

An appeal

- by -

Diana Robertson, a Director or Officer of R Group Communications Inc.
(“Mrs. Robertson”)

- 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: David B. Stevenson

FILE No.: 2009A/067

DATE OF DECISION: July 16, 2009

DECISION

SUBMISSIONS

D. Brad Henry	on behalf of Diana Robertson
Roderick MacDonald	on his own behalf
Diane Smallwood	on her own behalf
Victor Lee	on behalf of the Director of Employment Standards

OVERVIEW

1. This matter has been returned to me as a follow up by a delegate of the Director of Employment Standards (the “Director”) to a decision dated March 20, 2009, BC EST # D031/09, in which I nullified a Determination of the Director, accepting the argument made on behalf of the appellant in that case, Diana Robertson (“Mrs. Robertson”), that the Director had contravened section 77 of the *Act* by failing to give her an opportunity to respond on the issue of whether she was a director/officer of R Group Communications Inc., an employer found to have contravened provisions of the *Act*. The decision referred the matter back to the Director under section 115 of the *Act*. In the decision, I made the following statement:

. . . I am not satisfied the deficiency with the process has been cured in this appeal 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 Mrs. Robertson with an opportunity to respond on all of the issues arising under Section 96 of the *Act*.

2. In returning this matter to the Tribunal, the Director has provided a brief report and submission, dated May 20, 2009, a letter from counsel for Mrs. Robertson, dated April 21, 2009, attaching a submission made by Mrs. Robertson, also dated April 21, 2009, and copies of documents referred to in that submission. The report from the Director re-states the conclusion that Mrs. Robertson was an officer of the company. The penultimate paragraph of the report sets out the complete submission of the Director on this issue:

It is the Director’s submission that Mrs. Robertson performed the duties normally associated with that of a corporate officer. Even though she had resigned her directorship in 2004, she became the sole shareholder and remained president of the company. In 2005 and 2006 she still exercised executive functions and even signed a personal guarantee on behalf of the company to secure the lease of the office premises. She admitted that although she resigned the formal title of President” in late 2006, she “would still be seen as President by the employees and customers at that point”. To the employees of the company, nothing had changed all these years. There was no public announcement that Mrs. Robertson had relinquished her role as director or officer of the company. She continued to work there as normal. What went on behind the scene as to the purported change in her role in the company was not visible or apparent to the employees. They continued to treat her as a co-owner of the business and respected her as such. She has represented herself as a corporate officer and acted as such and it is the Director’s submission that she should not be allowed to avoid personal liability under section 96 of the Employment Standards Act.

3. The report and the above submission are not a Determination. The Determination dated December 19, 2008, was declared a nullity in my March 20, 2009, decision. In other words, no Determination exists. The

result of the decision and the referral back required the Director not just to allow Mrs. Robertson an opportunity to respond, but also required another Determination be issued, replacing the nullity.

4. Without a Determination, the jurisdiction of the Tribunal is not invoked: see *Acton Transport Ltd. and Super Save Disposal Inc.*, BC EST # D081/05. When a Determination is issued, the Director has a statutory duty to give reasons (Section 81(1.3)). Adequate reasons are a cornerstone of an effective right of appeal: see *Kevin Hilliard*, BC EST # D296/97. The failure to provide adequate reasons can have a significant impact on the right to appeal.
5. This matter will not be processed any further by the Tribunal. Once another Determination is issued, Mrs. Robertson, or any other party, will have the right to consider whether to appeal that Determination.

David B. Stevenson
Member
Employment Standards Tribunal