

An appeal

- by -

Ryan Gibson, a Director/Officer Vocalscape Networks Inc.
("Gibson")

- 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/53

DATE OF DECISION: August 20, 2008

DECISION

SUBMISSIONS

Robert J. Palkowski and Ryan Gibson on behalf of Ryan Gibson
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 Ryan Gibson, a Director/Officer of Vocalscape Networks Inc. (“Gibson”) 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 Gibson 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.
2. In this appeal, Gibson says evidence has become available that was not before the Director at the time the Determination was made. The appeal is supported by the following assertions and submissions made by Gibson:
 1. That on or about the 1st day of June, 2006, 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 1st day of June, 2006. Enclosed herewith is a certified true copy of both the resignation and the acknowledgement by the company.
 2. Pursuant to Corporations Act of British Columbia and its predecessor the Company Act of British Columbia a director’s resignation is effective upon delivery to the company’s registered office.
 3. Therefore I submit that the order issued against me be vacated.
3. The appeal also includes a submission filed by counsel for Gibson that includes an assertion that the minute book of Vocalscape records his resignation.
4. Gibson 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 finding Gibson was a director/officer of Vocalscape and personally liable under Section 96 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 was sent to Vocalscape, with copies delivered to its registered and records office and to its listed directors and officers, including Gibson. The corporate Determination indicates that the regular wages found owing were earned between March 15, 2007 and August 31, 2007.
8. The Determination under appeal 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, Gibson was listed as a director and officer of Vocalscape. Material in the Section 112 record shows that Gibson became a director of Vocalscape on, or about, June 11, 2004. The finding in the Determination that Gibson was an officer of Vocalscape is not supported by any material in the Section 112 record, or by any other material. Gibson is not listed as an officer of Vocalscape and the Determination contains no facts which could lead to a finding that he functioned as an officer of the company (see *Director of Employment Standards (Re Michalkovic)*, BCEST #RD047/01).
9. The amount of the Determination was found to be equivalent to two months’ wages for the employee covered by the corporate Determination.

ARGUMENT

10. Gibson 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 June 1, 2006. A true copy of the resignation has been submitted with the appeal. Its receipt appears to have been acknowledged on behalf of Vocalscape on June 1, 2006.
11. The copy of the resignation is evidence that was not before the Director when the Determination was made. The Director notes this is new evidence, but has not objected to its introduction.
12. Legal counsel for Gibson also says his resignation was acknowledged in the minute book of Vocalscape.
13. The Director says that while the appeal appears to have some merit based on the resignation, the validity of the resignation is called into question by information provided in an appeal filed by another director of Vocalscape, Ronald Stephen McIntyre. The basis for this argument is a statement by Mr. McIntyre that he had resigned as a director of Vocalscape in November 2004 and Mr. McIntyre’s reference to a separate corporate entity, Vocalscape Networks, Inc., registered in the state of Nevada. The Director says the statement made by legal counsel for Gibson is not supported by a copy of the minute book referred to.

14. The Director relies on the information contained in the BC Company Summary, which lists Gibson as a director of Vocalscape, as establishing the basis for his liability. The Director also says the corporate Determination identifies Gibson as a Director/Officer of Vocalscape and that corporate Determination was not appealed.
15. In his final response, Gibson has provided additional information supporting his assertion that he had resigned as a Director of Vocalscape in June 2006, including a letter dated July 14, 2008 and addressed to Gibson from Patrick W. Watson, a lawyer having the same address as the registered and records office for Vocalscape. For the purpose of this appeal, the key passage in that letter states:

I confirm that the corporate minute book for Vocalscape networks inc. [sic] contains your resignation as a director of Vocalscape Networks Inc. date June 1, 2006.

16. Gibson says he has no authority or ability to provide a copy of the minute book.

ANALYSIS

17. 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.*

18. 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.

19. I will first consider whether I should accept the additional evidence provided by Gibson that he had resigned as a director of Vocalscape in June 2006, including the resignation letter and the assertion from his legal counsel relating to the corporate minutes.

20. The Tribunal has discretion to allow new or additional evidence. In addition to considering whether the evidence which a party is seeking to introduce on appeal was reasonably available during the complaint process, the Tribunal considers whether such evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it is reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination (see *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03 and *Senor Rana's Cantina Ltd.*, BC EST #D017/05).

21. In the circumstances, it is appropriate to receive this material with the appeal (see *Samuel Nam, a Director or Officer of Teles Training Inc.*, BC EST #D102/04).

22. A review of the Section 112 record indicates this evidence was not available to the Director at the time the Determination was made or that there was any opportunity for Gibson to produce this ‘new’ evidence at any point in the process up to the making of the Determination. It appears that he was not involved in the corporate investigation in any way, including the complaint hearing process. He is not even referred to in the reasons for the corporate Determination, except for a reference to his being listed as a director of Vocalscape in the Corporate Registry. The corporate Determination gave notice to the directors and officers of the corporation that they may be found personally liable. However there is no evidence that Gibson was personally served with a copy of the corporate Determination or that he had knowledge of the result of, or reasons for, that Determination¹. 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.
23. 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. I do not accept the director’s suggestion that the reference to Gibson in the corporate Determination as a Director/Officer of Vocalscape is either determinative or persuasive. A corporate Determination is limited to deciding the liability under the *Act* of the employer. It addresses neither the identity nor the liability of the directors and/or officers of the employer where the employer is a limited company. The *Act* requires the personal liability of a director and/or officer of a corporation to be established and recorded in a separate Determination and allows an appeal to be filed from that Determination. The Tribunal has limited such appeals to arguing those issues which arise under Section 96 of the *Act*, which includes whether the individual has been correctly identified as a director and/or officer of the corporation. As well, as indicated above, there is no indication Gibson participated in the process leading to the corporate Determination.
25. The strongest argument for the Director is that Gibson is identified in the Registrar of Companies’ records as a director of Vocalscape. The Registrar of Companies’ records may be presumptively relied on by the Director: see *David Wilinofsky and Ron J. Wilinofsky*, BC EST # D106/99. It then falls to the person identified in those records as a director or officer to show, by clear and cogent evidence, that the Registrar’s records are inaccurate (*Re Michalkovic, supra*).
26. The Director says Gibson has not met that burden. That position is not inconsistent with other decisions of the Tribunal which have held 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.
27. In the circumstances of this case, however, the resignation does not stand alone. It is corroborated by an acknowledgement of receipt on the resignation letter by Mr. McIntyre, who I accept was, at least, the President of Vocalscape Networks, Inc., the Nevada corporation, on June 1, 2006, reference to his

¹ The corporate Determination was served on Gibson under Section 122(1) of the *Act*, which deems service of a Determination where it is sent by registered mail to the person’s last known address.

resignation in the minutes of the provincially incorporated Vocalscape, confirmed by two lawyers in this province, and by the complete absence of any indication that Gibson was involved in any aspect of Vocalscape during the period covered by Mr. Muzzetti's complaint.

28. On balance, I find that Gibson has sufficiently demonstrated that the corporate records are inaccurate and that he was not a director of Vocalscape at the time Muzzetti's wages were earned, or should have been paid. The presumption in the Registrar of Companies' records has been rebutted and the appeal succeeds.

ORDER

29. Pursuant to Section 115 of the *Act*, the Determination issued against Gibson on May 6, 2008 is cancelled.

David B. Stevenson
Member
Employment Standards Tribunal