

An appeal

- by -

Diana Robertson, a Director of Officer of R Group Communications Inc.
(“Mrs. 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: David B. Stevenson

FILE No.: 2009A/006

DATE OF DECISION: March 20, 2009

DECISION

SUBMISSIONS

D. Brad Henry	on behalf of Diana Robertson
Roderick McDonald	on his own behalf
Diane Smallwood	on her own behalf
Steve Weigh	on his own behalf
Joy Wood	on her own behalf
Victor Lee	on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Diana Robertson, a Director or Officer of R Group Communications Inc. (“Mrs. Robertson”) of a Determination that was issued on December 19, 2008 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Mrs. Robertson was a director/officer of R Group Communications Inc. (“R Group”), an employer found to have contravened provisions of the Act, and was personally liable under Section 96 of the *Act* for an amount of \$32,549.81.
2. In this appeal, legal counsel acting on behalf of Mrs. Robertson says the Director erred in law and failed to observe principles of natural justice in making the Determination. The appeal also submits there is evidence available which was not available when the Determination was made. Mrs. Robertson seeks to have the Determination against her cancelled.
3. While the appeal submissions presume there will be a hearing on the appeal, the Tribunal has discretion whether to hold a hearing on an appeal. If a hearing is considered necessary, the Tribunal 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 17 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 a hearing is not necessary in order to decide this appeal.

ISSUE

4. The issue in this appeal is whether the Director committed a reviewable error in deciding Mrs. Robertson was a director/officer of R Group.

THE FACTS

5. The Director issued a Determination against R Group (the “corporate Determination”) on October 3, 2008 in favour of four former employees of the business of R Group (the “complainants”) in the amount of \$47,155.37. The unpaid wages of the complainants were earned between March 1, 1994 and June 27, 2008. There was no appeal of the corporate Determination.
6. The Determination indicates a search of the BC On-line Registrar of Companies showed that R Group was incorporated on January 19, 1989, that Mrs. Robertson was once a director of the company but ceased to be so on April 14, 2004 and that as of August 11, 2008, Mrs. Robertson was listed in the corporate registry as “President and Secretary” of the company. There were no other officers of R Group recorded in the corporate registry.
7. The Determination refers to evidence received from the complainants that Mrs. Robertson had regularly identified herself as “owner and principal” of the company and had signed business communications as “President, Director of Creative Services”. She was identified on the company’s website as its president.
8. The complainants also stated to the Director that Mrs. Robertson directed them in the performance of their work, made all day to day decisions regarding the company and had control over financial matters. The complainants asserted that she hired and fired employees and had issued the Records of Employment to the complainants on their termination.
9. During the complaint process, counsel for Mrs. Robertson, in a letter dated November 28, 2008, informed the Director that an error had been made in the filing of the company’s 2007 and 2008 Annual Reports relating to the listing of Mrs. Robertson as an officer. Included with that letter was a copy of an undated document from Mrs. Robertson, addressed to the registered and records office of the company, saying she had ceased acting in the capacity of President for R Group and, to her knowledge, had never been Secretary of the company. The document was said to have been received in the records and registered offices of the company in May 2008.
10. The Director found Mrs. Robertson performed duties and functions and exercised the powers and authorities commonly associated with a corporate officer and was liable under section 96 of the *Act*.

ARGUMENT

11. Counsel for Mrs. Robertson submits the Director erred in finding she was a director/officer of R Group. He says Mrs. Robertson has never seen some of the documents relied on by the Director and was never asked to provide any submission in response to the complainants’ information regarding her status as a director of officer of the company. He submits the document filed with the Corporate Registry cannot be relied on as accurate, as the complainants’ claims relate to periods after the latest Report was filed and, in any event, the latest Annual Report was “prepared in haste in order to meet an imminent deadline”.
12. The appeal includes: four letters dated between February 2008 and May 2008, in which there is no reference to Mrs. Robertson as president of the company; an edited copy of a memorandum dated March 3, 2008 prepared by David Robertson; draft web site content dated March 20, 2008; and the November 28, 2008 letter from Mrs. Robertson’s counsel to the investigating delegate. The appeal submission closes with a request that Mrs. Robertson be allowed to make additional submissions once she has had an opportunity to make a more thorough search for relevant documents.

13. In response to the appeal, each of the complainants, and the Director, has filed a submission. The submissions of the complainants appear to substantially reiterate information which was provided by each of them to the Director and which is reflected in findings made in the Determination. The Director has provided the section 112 Record and restates the conclusions reached from the evidence provided during the complaint process:

. . . even though Mrs. Robertson may have resigned as a director or officer of the corporation, she had performed the duties and functions and exercised the usual authorities or powers associated with a corporate officer during the time wages owed to the employees were earned and payable.

14. The Director refers to the following excerpt from the decision of the Tribunal in *Michalkovic*, BC EST # RD047/01:

It is clear, on the Tribunal's case law, that a person may be a director or officer without being recorded as such in the company's records (see, for example, Gordon, BCEST #D537/97; Penner and Hauff, above; Okrainetz, BCEST #D354/97). In the cases mentioned, the Tribunal applied a functional test and considered whether or not the person in question exercised the functions, duties or tasks that a corporate director or officer would, in the usual course of events, would exercise.

15. In the final response, counsel for Mrs. Robertson has filed a statement from her, which includes more documents, answering the submissions made by the complainants and the Director. In that statement, which Mrs. Robertson says is an attempt to set out all the facts she believes are relevant, the following points are made, which I will only summarize:

1. She was a director and officer of R Group for many years;
2. Her status in the company began to change in 2004-5 and by 2008 she was no longer a director or officer of the company;
3. She gave up all personal ownership in the company in 2004 and resigned as a director;
4. It was probably not until late 2006 when she began to move away from the role of exercising executive functions within the company;
5. In September of 2006, she signed a personal guarantee on the lease of the company's business premises;
6. Sometime in late 2006, she believes she resigned the formal legal title of president of R Group, although she acknowledges she would have continued to be seen as president of the company by employees and clients;
7. Her role as president began changing through 2007, as her husband, David Robertson, began to assume more operational responsibilities;
8. She says the document – a “bio” for Mrs. Robertson – provided by one of the complainants, Roderick McDonald, during the complaint process is “highly misleading” as it is an older document which, to her knowledge, was not circulated to clients in 2007-2008;

9. The U.S. Immigration & Naturalization letter, which is included in the section 112 Record and dated November 20, 2008, is a template created “many years earlier” and used for a number of employees in 2006 and 2007;
 10. She says her actual function for the company in 2008 was to perform and manage ongoing creative work for three U.S. clients and attempt to solicit new business;
 11. She says that by January 2008, David Robertson had taken on all of the functions relating to the company’s operations including all financial matters and efforts to sell the company;
 12. She disputes the assertion by Mr. McDonald that he was responsible to her;
 13. If she signed any Records of Employment, it was a matter of convenience because no one else was on hand to do it;
 14. She says another of the complainants, Joy Wood, communicated with Mr. Robertson on matters relating to payment of wages and expenditures;
 15. She says another of the complainants, Steven Weigh, was brought into the company by the company’s then Studio Manager, although both she and Mr. Robertson were consulted about the hiring;
 16. She does not recall renewing Mr. Weigh’s contract in February 2008, but if she had it was a matter of convenience, because the document was easy for her to access on her computer;
 17. She denies the assertion made by Mr. Weigh that she was “responsible for crisis meetings and reassurances to staff regarding the company’s future”;
 18. She says most of cheques payable to employees in 2008 were signed by David Robertson;
 19. She says any cheques were signed by her because David Robertson was not available; and
 20. She continued to be a signatory on the company bank account, although she says another person, Michelle McKay (who is identified in the section 112 Record as Mrs. Robertson’s executive assistant), had also been a signatory.
16. In the covering letter to the final reply, counsel for Mrs. Robertson expresses his “understanding” that submissions and argument would follow Mrs. Robertson’s statement of facts/reply. His understanding seems to be based on a presumption that the Tribunal would order a hearing on this appeal; it is clearly not based on anything the Tribunal has conveyed. In the February 18, 2009 communication to counsel and the parties, the Tribunal invited a final reply by the parties to the submissions of the complainants and the Director. The penultimate paragraph of that communication reads:
- Once the final replies have been received, the Tribunal will assign a Member to decide this appeal. In a Decision, the Member may confirm, vary or cancel the Determination or refer it back to the Director.
17. As indicated above, as a matter of law, the Tribunal has discretion to decide whether a hearing is required on an appeal and has decided none is required in this case. The matter will be decided on the material delivered to Tribunal in accordance with the directives delivered to the parties.

ANALYSIS

18. 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.*
19. 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. Robertson (see *James Hubert D'Hondt operating as D'Hondt Farms*, BCEST #RD021/05 (Reconsideration of BCEST #D144/04)).
20. 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.
21. In this appeal, counsel for Mrs. Robertson has raised three grounds of appeal: error of law, failure to comply with principles of natural justice and new evidence.
22. The appeal raises no discreet question of law.
23. In the context of the *Act*, a finding that a person is a director/officer of a corporation is a question of mixed law and fact which is predominantly determined on findings of fact. In such circumstances there may be a question about whether the Director has acted in the absence of facts or on an unreasonable view of the facts and so committed an error of law, but those considerations do not arise in this case. Based on the material in the section 112 Record there were facts on which the Director could reasonably have found Mrs. Robertson was an officer of R Group.
24. Specifically, the Director found the factual basis for the Determination in the inclusion of Mrs. Robertson as an officer in the corporate records of the company and in the information provided by the complainants that she “performed the duties and functions and exercised the usual authority and power associated with a corporate officer”.

25. Mrs. Robertson says, however, that in respect of those findings that she had no opportunity to see the documents relied on by the Director or to provide a response to those documents or any other information provided to the Director concerning her function within the company.

26. The grounding of this appeal in a failure by the Director to observe principles of natural justice raises considerations relating to Section 77 of the *Act*, which is headed ‘opportunity to respond’ and states:

77. If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

27. The above provision, as has been noted in several decisions of the Tribunal, is both a legislated procedural fairness requirement, consistent with the purposes of the *Act* found in sections 2(b) and (d), to “promote fair treatment of employees and employers” and to “provide fair and efficient procedures for resolving disputes over the application and operation of this Act”, and an element in the basic common law requirement to comply with principles of natural justice: see *Insulpro Industries Inc.*, BC EST #D405/98, *J. C. Creations Ltd.*, BC EST #RD317/03 and *Donald Oliver*, BC EST #D036/07.

28. Mrs. Robertson says that she was not given an opportunity to see the documents provided to the Director by the complainants or to respond to them. That assertion raises two questions. The first is whether that assertion is borne out by the material in the file. The second is whether, if it is borne out, that lack of opportunity was a breach of section 77 of the *Act* or was in any other way a failure to comply with principles of natural justice.

29. In this case, there is no question that Mrs. Robertson was aware her status as an officer of R Group was under consideration. That matter was identified by the Director in correspondence to R Group dated July 28, 2008. Mrs. Robertson filed a response to that correspondence in a letter dated August 8, 2008, which reads:

Regarding a copy of a letter I received on August 8, 2008, directed to R Group Communications, I would like to advise the following:

I am not an officer or director of R Group. The company was sold in 2005, along with my shares and I ceased being an officer of the company in September 2006. My status as an employee also ended December, 2007. The corporate records and my ROE should reflect this information.

30. In September, 2008, the Director corresponded directly with Mrs. Robertson, providing her with copies of the corporate searches of the company, obtained August 11, 2008, and which listed her as an officer. Mrs. Robertson replied in a letter dated September 23, 2008, in which she enclosed a letter which she said had been sent to her lawyer in May 2008, and stated, in part:

This letter was sent upon the company receiving information that the 2006/2007 annual reports had been automatically filed “on line” in 2008, and my information had not been updated because they were filed on line. My understanding is that errors or delays in reporting this information, does not make me an officer of the company, if I am in fact not one.

31. The section 112 Record indicates a further letter on this matter from counsel for Mrs. Robertson dated November 28, 2008 was delivered to the Director, confirming some of the information provided to the Director by Mrs. Robertson regarding her status as an officer of the company.

32. Up to that point in time, all of the correspondence and the exchange of information and documents between the Director and Mrs. Robertson, and her lawyer, related to the correctness of the corporate records showing her as an officer of R Group. There is no indication in the record that the Director either notified Mrs. Robertson that he intended to examine her status as an officer of the company on a functional analysis or provided her with the information submitted by the complainants relating to that analysis.
33. Section 77 does not impose a requirement on the Director to disclose all documents and information received to the other parties involved in the complaint, so long as the general thrust of the matter, and the evidence in support of it, is made known to the parties. However, documents and information which appear to have significant probative value relating to the complaint, or at least a summary of their contents, should be disclosed prior to the issuance of a Determination so that the person under investigation and against whose interests the documents speak may respond to those documents if they wish: see *Urban Native Indian Education Society*, BC EST #D309/99.
34. The Director has not contradicted the assertion that Mrs. Robertson was not provided with the documents and information or given any opportunity to respond to the information provided by the complainants during the investigation that concluded with the issuance of the Determination. The reliance by the Director on this information to conclude Mrs. Robertson functioned as an officer of R Group speaks to its significance. In the absence of a contrary indication from the Director, supported by some evidence in the file, I am compelled to accept Mrs. Robertson's assertion, find that her ability to address her status from the perspective of a functional analysis was prejudiced by the non-disclosure and conclude the Director failed to comply with the requirements of Section 77 and principles of natural justice.
35. The next question is what flows from my conclusion on this ground of the appeal.
36. In *Tony Field, also known as Anthony Field, a Director or Officer of Image Power, Inc.*, BC EST #D034/03, the Tribunal made the following statement:
- The Tribunal has taken the position that a failure to comply with Section 77 voids the Determination unless the failure, and the resulting deficiency in the Director's process, has been 'cured' during the Tribunal's appeal process (see *O'Reilly*, BC EST #RD165/02 and *Modern Logic Inc.*, BC EST #D151/02). The Tribunal has also decided that, provided all of the relevant information is available, the matters in dispute may be addressed in the appeal process, reasoning that to conclude otherwise would be inconsistent with the dispute resolution scheme envisioned in the Act and the objective of establishing fair and efficient procedures for resolving disputes under the Act.
37. In this case, however, I am not satisfied the deficiency with the process has been cured in this appeal or that the matters in dispute can be properly addressed by the Tribunal. In my view further investigation is required by the Director. The consequence of that conclusion is to treat the Determination as a nullity and refer the matter 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*.
38. In light of the above, it is unnecessary to consider the issue relating to the introduction of new evidence in this appeal.

ORDER

39. Pursuant to section 115 of the *Act*, I order the matter be referred back to the Director.

David B. Stevenson
Member
Employment Standards Tribunal