

An appeal

- by -

Ronald Stephen McIntyre, a Director/Officer Vocalscape Networks Inc.
("McIntyre")

- 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.: 2008A/49

DATE OF DECISION: August 20, 2008

DECISION

SUBMISSIONS

Patrick W. Watson and Ronald S. McIntyre on behalf of Ronald Stephen McIntyre
Megan Roberts on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Ronald Stephen McIntyre, a Director/Officer of Vocalscape Networks Inc. (“McIntyre”) of a Determination that was issued on May 6, 2008 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that McIntyre was a director/officer of Vocalscape Networks Inc. (“Vocalscape”) an employer found to have contravened provisions of the *Act*, and was personally liable under Section 96 of the *Act* for an amount of \$10,817.71 and liable under Section 98(2) of the *Act* in the amount of \$1500.00.
2. In this appeal, McIntyre says the Director erred in law in finding he was a Director of Vocalscape at the time wages were earned, or should have been paid. The following assertion, found in Schedule A to the appeal, is central to his appeal:
 1. That on or about the 13th day of November, 2004 I delivered to the registered office of the company located at 6800 Francis Road, Richmond, British Columbia my resignation as a director and officer of Vocalscape Networks Inc., a British Columbia Company incorporated under number 637249. The resignation was acknowledged by the solicitor who maintains the registered and records office of the company on the 13th day of November, 2004. Enclosed herewith is a certified true copy of both the resignation as well as a copy of the register of directors of the company.
3. The appeal material also includes a submission filed by counsel for McIntyre that includes the following statements:

Ronald Stephen McIntyre is the President, Secretary and a Director of Vocalscape Networks Inc., a Nevada Corporation . . .

Mr. McIntyre has never had signing authority on any bank accounts and if the company had completed the annual Corporation documentation as prepared by the company lawyer and returned it to the companies [sic] registered and records office so that annual reports could be filed following Mr. McIntyre’s departure his name would no longer appear . . .

Mr. McIntyre has never received a pay cheque or remuneration from Vocalscape Networks Inc., a B.C. Company and consequently has never received a T4 from Vocalscape Networks Inc.

At no time since his resignation as a Director of the company has Ronald McIntyre ever given any direction to or direct management of any of the employees of the B.C. Company.

The only reason that Mr. McIntyre attended at the hearing was that the representative of the Company was ill and unable to attend the hearing.

4. McIntyre does not seek an oral hearing on the appeal.
5. The Tribunal has a discretion whether to hold a hearing on an appeal and if a hearing is considered necessary, may hold any combination of written, electronic and oral hearings: see Section 36 of the *Administrative Tribunals Act* (“ATA”), which is incorporated into the *Employment Standards Act* (s. 103), Rule 17 of the Tribunal’s Rules of Practice and Procedure and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575. In this case, the Tribunal has reviewed the appeal, the submissions and the material submitted by all of the parties, including the Section 112 (5) record filed by the Director, and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

6. The substantive issue is whether the Director erred in law in finding McIntyre was a director/officer of Vocalscape and personally liable under Section 96 and Section 98(2) of the *Act* for the amounts shown in the Determination.

THE FACTS

7. On April 3, 2008, the Director issued a Determination against Vocalscape (the “corporate Determination”) in favour of Andre Muzzetti in the amount of \$26,479.18, an amount comprising regular wages, compensation for length of service, annual vacation pay and interest. The Director also issued administrative penalties in the amount of \$1500.00. The corporate Determination followed a complaint hearing which was attended by McIntyre acting for Vocalscape. The corporate Determination also indicates he gave evidence at the complaint hearing for Vocalscape.
8. The corporate Determination was sent to Vocalscape, with copies delivered to its registered and records office and to its listed directors and officers, including McIntyre. The corporate Determination was, according to Canada Post recording, refused by McIntyre and returned to Employment Standards. The corporate Determination indicates that the regular wages found owing were earned between March 15, 2007 and August 31, 2007. The corporate Determination has not been appealed.
9. The Determination at issue here states that BC On-Line searches of the Registrar of Companies, conducted on October 9, 2007 and April 18, 2008, showed that Vocalscape was incorporated on November 14, 2001 and that as of the date of the searches, McIntyre was listed as a Director/Officer of Vocalscape. The search information, however, does not list McIntyre as an officer of Vocalscape.
10. The Determination makes findings that McIntyre was a Director/Officer of Vocalscape during the entire period of Mr. Muzzetti’s employment and “was involved in the day to day operation of Vocalscape, managed the business, and authorized and controlled the payment of wages to Mr. Muzzetti”. The Determination also finds that McIntyre was “the lead manager and the person in control of the Metro Vancouver business location” and in that capacity had “hired Mr. Muzzetti, authorised him to work from abroad, directed and administered the Vocalscape Stock Option Plan, was aware of wages not being paid and, ultimately, terminated Mr. Muzzetti without notice or cause”.
11. The amount of the Determination was found to be equivalent to two months’ wages for the employee covered by the corporate Determination and three administrative penalties imposed on McIntyre under Section 98(2) of the *Act*.

ARGUMENT

12. McIntyre says the Determination is incorrect and that he was not a director/officer of Vocalscape at the time the wages were earned, or should have been paid. He says, as a matter of fact, he had submitted a written resignation as a director of Vocalscape to the registered office of Vocalscape on November 13, 2004. He says that under the *Business Corporations Act*, a resignation takes effect on the date it is delivered to the company. McIntyre acknowledges that although he is the President, Secretary and a Director of Vocalscape Networks, Inc., a Nevada Corporation (“Vocalscape Nevada”), he has not been a director of Vocalscape since his resignation.
13. The Director notes that the initial appeal did not include any copy of a resignation by McIntyre as a director of Vocalscape¹. The Director argues the information contained in the BC Company Summary lists McIntyre as a director of Vocalscape as of the date of last Annual Report filing, November 14, 2005, and shows no changes in the directors of the corporation after that date.
14. The Director argues that the Annual Report – fiscal year to December 2007 – and the Quarterly Report – May 20, 2008 – of Vocalscape Nevada describes McIntyre as being a “Beneficial Owner” and lists his address as the office of Vocalscape in Vancouver, describes him as President, Secretary and Director of the company and indicates the company is party to a five year lease “for the office in Vancouver, British Columbia”.
15. The Director also notes that in the appeal of Ryan Gibson, who was identified by the Director as a director/officer of Vocalscape, Gibson refers to delivering his resignation to “Ronald McIntyre, President, at the Vancouver office of Vocalscape on June 1, 2006 and receipt of the resignation letter was acknowledged by McIntyre as “director/legal counsel”, which is after the date McIntyre says he resigned as a director of Vocalscape.
16. The Director also refers to the findings relating to McIntyre’s liability under Section 98(2) of the *Act*.
17. In his final reply, McIntyre addresses the several points made by the Director, and has provided a copy of lease agreement for the Vocalscape Vancouver office – although the 4th and 5th pages are missing – a copy of a resignation which he says was submitted to Vocalscape in November 2004 and a copy of a letter from Mr. Gibson dated July 14, 2008.
18. In response to the references by the Director to the annual and quarterly reports, he says:
- The term “Beneficial Owner” cannot be taken literally. He says it simply means he has a legal obligation relating to the disclosure, that he holds only a small percentage of the equity securities (ownership) of Vocalscape Nevada and that it is unreasonable for the Director to presume beneficial ownership in Vocalscape Nevada translates to his being a director/officer of Vocalscape.
 - Vocalscape Nevada is not party to the lease for the Vancouver office of Vocalscape.
 - The Gibson resignation as a director of Vocalscape was received by McIntyre as a “matter of convenience” on some express or tacit understanding that he would deliver it to Robert Koch, the person who is listed in the Corporate Registry as the President, Secretary and a director of Vocalscape.

¹ A copy was provided with McIntyre’s final reply submission.

- He never received the “preliminary findings” letter from the Director, but even if he did, he would have no concern as he was not a director of Vocalscape.
- He attended the complaint hearing because one of the people representing Vocalscape through the complaint process became ill and unable to attend. He was called on by Mr. Koch to attend as Vocalscape’s representative.
- The unsigned employment agreement is not evidence that he is a director of Vocalscape. He denies the creation of or involvement in any such agreement.
- The e-mail dated January 26, 2007 is simply evidence that he witnessed and documented a discussion between Mr. Muzzetti and his supervisor relating to Mr. Muzzetti’s request to work from Germany.
- He has not received any payroll cheques from Vocalscape, has no signing authority on the bank accounts of Vocalscape and has not provided any direct or indirect supervision of Mr. Muzzetti.

19. I note here that several of these assertions are bare denials that contradict findings of fact made by the Director in the determination and are inconsistent with material included in the Section 112 record.

ANALYSIS

20. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

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 made.

21. 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.

22. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law (see *Britco Structures Ltd.*, BC EST #D260/03). The Tribunal has adopted 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)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment 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.

23. There is a question about new evidence that McIntyre has submitted with the appeal. The same question arose in the appeal filed by Mr. Gibson and I allowed the additional evidence, stating:

There is no indication in the material that Gibson was ever provided an opportunity to make any submission on his potential personal liability as a director/officer of Vocalscape before the Determination against him was issued. All of the material suggests the first opportunity for Gibson to respond was after he received the Determination making him as personally liable as a director/officer of Vocalscape.

Section 77 of the Act provides that if an investigation is conducted, the Director must make reasonable efforts to give a person under investigation an opportunity to respond. In addition, natural justice requires that when any individual is to be held personally liable for a corporate liability, be they employees, directors, officers, or agents, they must be given a meaningful opportunity to respond: *Competition Towing Ltd.*, BC EST #D392/99.

24. For substantially the same reasons I choose to admit the new material in this appeal. That does not, of course, mean that I adopt it. It is an entirely different issue to what extent, if any, that additional information is relevant or impacts the conclusion that McIntyre is personally liable under the *Act*. It becomes evidence which I must assess in the context of findings of fact made in the Determination and other evidence in the Section 112 record.

25. As a matter of law, there are three main principles that operate in this appeal.

26. The first is expressed above: the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law. There is no indication in this appeal that the Director committed an error of law in making any of the findings of fact in the Determination. The position taken by McIntyre is that there is relevant evidence which was not available to the Director relating to and affecting the conclusion that he was a director of Vocalscape and therefore personal liability under Section 96 of the *Act*.

27. The second is that expressed in the Tribunal's decision, *David Wilinofsky and Ron J. Wilinofsky*, BC EST #D106/99: the Director may issue a section 96 Determination relying on the corporate records filed with and maintained by the Registrar of Companies; 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 and/or officer of the company in question. This presumption may be rebutted by credible and cogent evidence that the Registrar's records are inaccurate; the evidentiary burden of proving that one is not a corporate director or officer lies with the individual who denies such status.

28. The third is that that an apparently timely but an uncorroborated resignation is not sufficient to rebut the presumption founded on corporate records: see for example *Leonard W. Hester, a Director or Officer of A.K.A. Rhino Prepress and Print Inc.*, BC EST #D287/02.

29. In respect of the second principle, I must consider whether McIntyre has met this evidentiary burden; in my view, he has not.

30. The Determination contains the following findings of fact:

- McIntyre is listed as a director of Vocalscape in the records of the Registrar of Companies.

- McIntyre was involved in day to day operations of Vocalscape, managed the business and authorized and controlled the payment of wages to Mr. Muzzetti.
- McIntyre was the “lead manager” and the person in control of the Metro Vancouver business location of Vocalscape.
- In his managerial capacity, McIntyre hired Mr. Muzzetti, authorised him to work from abroad, directed and administered the Vocalscape Stock Option Plan, was aware wages were not being paid and terminated Mr. Muzzetti without notice or cause.

31. While I appreciate that individually, it is arguable that the above matters do not define McIntyre’s position as a director of Vocalscape, but cumulatively and considered with other evidence in the file, they speak volumes to his involvement in Vocalscape as a director. None of these findings are affected by any of the contradictory assertions made by McIntyre in his appeal submissions. In respect of the finding that McIntyre hired Mr. Muzzetti, I reject entirely his denial of any involvement in creating the employment agreement for Mr. Muzzetti. Not only is his name on the document offering employment to Mr. Muzzetti on the terms set out in it, the Determination notes that he agreed Mr. Muzzetti was hired August 28, 2006 (the date on the employment offer) and provided comprehensive evidence at the complaint hearing relating to the application and operation of its terms.

32. In addition to these findings of fact, the Section 112 record includes the following information bearing on the issue in this appeal:

- The record indicates the last annual report was filed by Vocalscape on November 14, 2005. Apparently, no change to the directors was made as the information in the Corporate Registry continues to list McIntyre as a director.
- The resignation letter from Mr. Gibson is addressed to “Vocalscape Networks Inc., 1847 West Broadway Suite 305, Vancouver, BC; Dear Ron McIntyre, President” (italics added). It is not addressed to Mr. Koch, which would seem probable if, as suggested by McIntyre, it was actually intended for him.
- At page 17 of 75 of the Annual Report of Vocalscape Nevada, the following statements are found:
“The Company is headquartered in White Plains, New York and has an engineering and sales office in Vancouver, British Columbia.”

“Our principal corporate and executive offices, are located at 170 E. Post Road, Suite 206, White Plains, New York 10601 and our primary operations offices, which are located at 305-1847 West Broadway, Vancouver, British Columbia, Canada. . . . We also lease our offices located in Vancouver, British Columbia . . .”
- At page 56 of 75 of the Annual Report and at page 29 of 44 of the Quarterly Report, the following statement is found under the heading “Commitments and Contingencies:
“The Company is a party to a five-year office lease agreement covering 2,238 square feet, which commenced July 1, 2005, for the office in Vancouver, British Columbia.”

33. No records or minutes for Vocalscape corroborating McIntyre’s purported resignation have been provided. McIntyre says the Director will have to acquire that information from Vocalscape, as he is no longer a director and neither he nor his lawyer have authorization to submit such records to the Tribunal. There are several aspects of the facts of this case that give cause to doubt the veracity of that statement. The facts clearly indicate Vocalscape, although a separate corporate entity, is operated as part of Vocalscape, Nevada. All information relating to the operation of Vocalscape, including financial

information, is consolidated with the Vocalscape Nevada operation in the Annual Report and Quarterly Statement. McIntyre is admittedly the President, Secretary and on the board of directors of Vocalscape Nevada. He is described in these documents as the principal executive officer of the “Company”. The “Company” is described in these documents as including Vocalscape. It is unfathomable that he would have access to all manner of operational and financial information for Vocalscape, but not have access to the records and minutes of Vocalscape or authority to provide them to the Tribunal.

34. This view is reinforced by the fact that he could be asked to attend the complaint hearing on behalf of Vocalscape and be able to speak authoritatively on the issues being considered in the Determination.

35. Against the weight of the above evidence, and in some aspects, the lack of evidence, McIntyre has provided an uncorroborated resignation. On balance, that document does not rebut the presumption created by the corporate records.

36. I make one further comment. This appeal has been grounded in the contention that McIntyre was not a director of Vocalscape at the time the wages found owing in the corporate Determination were earned, and should have been paid. No argument has been made relating to the liability imposed under Section 98(2) of the *Act*. For reference, that provision states:

98 (2) If a corporation contravenes 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.

37. The liability in the above provision is not confined to directors and/or officers. The Determination makes findings relating to McIntyre’s liability under this provision. There is ample evidence supporting those findings and none are contested in this appeal.

38. The appeal is dismissed.

ORDER

39. Pursuant to Section 115 of the *Act*, I order the Determination dated May 6, 2008 be confirmed in the total amount of \$12,317.71.

David B. Stevenson
Member
Employment Standards Tribunal