

An appeal

- by -

Justin Duggan,
an Officer of Digital Fluency Marketing Inc.
("Mr. Duggan")

- 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: Shafik Bhalloo

FILE No.: 2016A/34

DATE OF DECISION: April 19, 2016

DECISION

SUBMISSIONS

Ilan B. Burkes

counsel for Justin Duggan, an Officer of Digital Fluency Marketing Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Justin Duggan (“Mr. Duggan”), an officer of Digital Fluency Marketing Inc. (“DFMI”), has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on January 29, 2016 (the “Determination”).
2. The deadline for filing an appeal of the Determination was March 7, 2016. Mr. Duggan’s Appeal Form was received by the Employment Standards Tribunal (the “Tribunal”) on March 7, 2016, together with a request for an extension of time to file his submissions.
3. On March 8, 2016, Mr. Duggan sent an email to the Tribunal attaching a revised page 1 of the Appeal Form. In the revised Appeal Form, Mr. Duggan has checked off the “new evidence” ground of appeal, and indicated that he wishes the Tribunal to change or vary the Determination or cancel it.
4. The Determination concluded that Mr. Duggan was an officer of DFMI at the time wages owed to Simon Britchford, Jeremy Butler and Alice Chen (collectively, the “Employees” or the “Complainants”) were earned or should have been paid and, as such, was personally liable under section 96 of the *Act* for an amount of \$16,916.90.
5. On March 9, 2016, the Tribunal sent a copy of Mr. Duggan’s appeal to the Complainants and to the Director for informational purposes only. The Tribunal advised the Complainants and the Director that no submissions from them were being requested at this time. In the same letter, the Tribunal requested the Director to provide the section 112(5) “record” (the “Record”) to the Tribunal. The Tribunal also requested Mr. Duggan to provide his written reasons and argument for the appeal, as well as any additional supporting documents, no later than April 8, 2016. The Tribunal also informed Mr. Duggan that this deadline is not an extension to the appeal deadline.
6. On March 17, 2016, the Director sent the Record to the Tribunal.
7. On March 23, 2016, the Tribunal disclosed the Record to Mr. Duggan, and afforded him an opportunity to object to its completeness. However, no objection as to the completeness of the Record was received from Mr. Duggan and, therefore, the Tribunal considers the Record as complete.
8. On April 6, 2016, the Tribunal received another Appeal Form and accompanying written submissions from Ilan Burkes, counsel for Mr. Duggan. In the Appeal Form, Mr. Duggan is now seeking the Tribunal to refer the Determination back to the Director. In the written submissions, Mr. Duggan’s counsel is asking for an oral hearing to adjudicate the appeal.
9. On April 12, 2016, the Tribunal sent the Complainants and the Director the written submissions of Mr. Duggan’s counsel and notified all parties that the matter would now be reviewed by a Tribunal Member

who may, without seeking submissions from the parties, dismiss all, or part, of the appeal and/or confirm all, or part, of the Determination.

10. Turning to counsel's request for an oral hearing of Mr. Duggan's appeal, the Tribunal has discretion whether to hold an oral hearing on appeal. Section 103 of the *Act* incorporates, *inter alia*, section 36 of the *Administrative Tribunals Act* (the "ATA"), which provides:

Form of hearing of application

- 36 In an application or an interim or preliminary matter, the tribunal may hold any combination of written, electronic and oral hearings.

11. Rule 8 of the Tribunal's *Rules of Practice and Procedure* (the "Rules") provides:

Rule 8 Form of Proceedings

Written submission only proceeding

- (1) The Tribunal usually decides an appeal or application for reconsideration by way of a written submission only hearing.

Other forms of proceedings

- (2) The Tribunal may also conduct hearings in person, by telephone, or by other electronic means, or any combination of those modes, as it considers appropriate.
- (3) If all or part of an appeal or application for reconsideration is to be decided by way of a telephone conference call or in-person hearing, the Tribunal will set the time, date, and place or contact information for the hearing and notify the parties.
- (4) If a party who has been notified of a hearing does not participate, the Tribunal may proceed with the hearing and make a decision in the absence of that party.

12. I am not convinced that an exception to the usual written submission hearing in favour of an oral hearing is necessary in this case and nothing in counsel's written submissions persuades me otherwise. I have decided this appeal is appropriate to consider under section 114 of the *Act*. Therefore, at this stage, I will assess the appeal based solely on the Reasons for the Determination (the "Reasons"), the Appeal Forms submitted by Mr. Duggan and his counsel, the written submissions of counsel and my review of the Record that was before the Director when the Determination was being made. Under section 114(1) of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal without a hearing of any kind for any of the reasons listed in that subsection. If satisfied the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1), the Tribunal will invite the Complainants and the Director to file a reply to the question of whether to extend the deadline to file the appeal, and may request submissions on the merits of the appeal. Mr. Duggan will then be given an opportunity to make a final reply to those submissions, if any.

ISSUE

13. The issue to be considered at this stage of the proceeding is whether the appeal should be dismissed under section 114 of the *Act*.

THE FACTS

14. The Complainants filed their complaints under section 74 of the *Act*, alleging that DFMI contravened the *Act* by failing to pay them regular wages, compensation for length of service and annual vacation pay (the “Complaints”).
15. A delegate of the Director conducted an investigation into the Complaints, and, on December 10, 2015, issued a determination against DFMI (the “Corporate Determination”) which found DFMI liable for wages to the Complainants in the total amount of \$16,855.38 inclusive of interest. The Director also imposed two (2) administrative penalties on DFMI in the amount of \$1,000.00. The Corporate Determination, which included a Notice to Directors and Officers explaining their personal liability under the *Act*, was sent to DFMI, with copies to the registered and records office, and to the directors and officers of DFMI individually. In the case of Mr. Duggan, it was sent to two (2) separate addresses for him; namely, the East Keith Road address, as well as the Saint Andrews Avenue address, both in North Vancouver, British Columbia. The appeal period for the Corporate Determination expired on January 18, 2016, and no appeal was filed by DFMI, and the latter did not satisfy or pay the Corporate Determination amount.
16. On August 8, 2015, the delegate conducted a BC Online: Registrar of Companies – Corporation Search of DFMI, which showed that DFMI was incorporated on October 7, 2013, and Mr. Duggan was listed as an officer. The search also confirmed that Mr. Duggan was an officer between May 4, 2015, and June 30, 2015, when the Complainants’ wages were earned or should have been paid.
17. As a result, the delegate issued the Determination against Mr. Duggan, holding the latter personally liable for up to two (2) months’ unpaid wages for each of the Complainants.
18. As there was insufficient evidence to indicate that Mr. Duggan authorized, permitted or acquiesced in the contraventions of the *Act* by DFMI, he was not found liable for the administrative penalties levied against DFMI.
19. Mr. Duggan appeals the Determination based on the “new evidence” and the “natural justice” grounds of appeal, and is seeking the Tribunal to refer the Determination back to the Director.

SUBMISSIONS OF MR. DUGGAN

20. In his written submissions, dated April 6, 2016, counsel presents both, submissions in support of Mr. Duggan’s request for an extension of time to file his appeal, and on the merits of the appeal. I have reviewed the submissions in their entirety, and do not find it necessary to delineate here counsel’s submission in support of the request for an extension of time to file the appeal as I am able to dispose of the appeal under section 114(1) of the *Act*, based simply on my review of the merits of the appeal.
21. On the matter of the merits of the appeal, as indicated earlier, while counsel has only checked off the “new evidence” ground of appeal, his written submissions also invoke the “natural justice” ground.
22. In support of the natural justice ground of appeal, counsel submits that the Employment Standards Branch (the “Branch”) had an incorrect mailing address for Mr. Duggan and, therefore, he was not informed, nor aware, of the proceedings leading to the Corporate Determination. Mr. Duggan only learned of the proceedings “near their completion”. Mr. Duggan’s first notice of the proceedings was when he received the Corporate Determination, dated December 10, 2015. That is when he learned that he was an officer of

DFMI. Counsel argues that because Mr. Duggan was “unable to participate in the hearing, he was unquestionably denied a fair hearing”.

23. With respect to his submissions on the “new evidence” ground of appeal, counsel states:

...Mr. Duggan submits that, despite being listed on the corporate records as an officer of Digital Fluency, it would be inappropriate to find that he was an officer of the company. He was made an officer of Digital Fluency without his knowledge or consent. Further, as will be discussed in detail below, Mr. Duggan did not exercise any of the functions and duties of a corporate officer. Mr. Duggan was not involved in any of the operational management or running of Digital Fluency. He did not oversee or approve any financial matters or budgets, he was not responsible for any human resources or payroll matters, and he did not participate in setting the objectives and guiding the direction of the company.

24. In ensuing pages of his written submissions (pages 7 to 9 inclusive), counsel elaborates further on those duties and functions of an officer of the company, referred to in the quoted passage above, that Mr. Duggan did *not* perform. He states that when DFMI hired Mr. Duggan, it was “understood by all relevant parties” that Paul Brassard (“Mr. Brassard”), a director and officer of DFMI, would be acting as President of DFMI and that Rita Lichimo (“Ms. Lichimo”), an officer of DFMI, would be in charge of the company’s financial affairs. He states Mr. Duggan was only employed as a “salesperson” with DFMI, and his duties were “limited to the scope of that job”.

25. Counsel then submits that the *Act* is silent with respect to how the status of a director or officer is determined, refers to the decision of the Tribunal in *Michalkovic* (BC EST # RD047/01) and contends that the Tribunal has adopted a functional test in ascertaining whether an individual exercises the functions or duties that a corporate director or officer would normally exercise. He then refers to the decision of this Tribunal in *John Moore* (BC EST # D095/11) which refers to a non-exhaustive list of factors to be considered when determining whether an individual qualifies as a director or officer under the functional test.

26. Counsel also relies on the Tribunal’s decision in *Shauneen Martens* (BC EST # D614/01), where the Tribunal cancelled the Director’s determination holding the appellant, who was listed as a corporate officer in the corporate records of the company, but not properly appointed as an officer and did not perform functions of a corporate officer, liable as a corporate officer of the company. Counsel suggests that the *Shauneen Martens* case is similar to the present case, and this Tribunal should decide similarly to that case.

27. Counsel also adds that it is Ms. Lichimo and Mr. Brassard who were responsible for making all major decisions relating to DFMI. He contends that it was the two of them who were responsible for “designing and directing the corporate strategy, purchasing all office furniture, signing the office lease, hiring and firing employees, writing cheques to suppliers and making the decision to wind down the business”, and not Mr. Duggan. While Mr. Duggan signed bank documents, such as the credit card agreement, loan agreement and general security agreement on behalf of DFMI, it was because Ms. Lichimo and Mr. Brassard asked him to do so.

28. Counsel concludes, stating that this is the “rare and exceptional case” referred to in the Tribunal’s decision in *Michalkovic, supra*, where it would be inappropriate to find that a person is an officer despite being recorded as such. This is particularly so, states counsel, because Mr. Duggan “was not aware that he was an officer of the company”.

ANALYSIS

29. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *Act*, which states:

Appeal of director's determination

- 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.

30. 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. As indicated, counsel for Mr. Duggan has checked off the “new evidence” ground of appeal on the Appeal Form but his written submissions also raise the “natural justice” ground of appeal. Accordingly, the burden is on Mr. Duggan to show that the Director failed to observe the principles of natural justice in making the Determination and that new evidence has become available that was not available at the time the Determination was made. I will first address the natural justice ground of appeal.

(a) *Natural Justice*

31. The Tribunal has briefly summarized the natural justice principles that typically operate in the complaint process, including these Complaints, in *Imperial Limousine Service Ltd.*, BC EST # D014/05:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated* BC EST #D050/96)

32. Counsel submits that Mr. Duggan was unaware of the “prior proceedings” leading to the Corporate Determination of December 10, 2015, as the Branch had an incorrect mailing address for him. Counsel states that the first notice Mr. Duggan received regarding the proceeding against DFMI was when he received the Corporate Determination of December 10, 2015; therefore, he was “unable to participate in the hearing” and thus he was “unquestionably denied a fair hearing”.

33. Having reviewed the Record, I note that in the investigation of the Complaints leading to the Corporate Determination, Mr. Duggan was copied on all correspondence from the Branch to DFMI at his East Keith Road, North Vancouver address, which is the address provided in the corporate search of DFMI conducted by the delegate on August 8, 2015. When counsel for Ms. Lichimo, on November 23, 2015, informed the Branch that Mr. Duggan had a new address at Saint Andrews Avenue, North Vancouver, the delegate copied Mr. Duggan the next correspondence, dated December 10, 2015, namely, the Corporate Determination, at both the Saint Andrews and the Keith Road addresses. It is not clear when Mr. Duggan changed his address. However, I find that it was reasonable for the delegate to have relied on the East Keith Road, North

Vancouver address for Mr. Duggan set out in the corporate search until the delegate was advised of his new address by Ms. Lichimo's counsel. In the circumstances, I find the delegate made all reasonable efforts to involve Mr. Duggan in the "prior proceedings" since Mr. Duggan was listed in the corporate records as an officer of DFMI. I do not think any actions of the delegate, in the proceeding against DFMI, could be said to amount to a denial of a "fair hearing" to Mr. Duggan.

34. It is also important to note that the proceeding leading to the Corporate Determination was against DFMI and not Mr. Duggan. While Mr. Duggan may be interested in that proceeding in his individual capacity, he was not a *party* to that proceeding. The natural justice rights the Tribunal speaks of in *Imperial Limousine Service Ltd., supra* are rights accorded to *parties*.
35. In the result, I do not find Mr. Duggan has established a failure on the part of the Director to observe the principles of natural justice in making the Determination (on the basis of Mr. Duggan's "inability to participate in the hearing" leading to the issuance of the Corporate Determination).

(b) New Evidence

36. The gist of the new evidence presented by counsel is that Mr. Duggan, although listed in the corporate records as an officer of DFMI, was not aware of his status as an officer, nor did he consent to acting as an officer. In addition, counsel argues that Mr. Duggan did not perform any of the functions ordinarily associated with being an officer of a company; he was simply a salesperson for DFMI, and his duties were limited to that position. When he signed business documents such as the credit card agreement, loan agreement, and general security agreement as a representative of DFMI, it was at the direction of Ms. Lichimo and Mr. Brassard.
37. Having said this, central to this appeal is the question of whether the Director erred in finding Mr. Duggan was an officer for the purposes of section 96 of the *Act*.
38. Section 96 of the *Act* states:

Corporate officer's liability for unpaid wages

- 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.

39. In *Director of Employment Standards* (BC EST # RD047/01) ("*Michalkovic*"), the Tribunal considered the scope of section 96 and summarized the case law relating to section 96 of the *Act* as follows:
1. 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.
 2. 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.
 3. 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. [*Emphasis added*]

4. The determination of director-officer status should be narrowly construed, at least with respect to Section 96.
40. Counsel for Mr. Duggan has advanced two arguments in the appeal. He argues that the test for determining director/officer status under the *Act* is a functional one, with only those persons who actually exercise the functions of a director or officer of a corporation being caught by the operative provisions and, as Mr. Duggan did not exercise any such functions, he could not be considered an officer of DFMI. He also argues that the records of the corporation are inaccurate as Mr. Duggan did not consent to act as an officer, and only learned that he was an officer after he received the Corporate Determination.
41. Counsel refers to and relies on several decisions of the Tribunal in support of his argument for a functional test, including the reconsideration decision in *Michalkovic*, *supra*. In that decision, however, the Tribunal specifically rejected a functional approach to liability under section 96 of the *Act* in cases where, as here, the person seeking relief from liability is listed as a director or officer of the corporation in their corporate records. However, the Tribunal endorsed the approach described in *Wilimofsky* (BC EST # D106/99), that accepted the presumptive reliability of the company's corporate records. Based on those decisions, I am unable to accept that the question of Mr. Duggan's status for the purposes of section 96 should be decided on a functional analysis of his duties and responsibilities with DFMI.
42. Having said this, I note that in *Michalkovic*, the Tribunal delineated, and confirmed, the following propositions arising from the *Wilimofsky* decision: that the presumption can be rebutted by the putative director or officer showing the corporate records are inaccurate or by showing circumstances exist which would make it inappropriate to find that person is a director or officer for the purposes of the *Act*; and that a determination on director/officer status under section 96 should be narrowly construed. The burden is on the person recorded as a director or officer to rebut the presumption raised in the corporate records.
43. On the question of the accuracy of the corporate records of DFMI, the burden requires fairly clear and cogent evidence that the records are inaccurate. I am not satisfied, on a balance of probabilities, that Mr. Duggan has met his evidentiary burden in this regard. I do not find there is sufficient corroborative evidence before me that Mr. Duggan did not consent to and did not know he was an officer of DFMI. All I have before me is his bare assertion.
44. I also note that in *Michalkovic* the Tribunal also confirmed that it will be the rare and exceptional case where an individual who is listed as a director/officer in the corporate records will be found not to be a director/officer for the purposes of section 96 of the *Act* and that *such a finding will not be made simply on whether the individual actually performs the duties, functions or tasks of a director/officer*. I do not find the circumstances here to be a "rare and exceptional case".
45. Finally, I note that counsel for Mr. Duggan has referred to and relied upon the Tribunal's decisions in *John Moore* and *Shauneen Martens* respectively. I will address each below.
46. In *John Moore*, this Tribunal set out a non-exhaustive list of factors to be considered under the functional approach when determining whether an individual qualifies as a director or officer of a company. However, *John Moore* is distinguishable from the present case as it involved circumstances where the appellant was *not* listed as a director or officer in the corporate search. Therefore, in *John Moore*, it was open to the delegate to apply the functional approach to determine whether Mr. Moore was a director or officer of the company.

47. In *Shauneen Martens*, the appellant was listed in the corporate search as an officer of the company but she did not consent to being an officer, nor was she aware that she was identified as an officer on the corporate search of the company. However, unlike in the present case, in *Shauneen Martens*, the appellant proffered “credible and cogent evidence” that the Registrar’s corporate records were inaccurate. In particular, in *Martens*, the husband of the appellant, who was the president of the company, and the company’s accountant, both explained how the appellant’s name came to be on the corporate records without her knowledge and consent. More specifically, the appellant’s husband indicated that when it came time to file the annual return for the company he received from the accountant, rather than returning it to her, sent it directly to the Registrar of Companies. As the form stated that every company must have a president and secretary, he put down his own name as the president and the appellant’s (his wife’s) as the secretary. He thought that since his wife helped him with secretarial work, such as typing, it was appropriate for him to put down her name as the corporate secretary, and this is how she became the officer.
48. For all of the above reasons, I find that Mr. Duggan’s appeal of the Determination has no reasonable prospect of any success, and I dismiss it pursuant to section 114(1)(f) of the *Act*.
49. Having decided the appeal, I do feel compelled to make one passing observation and comment with respect to the RBC Royal Bank Business Credit Card Agreement, the Royal Bank of Canada Business Banking Loan Agreement and the General Security Agreement that DFMI entered into with the Royal Bank and which accompanied counsel’s written submissions in this appeal. The first document shows Mr. Duggan, and also Ms. Lichimo, signed as a “Director” of DFMI, and shows him acknowledging that he has “authority to bind the Applicant [DFMI]”. In the second document, along with Mr. Brassard and Ms. Lichimo, Mr. Duggan signed as the “authorized signing officer” of DFMI and an “owner/partner”. In the third document, along with Mr. Brassard and Ms. Lichimo, Mr. Duggan signed as “authorized officer or partner”. I find it curious that Mr. Duggan who was only employed as a “sales-person for the company and his duties were limited to the scope of that job”, as contended by counsel, would go beyond the scope of his duties as a salesperson to sign legal/contractual documents as an “authorized officer”, “owner/partner”, and “director” of DFMI just because he was instructed to do so by Ms. Lichimo and Mr. Brassard. One would think that Mr. Duggan would at least question why as a “salesperson” he was required to sign these documents or have some reservation in misrepresenting his status or authority (if indeed he was misrepresenting it) to a third-party on legal/contractual documents.

ORDER

50. Pursuant to section 115 of the *Act*, I order the Determination, dated January 29, 2016, be confirmed, together with any interest that has accrued under section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal