

An appeal

- by -

Tony Field also known as Anthony Field,
a Director or Officer of Image Power, Inc.
("Field")

- 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

ADJUDICATOR: David B. Stevenson

FILE No.: 2002/566

DATE OF DECISION: January 28, 2003

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Tony Field, also known as Anthony Field, a Director or Officer of Image Power, Inc. (“Field”) of a Determination that was issued on October 28, 2002 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Field was a Director or Officer of Image Power, Inc., an employer found to have contravened provisions of the *Act*, and, under Section 96 of the *Act*, was ordered to pay an amount of \$9,410.76.

A Determination (the “corporate Determination”) was issued against Image Power, Inc. on June 3, 2002. No appeal of that Determination was received by the Tribunal.

The appeal sets out the following reasons for the appeal:

1. Field was not aware of the corporate Determination and had no opportunity to respond during the investigation of the complaints made against Image Power, Inc.;
2. Field was not aware of the investigation of the Determination under appeal, only becoming aware of the matter on October 29, 2002, and was never provided with any opportunity to respond;
3. Field was an ‘outside director’ of Image Power, Inc., was not involved in the day-to-day management of that corporation, did not participate in payroll or wage earning activities and was not aware of the circumstances outlined in the corporate Determination;
4. Field has subsequently learned that some of the complainants (employees of Image Power, Inc.) were told in advance they may not be paid for on-going services and notwithstanding that notice, opted to continue to work for Image Power, Inc.;
5. Field’s records indicate he submitted his resignation as a director of Image Power, Inc.; and
6. The Determination is not fair or reasonable to Field, is not an efficient procedure for resolving the dispute or promoting the growth and development of a productive labour force that can contribute to the prosperity of BC in the future.

The appeal asks that the Determination be canceled.

The Tribunal has decided an oral hearing is not required in order to address this appeal.

ISSUE

The sole issue in this appeal is whether the appeal demonstrates any basis on which the Determination might be cancelled.

FACTS

The corporate Determination was issued on June 3, 2002. No appeal of that Determination was received by the Tribunal. The time limit for an appeal of that Determination expired on June 26, 2002. The Determination under appeal indicates that a copy of the corporate Determination was sent to Field, as a director of Image Power, Inc. Field says he did not receive it.

The corporate Determination related to wages earned by an employee in the period from May 8, 2000 to July 30, 2001.

An on-line search of the Corporate Registry, done on August 15, 2002 and showing the state of Image Power, Inc. as of July 15, 2002, showed that Field was a director of Image Power, Inc. during the time the unpaid wages were earned.

With his appeal, Field has submitted two handwritten resignations, one dated 31 March 2001 and the other dated 31 March 2002, both addressed to Stephen Swift (the president of Power Image, Inc.) and Board of Directors, and both stating:

“I hereby resign as a Director effective the above date.”

Field says those documents come from his records. He does not say either of those letters were ever delivered to the Board of Directors of Image Power, Inc. nor does he explain why he felt it necessary to resign in March 2002 if he had already done so in March 2001.

ARGUMENT AND ANALYSIS

The first two reasons for appeal raise 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.*

The assertion by Field that he had no notice of the investigation of complaints made against Image Power, Inc. and no opportunity to respond to the complaints does not, in the circumstances, provide any basis for an appeal of the Determination under consideration here. It is clear from the material on file that Image Power, Inc., who was for the purposes of the *Act* the ‘person’ under investigation, was notified of the complaints, was provided with an opportunity to respond to those complaints and participated fully in the investigative process. If Image Power, Inc. did not notify all of their directors and officers of the complaints that is potentially an internal problem, but it does not affect the validity of the investigation or the Determination issued against Image Power, Inc.

Field also says he was not notified of the investigation that resulted in the Determination against him and given no opportunity to respond to his potential liability under Section 96 of the *Act*. In reply to this point, the Director says the corporate Determination was sent to Field at the same address as the Determination against him and has not been returned as undeliverable. I have two comments on that reply. First, no evidence has been provided by the Director establishing the corporate Determination was delivered to Field. Second, and more fundamentally, even if the corporate Determination was delivered to Field, such delivery does no more than prop up the rationale for precluding directors and officers of a

corporation from seeking to re-litigate the corporate Determination in the context of an appeal of a director/officer Determination. Such an argument has no bearing on an appeal from a director/officer Determination relating to issues that arise under Section 96 of the *Act*, such as whether the appellant was a director or officer of the corporate employer at the relevant time or whether, in the circumstances, the appellant should be held liable under Section 96.

The Director has not contradicted the assertion that Field was not given any opportunity to respond during the investigation that concluded with the issuance of the Determination under appeal. Nor is there any evidence on the file indicating Field was notified of the investigation relating to his potential liability as a director or officer of Power Image, Inc. or given an opportunity to respond. In the absence of a contrary indication from the Director, supported by some evidence in the file, I am compelled to accept that assertion and conclude the Director failed to comply with the requirements of Section 77.

The next question is what should flow from the above conclusion.

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*.

In this case, however, I am not satisfied the deficiency has been entirely cured 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 Field with an opportunity to respond on the issues arising under Section 96 of the *Act*.

In light of the above, it is unnecessary to consider the other arguments on the appeal.

ORDER

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

David B. Stevenson
Adjudicator
Employment Standards Tribunal