

An appeal

- by -

Brett Malet-Veale a Director or Officer of Malet Transport Corp.
("Malet-Veale")

- 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: Ian Lawson

FILE No.: 2004A/5

DATE OF DECISION: March 16, 2004

ARGUMENT

Malet-Veale's appeal alleges the Director erred in law. In support of the appeal, the following argument was filed by Malet-Veale's counsel:

Brett Malet-Veale denies that he is obliged to pay any amounts to the Director of Employment Standards as he was not a director at any time of the company and did not consent to be a secretary of the company at any time. It was only at the instance of Lance Malet, his father, that Brett was placed as a Secretary and this was done without his consent. As such, Brett Malet-Veale has no liability.

In reply to the Director's submission, Malet-Veale's counsel stated the following:

We have reviewed Mr. MacNeill's letter of February 4, 2004, and, whether he likes it or not, I am advised that the son never knew and therefore should not be liable. If you wish him to give evidence, he will.

ANALYSIS

Section 96(1) of the Act reads 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 two months' unpaid wages for each employee.

This provision was analyzed by a Reconsideration Panel of this Tribunal in *Re Director of Employment Standards (and Michalkovic)*, BC EST #RD047/01. In that decision, it was held that a broad and remedial interpretation of the Act does not apply to the imposition of personal liability on corporate directors and officers, which is itself an extraordinary exception to the general principle that directors and officers are not personally liable for corporate debts. It was held that corporate directors are different from corporate officers, and that a functional test could be undertaken to determine whether an individual was liable as an officer, regardless whether he or she was identified as such in the corporate register. The Tribunal then set out the following propositions:

- The corporate records, primarily those available through the Registrar of Companies or available at a corporation's registered and records office, raise a rebuttable presumption that a person is a director or officer. In other words, the Director of Employment Standards may presumptively rely on those corporate records to establish director or officer status.
- It is then open to the person, who, according to the corporate records, is a director or officer, to prove on the balance of probabilities that the company records are inaccurate, for example, because the person resigned and the documents were not properly processed, a person is not properly appointed, etc.
- There may well be circumstances where it would be inappropriate to find that a person is a director or officer despite being recorded as such. However, it will be the rare and exceptional case to be decided on all the circumstances of the particular case and not simply by showing that he or she did not actually perform the functions, duties or tasks of a director or officer.

- The determination of director-officer status should be narrowly construed, at least with respect to section 96.

In that case, Michalkovic was listed in corporate records as an officer, and he was in fact hired as Vice-President of Technology. He argued that he was an officer in name alone, and that he did not in fact perform any duties as a corporate officer. While his argument was accepted by the Adjudicator, the Reconsideration Panel overturned that finding and held Michalkovic was not the “rare and exceptional case” and the evidence he tendered was not sufficient to rebut the presumption that the corporate record was accurate.

In the present appeal, it is clear that a presumption arises from the corporate records that Malet-Veale was an officer of Malet Transportation Corp. To rebut that presumption, Malet-Veale does not challenge the accuracy of the records, but he submits cryptically that he had no knowledge of his designation as an officer and did not consent to it.

I do not see the issue of consent as relevant, as there is no statutory requirement that an officer consent to his or her appointment before liability can be imposed. While Malet-Veale’s lack of knowledge of the appointment is indeed relevant, I do not see that as the key to determining his liability – a presumption arises from the designation itself, if the corporate record is accurate. Indeed, as this Tribunal held in *Michalkovic*, the presumption may stand even in the face of proof the officer performed none of the functions of an officer in the corporation. The real issue is whether on the particular facts of this case, it would be inappropriate to find Malet-Veale is an officer of Malet Transportation Corp. despite being recorded as such.

The record discloses few facts on which the inappropriateness of Malet-Veale’s designation can be considered. There is no evidence as to his actual role in the corporation. Malet-Veale is the son of Lance Malet-Veale, who is the president and only other officer listed on the corporate record. There is no explanation why the son had no knowledge of his designation, or why the father made the designation in the first place, apart from the following lines in an e-mail sent by Lance Malet-Veale’s spouse to the Tribunal on February 26, 2004:

To start I will verify that Brett had no knowledge of being listed as a secretary of his fathers company. At the time Lance was extremely focused on his contract and put all of his expertise and energy to the job at hand. When the yearly report for filing had come in the mail he put Brett on as Secretary. A year later another report for filing came and I mentioned to him I had not known he put Brett on as secretary, his reply, Julie I forgot all about that and I still haven’t told Brett but I guess it really isn’t all that important anyway as he can’t do anything to help as a secretary so I won’t bother about it.

No further light is shed on why Lance Malet-Veale decided to appoint his son as an officer, or whether any remuneration went to his son as a result of that appointment. There is no evidence as to what Malet-Veale (the son) did for a living, and in particular, whether he was involved to any extent in the operation of Malet Transportation Corp. The corporate record indicates Malet Transportation Corp. was incorporated in 1996, and as statutory duties rest upon the secretary to keep records and make annual filings, Malet-Veale’s involvement with the company (or lack thereof) cries out for greater explanation.

In my view, it is not for the Director to investigate Malet-Veale’s relationship to the corporation or whether he performed any of the duties of an officer. The section 96 presumption arises solely from the corporate record, and it is for Malet-Veale to rebut that presumption. In the absence of error in the

corporate record, Malet-Veale must present facts or argument to demonstrate he falls into the “rare and exceptional” category of officers trying to rebut the same presumption. In that regard, I find Malet-Veale has failed to prove he is a rare exception to the rule. In fact, all he presents in this appeal is an assertion he had no knowledge of his designation as a corporate officer, without adequate explanation or any information about his role in the corporation. This is insufficient to place him in the rare and exceptional category. I find he has failed to demonstrate any error in the Determination and his appeal must be dismissed.

ORDER

Pursuant to section 115(1) of the Act, the appeal is dismissed and Determination ER #116366 issued on December 10, 2003 is confirmed, with interest pursuant to section 88 of the Act.

Ian Lawson
Member
Employment Standards Tribunal