

An appeal

- by -

Nelson Burtnick
("Burtnick")

- 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: Yuki Matsuno

FILE No.: 2007A/046

DATE OF DECISION: September 5, 2007

DECISION

SUBMISSIONS

Nelson Burtnick	on his own behalf
Rod Bianchini	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Nelson Burtnick to the Employment Standards Tribunal of a determination issued by the Director of Employment Standards. Before reviewing the merits of his appeal, I turn first to consider a preliminary issue: which determination is properly the subject of his appeal?
2. On December 14, 2006, following an investigation, a delegate of the Director of Employment Standards (the “Delegate”) issued a determination (the “Corporate Determination”) against Copeland, Burtnick & Associates Ltd. (“CBA”) for wages owing to Monique Brelsford and Nicole Turner, as well as an administrative penalty of \$500.00. It is noted in the Corporate Determination that the deadline for appeal is January 22, 2007.
3. On April 18, 2007, the Delegate issued individual determinations against Mr. Burtnick and Sean Copeland as Directors/Officers of CBA (the “Burtnick Determination” and the “Copeland Determination”). It is noted in the Burtnick Determination and the Copeland Determination that the deadline for appeal is May 28, 2007. On June 7, 2007, the Corporate Determination and the Copeland Determination were filed in the Supreme Court of British Columbia.
4. On May 23, 2007, an appeal form signed by Mr. Burtnick was faxed to the Employment Standards Tribunal (the “Tribunal”) and was stamped as having been received by the Tribunal on May 24, 2007. The appeal form is dated May 1, 2007. Mr. Burtnick indicates on the appeal form that his grounds for appeal is that the Director of Employment Standards erred in law; that he wants the Tribunal to change or vary the determination; and that the appeal is not a late appeal [my emphasis]. Attached to the appeal form is a letter addressed to the Tribunal from Mr. Burtnick, unsigned and dated March 22, 2007. The letter addresses the issues arising out of the Corporate Determination and purports to put forward CBA’s position on the Corporate Determination.
5. Mr. Burtnick’s appeal form does not indicate which determination he is appealing. The question to be decided first, then, is whether Mr. Burtnick is appealing the Corporate Determination or the Burtnick Determination. In my view, the information taken as a whole, especially the timing of Mr. Burtnick’s appeal (received by the Tribunal on May 24, 2007, where the time limit for appealing the Burtnick Determination was May 28, 2007) and his indication on the appeal form that his appeal is not a late appeal, indicates that the subject of Mr. Burtnick’s appeal which is properly before me is the Burtnick Determination, not the Corporate Determination.
6. As Mr. Burtnick has not requested an oral hearing, and credibility is not an issue, I will decide this appeal on the basis of the following written materials: Mr. Burtnick’s appeal form and submission; the Director’s submission; the Respondent Monique Brelsford’s submission; a submission from Mr. Copeland; the

Burtnick Determination; the Copeland Determination; the Corporate Determination; and the Record for the Corporate Determination.

7. **THE DETERMINATION AND APPEAL**

8. The Burtnick Determination (referred to from this point as the “Determination”) was issued on April 18, 2007. In the Determination, the Delegate found that the *Employment Standards Act* (the “Act”) had been contravened and that Mr. Burtnick was a Director/Officer of CBA at the time wages owed to Ms. Brelsford and Ms. Turner were earned or should have been paid. As of the date of the Determination, CBA had not paid the amount it owed pursuant to the Corporate Determination. The Delegate found Mr. Burtnick to be personally liable to pay the amount of \$17,283.19, made up of wages owing to Monique Brelsford and Nicole Turner, employees of CBA, up to a maximum of two months’ unpaid wages for each employee, and an administrative penalty in the amount of \$500.00.

9. The Determination also had attached to it a “Notice to Directors/Officers” that states:

A Director/Officer cannot argue the merits of the Determination against the company after its appeal period has expired. After that time, there are only three grounds for appeal:

- (a) whether you were a Director of the company at the time wages were earned; [*sic*] or should have been paid;
- (b) whether the calculation of your personal liability is correct; and; [*sic*]
- (c) whether you authorized, permitted or acquiesced in the contravention.

If you dispute any findings in the Determination against the company, the Company must appeal within the appeal period provided with the Determination issued against the company.

10. Mr. Burtnick appeals the Determination on the ground that the Director, represented by the Delegate, erred in law.

ISSUE

11. Did the Delegate err in law in making the Determination?

ARGUMENT AND ANALYSIS

12. Mr. Burtnick’s appeal contains several assertions regarding Ms. Brelsford and her work with CBA. He makes the following points:

- CBA employed Ms. Brelsford as a part-time contractor from January 1, 2002 to March 14, 2003.
- During this period, Ms. Brelsford did not work set hours and was not required to come to the office.
- During this period, Ms. Brelsford was also working full-time for Weyerhaeuser.
- Ms. Brelsford was not an employee of CBA during this period, and she is therefore entitled to only three weeks of severance from the company.

13. I note that the points made by Mr. Burtnick relate only to the merits of the Corporate Determination, which was issued against the company, i.e. CBA. They do not address the findings in the Burtnick Determination, which was issued to Mr. Burtnick personally in his capacity as a Director/Officer of CBA.
14. Mr. Copeland's submission, dated July 20th, reiterates the arguments made by Mr. Burtnick.
15. Ms. Brelsford's submissions contradict those of Mr. Burtnick, in detail. Most notably, Ms. Brelsford says that she was never employed by Weyerhaeuser while she worked for CBA; that she was an employee of CBA during the time determined by the Director; and that the Director's calculations as to wages owing are correct. Ms. Brelsford's submissions, like those of Mr. Burtnick and Mr. Copeland, relate only to the matters raised in the Corporate Determination.
16. In the submission he makes on behalf of the Director, the Delegate points out that Mr. Burtnick's arguments relate to the merits of the Corporate Determination, which was never appealed and for which the appeal deadline has passed; that in any event, Mr. Burtnick has not produced sufficient evidence to show that Ms. Brelsford was an independent contractor; and that the only areas of appeal open to Mr. Burtnick with respect to the Determination are whether he was a director of CBA, and whether the wages calculated as owing were calculated correctly in accordance with section 96(1) of the *Act*.
17. Section 96 of the *Act* provides:
- 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.
- (2) Despite subsection (1), a person who was a director or an officer of a corporation is not personally liable for
- (a) any liability to an employee under section 63, termination pay or money payable in respect of individual or group terminations, if the corporation is in receivership,
- (b) any liability to an employee for wages, if the corporation is subject to action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act,
- (c) vacation pay that becomes payable after the director or officer ceases to hold office, or
- (d) money that remains in an employee's time bank after the director or officer ceases to hold office.
-
- (3) This Act applies to the recovery of the unpaid wages from a person liable for them under subsection (1) or (2.1).
-
18. Section 98 provides:
- 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.

....

19. Mr. Burtnick argues that the Director erred in law and it is his burden, as the appellant, to establish the basis of his appeal. The applicable jurisprudence with respect to errors of law is outlined in *Britco Structures Ltd.*, BC EST # D260/03, in which the Tribunal noted that panels have used the following definition of “error of law”, set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia* (Assessor of Area #12 – Coquitlam), [1988] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act;
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle (in the employment standards context, exercising discretion in a fashion that is wrong in principle: *Jane Welch operating as Windy Willows Farm*, BC EST #D161/05).

20. With respect to section 96(1) of the *Act*, Mr. Burtnick does not deny that he was a director of CBA during the relevant time and there is no evidence to contradict the Delegate’s conclusions on this point. Further, Mr. Burtnick does not bring forward any evidence of a calculation error with respect to the wages determined to be owed by him under section 96(1). Mr. Burtnick does say that the calculations of wages owing to Ms. Brelsford is incorrect, but his assertion is based on his arguments with respect to Ms. Brelsford’s status as an employee, which, as mentioned previously, is not properly a subject of appeal here. An error of law might also have been found if the Delegate had failed to apply an applicable exception to personal liability listed under section 96(2); however, there is no evidence that any of the exceptions apply. With respect to the Delegate’s findings regarding Mr. Burtnick’s personal liability for unpaid wages under section 96(1), I find no error of law.

21. With respect to section 98(2) of the *Act*, the Delegate must meet a higher standard of proof to successfully show that a director or officer should be personally responsible for an administrative penalty. The section only applies to a director or officer if he or she “authorizes, permits or acquiesces in the contravention” of the *Act* which the Delegate found had been carried out by the company. As the Tribunal held in *Competition Towing Ltd.*, BC EST #D392/99:

... Simply being a director or officer when a violation of the *Act* or of the Regulations occurs is not in itself sufficient to attract liability for penalties. In short, there is a defence for directors or officers under Section 98(2) which is not there under Section 96.

There is therefore a higher standard of proof that the Director must meet under Section 98(2) of the *Act* when assigning personal liability for penalties to directors or officers of corporations as opposed to assigning liability to directors or officers for unpaid wages. Consequently, before the Tribunal confirms a determination assigning personal liability for a penalty under Section 98(2) of the *Act*, it must ensure that the Director has taken those extra steps to determine if the person

named in the determination have in fact *authorized, permitted or acquiesced* in the contravention. At the very least, in the interests of natural justice, the Tribunal should be satisfied that such persons have been given a meaningful opportunity to respond to any assertion by the Director that they had in fact *authorized, permitted or acquiesced* in the contravention. The Determination must also be clear as to the reasons why those named are being held liable. [emphasis in original]

22. This right to a meaningful opportunity to respond is especially important given the nature of section 98(2). It is one of several provisions in the *Act* that create an extraordinary exception to the common law principle that directors and officers are not personally liable for corporate debts and therefore should be narrowly construed: *Re Michalkovic*, BC EST #RD 047/01.

23. With respect to Mr. Burtnick's liability for the administrative penalty, the Delegate determined:

Pursuant to Section 98(2) of the Act if a corporation contravenes a requirement of this Act or the Regulations a director or officer of the corporation who authorizes, permits or acquiesces in the contravention is also liable to pay the penalty.

In this case Nelson Burtnick was contacted regarding the complaints and did not dispute the complainants were owed wages. Mr. Burtnick was candid and advised he was involved in the day to day operation of the business and was involved in the decision to terminate the complainant's employment. Mr. Burtnick further confirmed he and Sean Copeland were the sole owners of Copeland, Burtnick and Associates Ltd. and were the main contacts and directed business and human resource inquires and issues.

Nelson Burtnick is therefore personally liable for the administrative penalty.

24. It appears from the documents before me that the Delegate contacted Mr. Burtnick with respect to the employees' complaints regarding unpaid wages and gave him an opportunity to respond to the issue of whether or not wages were owed. The Determination and the Record reveal that there was some evidence on which the Delegate could base a finding that Mr. Burtnick, as a director/officer of CBA, authorized, permitted or acquiesced in the contravention. Further, the Determination outlined the reasons why this liability was being imposed on Mr. Burtnick. However, there is no evidence or indication, in either the Determination or the Record, that Mr. Burtnick was given an opportunity to respond specifically to the Delegate's allegation that he authorized, permitted or acquiesced in the contravention and therefore is liable for the administrative penalty pursuant to section 98(2). It appears that the Delegate used the evidence received in the course of the investigation of the Corporate Determination to come to his conclusions in the Determination. While this was sufficient to ground Mr. Burtnick's liability for wages under section 96(1), it is insufficient to anchor a finding of liability for an administrative penalty under section 98(2). I am not satisfied that the Delegate gave Mr. Burtnick a meaningful opportunity to respond to the assertion that he authorized, permitted or acquiesced in the contravention. By failing to give Mr. Burtnick a meaningful opportunity to respond, the Delegate failed to observe the principles of natural justice, specifically, the right of a party to have an opportunity to respond to the case against it. Although Mr. Burtnick did not frame his appeal in terms of a breach of natural justice, this does not preclude me from finding such a breach and allowing the appeal with respect to the administrative penalty; it is inappropriate to take an overly legalistic and technical approach to appeals to the Tribunal and how they are articulated by a party, given the purposes of the *Act*: *J.C. Creations Ltd. o/a Heavenly Bodies Sport*, BC EST # RD317/03.

25. I conclude that Mr. Burtnick has failed to discharge the burden of proving that the Delegate erred in law with respect to the liability for unpaid wages imposed pursuant to section 96(1). However, I find that with

respect to the administrative penalty in the amount of \$500.00, the Delegate failed to observe the principles of natural justice by not allowing Mr. Burtnick a meaningful opportunity to respond to the assertion that he authorized, permitted, or acquiesced in the contravention of the *Act* carried out by the company.

26. Mr. Burtnick's appeal of the Determination is allowed only to the extent that the administrative penalty levied against him as a director/officer pursuant to section 98(2) of the *Act* is cancelled.

ORDER

27. Pursuant to Section 115 of the *Act*, I order that the Determination, issued against Mr. Burtnick as director/officer of Copeland, Burtnick & Associates Ltd. and dated April 18, 2007, be varied to exclude liability for the administrative penalty in the amount of \$500.00. In all other respects, the Determination is confirmed in the varied amount, together with any interest that has accrued under Section 88 of the *Act*.

Yuki Matsuno
Member
Employment Standards Tribunal