

An appeal

- by -

Terrance Michael O'Neill, Director of Blackwater Construction Co. Ltd.
(“O’Neill”)

- 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 E. Groves

FILE No.: 2010A/051

DATE OF DECISION: July 12, 2010

DECISION

SUBMISSIONS

Terrance O'Neill	on his own behalf
Barbara Laass	on her own behalf
Daryl Jordan	on his own behalf
Albert Parsons	on his own behalf
Wallace Sharpe	on his own behalf
Warren Appler	on his own behalf
John Nelson	on his own behalf
Ronald Buchi	on his own behalf
Bonnie Anderson	on her own behalf
Alan Phillips	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal brought by Terry O'Neill ("O'Neill") challenging a March 5, 2010 determination (the "Determination") of a delegate (the "Delegate") of the Director of Employment Standards.
2. The Determination concluded that O'Neill was a director of Blackwater Construction Co. Ltd. ("Blackwater") at the time unpaid wages owed to former employees were earned or should have been paid. O'Neill was ordered to pay \$103,583.79 in compensation for length of service, annual vacation pay, and interest. He was also ordered to pay an administrative penalty of \$500.00.
3. I have before me submissions from O'Neill, a submission from the Delegate, the record the Delegate has delivered in compliance with section 112(5) of the *Act*, and submissions from several of the employees who filed complaints following the loss of their employment with Blackwater.
4. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 17 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. My review of the material before me persuades me that I may decide this appeal on the basis of the written documentation before me without conducting an oral, or for that matter an electronic, hearing.

FACTS

5. The circumstances leading to the Delegate's making the Determination involved a decision on the part of Blackwater not to recall certain of its employees from temporary lay-off in the Spring of 2009.
6. Blackwater is a federally incorporated company, but it is extra-provincially registered in British Columbia and carries on operations here. Like many other employers in the forest harvesting sector, Blackwater has regularly laid off employees during spring "break-up." The spring of 2009 was no exception. However, due to the world recession, and difficulties it encountered in maintaining its credit facilities with its bank,

Blackwater did not recall certain of its employees at the end of their temporary lay-off periods, and so they were deemed to have been terminated pursuant to section 63(5) of the *Act*. Blackwater provided no notice of termination, or compensation for length of service, to the employees it laid off.

7. A number of the terminated employees filed complaints with the Director. Blackwater appears to have co-operated with the Delegate's ensuing investigation. In a companion determination also issued on March 5, 2010 (the "Corporate Determination") the Delegate analyzed each employee's entitlement to compensation for length of service having regard to the division within Blackwater's operation in which the particular employee had been working prior to termination. Some of the employees had been working in Blackwater's logging operation. Others worked in its construction division. The remainder worked in its office.
8. The Delegate determined that Blackwater had advanced no argument capable of supporting a conclusion that the employees working in its logging and office operations should be denied compensation for length of service.
9. As for Blackwater's employees performing work in its construction division, the Delegate considered whether no compensation for length of service was payable to them due to the operation of section 65(1)(e) of the *Act*, which reads:
 - 65(1) Sections 63 and 64 do not apply to an employee...
 - (e) employed at one or more construction sites by an employer whose principal business is construction...
10. The Delegate declined to give effect to this exemption. He observed that Blackwater's various operations were conducted under the umbrella of a single legal entity. Its construction business was not carried on in a manner independent from the company's other activities. Viewing Blackwater's operations as a whole, the Delegate determined that the company did not conduct its principal business in construction. Instead, it was primarily a logging contractor, and so section 65(1)(e) had no application.
11. The Corporate Determination ordered Blackwater to pay \$103,583.79 for compensation for length of service, annual vacation pay, and interest. It also ordered the company to pay an administrative penalty of \$500.00.
12. Blackwater, in submissions delivered by its principal, O'Neill, appealed the Corporate Determination, raising several distinct matters for the Tribunal's consideration:
 - Blackwater did not intend to terminate the complainants' employment, as the decision not to recall them from their seasonal lay-offs resulted from steps taken by Blackwater's bank to call its loans, making it impossible for it to continue normal operations;
 - the sums for compensation for length of service calculated for Blackwater's construction workers were "invalid" because they were hired "on a per project basis;"
 - the determination that Blackwater conducted its principal business as a logging contractor was incorrect;
 - the Delegate interpreted Blackwater's payroll information incorrectly, and so the calculations for compensation for length of service for some employees were inaccurate;
 - requiring Blackwater to pay the sums set out in the Determination would place the company into bankruptcy.

13. In a separate decision (the Corporate Decision (BC EST # D073/10)), I concluded that Blackwater's appeal of the Corporate Determination was without merit, and I confirmed the Corporate Determination.
14. O'Neill raised another issue in his material delivered on Blackwater's appeal of the Corporate Determination. He stated that the disclosure in the Corporate Determination that he was personally responsible as the sole director of Blackwater to pay the sums found to be owed to the terminated employees violated his privacy. I declined to accept this submission in the Corporate Decision, for two reasons. First, it appeared to me to be an issue that did not relate directly to Blackwater, but rather to O'Neill personally, and so I did not accept that it was a matter to be considered on Blackwater's appeal of the Corporate Determination. Second, I noted that the potential liability of the directors and officers of Blackwater was contemplated by sections 96 and 98 of the *Act*. I observed, moreover, that section 101 rendered proceedings under the *Act* a matter of public record. I stated, therefore, that I could not agree with O'Neill's contention that the statement in the Corporate Determination that the directors and officers of Blackwater were required to pay the wages owed by the company to its terminated employees constituted a violation of O'Neill's right to privacy.
15. In support of the Determination now before me, the Delegate advises that corporate searches conducted for Blackwater in July 2009 and January 2010 reveal that O'Neill was the company's sole director at the relevant times. Given that none of the employees who were the subject of the Corporate Determination were owed more than two months' wages, the Delegate concluded that O'Neill was personally liable to pay the total amount stipulated in the Corporate Determination. The Delegate relied on section 96(1) of the *Employment Standards Act* (the "*Act*"), 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.
16. The Delegate's decision to impose personally liability on O'Neill for the payment of the \$500.00 administrative penalty was grounded in the wording of section 98 of the *Act*, the relevant portions of which say this:
 - 98.(1) In accordance with the regulations, a person in respect of whom the director makes a determination and imposes a requirement under section 79 is subject to a monetary penalty prescribed by the regulations.

...
 - (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.
17. In his Reasons for the Determination the Delegate said that O'Neill acknowledged that he was the "owner" of Blackwater and was responsible for the day-to-day operations of the company. O'Neill also confirmed to the Delegate that he made the decision to lay the terminated employees off. The Delegate concluded from these admissions that O'Neill had authorized, permitted or acquiesced in Blackwater's failure to pay the required wages to the laid off employees, and so he was personally responsible for the payment of the administrative penalty.
18. O'Neill appeals the Determination making use of the identical submissions he made on behalf of Blackwater in the proceedings that led to the Corporate Decision.

ISSUE

19. 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

20. 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.
21. 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.
22. O'Neill wishes the Determination to be cancelled. He asserts that section 112(1)(b) provides a basis for such a disposition. He alleges that the Delegate failed to observe the principles of natural justice in making the Determination.
23. O'Neill made the same submission on behalf of Blackwater in the proceedings leading to the Corporate Decision. In that Corporate Decision I expressed my view that the submission misconstrued the focus of section 112(1)(b). That is so because a challenge to a determination on the basis that there has been a failure to observe the principles of natural justice raises a concern that the procedure followed by the Delegate was in some respect unfair. Examples of cases where natural justice concerns may arise include situations where a party has not received notice of a complaint, or has been deprived of a reasonable opportunity to respond to it. In other situations, a decision may be impeached if a party can show bias on the part of the decision-maker, whether actual, or reasonably apprehended.
24. The difficulty I have with O'Neill's suggesting there was a failure on the part of the Delegate to observe the principles of natural justice is that he nowhere challenges in his submissions the manner in which the Delegate conducted the proceedings prior to his issuing the Determination. There is no suggestion by O'Neill that he was unaware of the complaints that had been made, or that he had been deprived of a reasonable opportunity to respond to them.
25. It must be understood that when the Tribunal exercises its jurisdiction under section 112 it is engaged in the process of correcting error. A determination is deemed to be correct until an appellant proves that it is not, in whole or in part. The onus is on an appellant to demonstrate that there has been an error. This means that an appellant must ensure the sufficiency of its arguments in an appeal. If, as here, an appellant fails to explain the points it wishes to make, or to supply sufficient detail so as to enable the Tribunal to find an error, it will not satisfy that burden (see *MSI Delivery Services Ltd.* BCEST D051/06).

26. Instead of raising concerns relating to the process by which he was found to be personally liable to pay the sums owed to Blackwater's former employees, O'Neill's submissions on natural justice are the same as the ones he made on behalf of his company, Blackwater, in the proceedings leading to the issuance of the Corporate Decision. He submits that there will be no natural justice in the circumstances of this case if the Determination is permitted to stand, for the following reasons:
- Blackwater will cease to do business, and the employees it has retained will also lose their jobs;
 - O'Neill's intentions regarding the retention of Blackwater's employees were good, but the recession, and the untimely intervention of Blackwater's bank, were circumstances which arose that were clearly beyond O'Neill's ability to manage on behalf of the company while maintaining its workforce;
 - O'Neill did his best to provide the names of his terminated employees, and references for them, to other employers who might be in a position to hire them;
 - the terminated employees have a safety net of employment insurance and other benefits available to them, which O'Neill does not;
 - post-termination, O'Neill has pursued other opportunities for Blackwater, to rebuild the business, in the hope that it can re-employ the persons it has lost.
27. As I said in the Corporate Decision, I have no doubt these concerns are genuinely expressed, but they do not raise an issue of natural justice in the sense those words are meant to be interpreted for the purposes of section 112(1)(b). None of the items referred to by O'Neill undermine the validity of the procedure the Delegate followed during his investigation, or when he formulated the content of the Determination. There is, moreover, no suggestion of bias.
28. A failure to observe the principles of natural justice is the only ground of appeal O'Neill has identified on his Appeal Form. However, in order to do justice to appellants, particularly where, as here, he is unrepresented, it is the practice of the Tribunal to seek to discern from the record the true basis for a challenge to a determination, regardless of the particular box that may have been checked off on the Form (see *Triple S Transmission Inc.* BC EST #D141/03). Here, I believe I must consider the other submissions made by O'Neill in order to determine if they disclose grounds of appeal that might fall within sections 112(1)(a) or (c) of the *Act*.
29. In my view, the fact that O'Neill, on behalf of Blackwater, may have wished to retain the complainants as employees, but felt he was prevented from doing so due to factors beyond his control, is not relevant for the purposes of determining whether O'Neill can escape liability as a director of the company pursuant to sections 96 and 98 of the *Act*. The same can be said for the suggestion that the enforcement of the Determination may result in bankruptcy for Blackwater, and for O'Neill personally.
30. As I explained in the Corporate Decision, the *Act* is benefits-conferring legislation. It is designed to protect the interests of employees by requiring employers to comply with certain minimum standards that are mandated by the statute. As the *Act* is remedial legislation, it should be given such fair, large, and liberal construction by the Tribunal as best ensures the attainment of its objects (see *Machtiger v. HOJ Industries Ltd.* [1992] 1 SCR 986; *Re Helping Hands Agency Ltd.* (1995) 131 DLR 4th 336). At the same time, it must be remembered that the Tribunal is a creature of statute; it has no jurisdiction to decide appeals based on purely equitable grounds (see *Director of Employment Standards* BC EST #RD635/01; *Re Bennett* BC EST #RD234/01). This means that while O'Neill may believe that he committed Blackwater to a course of conduct which resulted in its contravening the *Act* for reasons that were pure, he cannot escape a determination that the

contraventions occurred, for which the *Act* stipulates remedies, including remedies involving corporate officers and directors under sections 96 and 98.

31. The other substantive arguments raised by O'Neill on this appeal are also untenable in my view. I gave reasons why I came to this conclusion in respect of Blackwater in the Corporate Decision. I do not believe it is open to O'Neill to re-argue these allegations before me now. They have already been decided. Previous decisions of the Tribunal have made it clear that in appeals relating to the personal liability corporate officers and directors under sections 96 and 98, the doctrine of *res judicata* precludes me from considering whether Blackwater was found properly liable in the Corporate Determination, and in the Corporate Decision which followed it. The policy reason underlying this approach is that the enforcement mechanisms of the *Act* are meant to operate quickly and inexpensively, and permitting corporate officers and directors to re-litigate a finding of corporate liability would undermine the fulfilment of that goal (see *Steinemann* BC EST #180/96).
32. Regarding O'Neill's claim that there has been a violation of his right to privacy which should be considered by the Tribunal on this appeal, I must repeat the relevant part of what I said with respect to this suggestion in the Corporate Decision. The potential liability of the directors and officers of Blackwater is contemplated by sections 96 and 98 of the *Act*. Section 101 renders proceedings under the *Act* a matter of public record. The inference to be drawn from these statutory provisions is that a reference in the Corporate Determination to a director's being personally liable to pay wages and penalties owed by Blackwater cannot be a violation of the director's right to privacy.
33. The main issue that arises when one considers O'Neill's liability under section 96 is whether he was a director or officer of Blackwater at the time the wages of the terminated employees were earned or should have been paid. On this point, the following comments of the Tribunal in *Wilnofsky* 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.
34. O'Neill was listed as the sole director of Blackwater on the corporate searches conducted by the Delegate. O'Neill also refers to himself as the sole director for the company in his submission delivered on this appeal. He nowhere disputes that he was the sole director of the company at all material times. Clearly, the presumption has not been rebutted. I see no basis for disturbing the Delegate's determination that O'Neill is liable to pay the sums noted pursuant to section 96.
35. Somewhat different issues arise when one considers O'Neill's liability under section 98. In order for O'Neill to be found liable under that provision, it is insufficient that it be established he was a director of Blackwater. In addition, it must be shown that he authorized, permitted or acquiesced in Blackwater's contraventions of the *Act* (see *Competition Towing Ltd.* BC EST #D392/99). The reason for this further requirement is that section 98 is an extraordinary statutory exception to the general legal principle that directors are not personally responsible for corporate debts, especially those that involve penalties. 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 these types of corporate obligations (see *Director of Employment Standards (Re: Laurent Michalkovic)* BC EST #RD047/01).
36. In this case, however, O'Neill has acknowledged that he was the sole director of Blackwater, and was responsible for its day-to-day operations. It is clear from his own submissions delivered on this appeal that it

was he who decided that the financial circumstances of Blackwater prohibited the recall of the employees who had been laid off, and their being paid compensation for length of service or annual vacation pay. In these circumstances, I believe the Delegate was right to determine that O'Neill is personally responsible for paying the administrative penalty, due to the operation of section 98 of the *Act*.

ORDER

37. Pursuant to section 115(1)(a) of the *Act*, I order that the Determination dated March 5, 2010 be confirmed as issued in the amount of \$104,083.79 together with whatever additional interest that has accrued pursuant to section 88 of the *Act* since the date of issuance..

Robert E. Groves
Member
Employment Standards Tribunal