, e-mail from David Robertson to an RGC employee regarding that employee's unpaid wages in which he stated "Diana [Ms. Robertson] and I regret the stress" that had been caused to the employee; that "We [Mr. and Ms. Robertson] truly appreciate your cooperation and understanding" and that "We [Mr. and Ms. Robertson] are pushing for all the money we can get as quickly as possible to cover payroll and other payables". One could reasonably infer from these statements that Mr. David Robertson considered the firm's perilous financial state to be his and his wife's joint responsibility.
18. In light of the foregoing, I am unable to conclude that Ms. Robertson effectively rebutted the presumption that the corporate records identifying her as a corporate officer were inaccurate. Further, and in any event, even if it could be said that Ms. Robertson formally resigned her office as president of RGC before the complainants' unpaid wage claims crystallized, the delegate was entitled, based on the evidence before him, to conclude that Ms. Robertson nonetheless continued to perform the functions of a senior officer.
19. The complainants assert that Ms. Robertson, perhaps fearing for her personal liability, simply arranged for her husband to become her surrogate in terms of the company's share ownership and direction and control while she retained effective control on a day to day basis. Ms. Robertson's own words lend some credence to this assertion. In her March 4, 2009, submission to the Tribunal she acknowledged that her husband had a poor credit rating and that as RGC's financial position deteriorated, "the less I wanted to be involved in anything to do with the company operations". It seems as though Ms. Robertson wished to have matters appear as though she was not operating as an RGC officer while, in fact, she retained a significant measure of direction and control over RGC's business affairs.

20. I do not find that the delegate erred in his interpretation or application of section 96(1) in this instance.

### **Failure to observe the principles of natural justice**

21. I am not satisfied that the Director of Employment Standards breached the principles of natural justice when he permitted the original delegate to continue the investigation. I note that Member Stevenson did not order the matter to be reinvestigated by a new delegate. Member Stevenson's order simply referred the matter back to the Director. If Ms. Robertson had a *bona fide* concern about the original delegate's neutrality, she could have sought reconsideration of Member Stevenson's order and asked that a new delegate become involved (as occurred in *Old Dutch Foods Ltd.*, BC EST # RD115/09). No such application for reconsideration was ever made. Further, nowhere in her April 21, 2009, submission to the delegate (she wrote to him specifically) – *i.e.*, the submission that followed the Tribunal's "referral back" order) – did she express any concern about the delegate's continuing involvement in the matter. It appears that Ms. Robertson is unhappy with the delegate's decision and now, long after the fact, challenges his decision as having been tainted by bias. In effect, the current appeal represents a "back-door" attempt to have the Tribunal's March 20, 2009, decision reconsidered.
22. While I do not consider the bias argument to be properly before me, I would observe, in any event, except for an adverse decision, there is no objective evidence before me to suggest that the delegate was predisposed against Ms. Robertson. Further, even if there were such evidence, in these appeal proceedings the parties have been given a full opportunity to argue the substantive question of whether Ms. Robertson was correctly determined to have been an RGC officer when the complainants' unpaid wage claims crystallized. Thus, I see no need to cancel the Determination and send the matter back to the Director yet again for another round of submissions, another determination, and (likely) yet another appeal proceeding. Such a process hardly seems in keeping with the mandate found in section 2 of the *Act* that disputes arising under the statute be resolved in a fair and efficient manner.
23. Finally, I do not accept Ms. Robertson's assertion that the delegate's reasons are so deficient that they constitute a failure to give a reasoned decision. The delegate's Reasons for the Determination identify the legal issue that was before him, accurately summarize Ms. Robertson's position and the evidence she provided in support of that position, summarize the complainants' evidence, identify the relevant statutory provisions and Tribunal authority, and finally, contain reasons why he determined that Ms. Robertson was fulfilling the functions of a corporate officer at the time the complainants' unpaid wage claims crystallized. In short, I am not persuaded that the delegate's reasons are legally deficient.

### **ORDER**

24. Pursuant to Section 115(1)(a) of the *Act*, I order the Determination dated September 23, 2009, be confirmed in the amount of \$32,549.81 together with any further interest that has accrued under section 88 of the *Act* since the date of issuance.

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**Kenneth Wm. Thornicroft**  
**Member**  
**Employment Standards Tribunal**