

An appeal

- by -

Sean W. Teather, a Director of 0716350 B.C. Ltd.
carrying on business as Park Royal Roofing

- 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: Robert Groves

FILE No.: 2007A/55

DATE OF DECISION: August 15, 2007

DECISION

OVERVIEW

1. Sean W. Teather ("Mr. Teather") appeals a determination dated May 11, 2007 (the "Determination") issued by a delegate of the Director of Employment Standards (the "Delegate") in which the Delegate determined that Mr. Teather was a director of 0716350 BC Ltd. (the "Company") and liable in that capacity under sections 96 and 98 of the *Employment Standards Act* (the "Act") for wages, vacation pay, interest and administrative penalties found to be owed by the Company to one John W. MacLean ("Mr. MacLean") in a determination dated September 18, 2006 (the "Corporate Determination").
2. I have before me Mr. Teather's Appeal Form and attached submission, the Determination and the Reasons for the Determination, a submission from the Delegate and the record the Delegate says was before her at the time the Determination was being made, as well as a final submission from Mr. Teather.
3. The Tribunal has determined that I will decide this appeal on the basis of the written materials submitted by the parties, pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act* and Rule 16 of the Tribunal's Rules of Practice and Procedure.

FACTS

4. The Corporate Determination was issued as a result of a complaint filed by Mr. MacLean under section 74 of the *Act* alleging that the Company had contravened the *Act* when it failed to pay Mr. MacLean wages. The delegate issuing the Corporate Determination ordered the Company to pay wages and interest of \$1,822.80, and administrative penalties amounting to \$1,000.00, for a total of \$2,822.80. As at May 11, 2007, interest had augmented that total to \$2,895.08.
5. The Company did not appeal the Corporate Determination in a timely way, nor did it pay the sums for which it had been found liable.
6. A BC Online Registrar of Companies Corporation Search in respect of the Company revealed to the Delegate that as at March 10, 2006 Mr. Teather was listed as a director. As the wages the Company had been ordered to pay were earned between February 2006 and March 10, 2006, the Delegate determined that Mr. Teather was liable under section 96 of the *Act*, the relevant portion of which reads:
 - 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.
7. In addition, the Delegate decided that Mr. Teather was responsible for the administrative penalties imposed in the Corporate Determination due to the operation of section 98(2) of the *Act*, which reads:
 - 98(2) If a corporation contravenes a requirement of this *Act* or the regulations, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the contravention is also liable to the penalty.

8. The Delegate issued the Determination on May 11, 2007. On June 18, 2007 the Company filed an appeal of the Corporate Determination, and an appeal of the Determination implicating Mr. Teather personally.
9. In a companion decision, BCEST #D069/07, I decided that the appeal of the Corporate Determination should be dismissed owing to its having been filed out of time.

ISSUES

10. Is there a basis for my deciding that the Determination must be varied or cancelled, or that the matter must be referred back to the Director for consideration afresh?

ANALYSIS

11. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:
 - 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 being made.
12. Section 115(1) of the *Act* should also be noted. It says this:
 - 115(1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
 - (a) confirm, vary or cancel the determination under appeal, or
 - (b) refer the matter back to the director.
13. In his Appeal Form, Mr. Teather alleges that the Delegate erred in law, and that evidence has become available that was not available at the time the Determination was being made. It is clear from Mr. Teather's submissions delivered in support of his appeal, however, that the matters he wishes to address under those heads relate to the conclusions drawn in the Corporate Determination against the Company, and not whether Mr. Teather is personally liable under sections 96 and 98 of the *Act*. Previous decisions of the Tribunal have made it clear that in appeals of this type the doctrine of *res judicata* precludes individuals like Mr. Teather from arguing whether the Company was properly found liable in the Corporate Determination. The policy reason underlying this approach is that the enforcement mechanisms of the *Act* are meant to operate quickly and inexpensively, and permitting corporate directors to re-litigate a finding of corporate liability would undermine the fulfillment of that goal (see *Steinemann* BC EST #180/96).
14. For the purposes of section 96, the principal issue is whether the person from whom a delegate seeks to enforce payment of a corporate liability imposed under the *Act* is a director or officer of that corporate

body. On this point, the following comments of the Tribunal in *Wilinofsky* BC EST #D106/99 have been oft-quoted:

...where an individual is recorded as an officer or director of a company in the records maintained by the Registrar, a rebuttable presumption arises that the individual actually is a director or officer, as the case may be, of the company in question. This presumption, however, may be rebutted by credible and cogent evidence that the Registrar's records are inaccurate – the burden of proving that one is not a corporate director or officer lies with the individual who denies such status.

15. In this instance, Mr. Teather does not deny that he was a director of the Company at the relevant time. Indeed, he identifies himself as a director on his Appeal Form, and in one of his submissions filed in support of his appeal. I would therefore dismiss his appeal in respect of section 96.
16. Whether Mr. Teather is liable for the penalties imposed on the Company under section 98 raises somewhat different issues. In order for Mr. Teather to be found liable under section 98 it is insufficient that it be established he was a director of the Company. In addition, it must be shown that he authorized, permitted or acquiesced in the contraventions of the *Act* the Delegate found had been perpetrated by the Company (see *Competition Towing Ltd.* BC EST #D392/99). In this case those contraventions are identified to have been a failure to pay Mr. MacLean wages, and the Company's violating section 21 of the *Act*.
17. In her Reasons for the Determination the Delegate explains why she found Mr. Teather liable under section 98 in this way:

At the time the complainant's unpaid wages were earned, Sean W. Teather was also the manager and operator of the employer, had notice of the claim and participated in the hearing of this matter. Sean W. Teather is therefore personally liable for the administrative penalty.
18. In my opinion, it is too facile for the Delegate to conclude that Mr. Teather authorized, permitted or acquiesced in the contraventions of the *Act* simply because the Delegate found him to have been the manager and operator of the employer when Mr. MacLean's wages were earned. In my opinion, one need not automatically conclude the former upon a finding of the latter. It must be remembered that section 98 is an extraordinary statutory exception to the general legal principle that directors are not personally responsible for corporate debts. It follows that while the *Act* as a whole should be interpreted broadly, so as to give full effect to the benefits it confers, care should be taken when imposing personal liability on individuals for corporate obligations (see *Director of Employment Standards (Re: Laurent Michalkovic)* BC EST #RD047/01). I am not persuaded that a finding *simpliciter* that an individual is the manager and operator of the corporate body in question satisfies the test set out in section 98. It is not a finding that a director is a manager and operator of a corporate body that justifies a finding of liability under section 98. Rather, the test requires that the director must have authorized, permitted, or acquiesced in the Company's delict. The fact that Mr. Teather had notice of Mr. MacLean's complaint, and the fact that he represented the Company in the proceedings which led to the Corporate Determination, are irrelevant. What the Delegate needed to do in order to find Mr. Teather liable under section 98 was consider whether the facts supported a conclusion that he authorized, permitted or acquiesced in the contraventions, given that he was the manager and operator of the Company. As it appears to me that the Delegate did not undertake an analysis of that sort, I have concluded that she misapplied the test set out in section 98 and thereby committed an error of law.

ORDER

19. Pursuant to section 115 of the *Act* I order that the Determination be varied. That portion of the Determination which finds Mr. Teather liable under section 96 is confirmed. The portion which finds him liable for the administrative penalties pursuant to section 98 is cancelled.

Robert Groves
Member
Employment Standards Tribunal