

An appeal

- by -

Robert Allan Cummings a Director or Officer of Imagika Ink Corporation
(“Cummings”)

- 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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2011A/82

DATE OF DECISION: August 23, 2011

DECISION

SUBMISSIONS

Robert A. Cummings

on his own behalf

Karin Doucette

on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Robert Allan Cummings (“Cummings”) of a Determination that was issued on March 4, 2011, by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Cummings was an officer of Imagika Ink Corporation (“Imagika”), an employer found to have contravened provisions of the *Act*, at the time wages owed were earned or should have been paid and as such was personally liable under Section 96 of the *Act* for an amount of \$5,299.34.
2. In this appeal, Cummings says the Director erred in law in making the Determination. He seeks to have the liability imposed against him in the Determination cancelled.
3. The Tribunal has reviewed the appeal, the submissions and the material submitted by the parties, including the Section 112 (5) record filed by the Director, and has determined this appeal can be decided from the material in the file.

ISSUE

4. The issue in this case is whether there is any basis for concluding the Director erred in finding Cummings was, for the purposes of section 96, an officer of Imagika during the relevant period of time.

THE FACTS

5. On September 15, 2010, the Director issued a Determination against Imagika in favour of two former employees, Alexandra Nicoara and Ahmad Zamani, in the amount of \$6,728.63, an amount that included wages, interest and administrative penalties (the “corporate Determination”). No appeal of the corporate Determination was received from Imagika.
6. The corporate Determination, which included a notice to the directors and officers explaining their personal liability under the *Act*, was sent to Imagika, with copies to the registered and records office of the company and to the directors and officers.
7. The Determination under appeal indicates Imagika was incorporated on June 16, 2004, under the name Westcoast Imaging Ltd. (“Westcoast”). Until November 12, 2008, Cummings was listed as a director and officer of Westcoast. Cummings sold his shares in Westcoast in November 2008 and a Notice of Change of Directors was filed with the Registrar of Companies indicating Cummings ceased to be a director of Westcoast on November 12, 2008. As part of the share purchase, Cummings had signed a document revoking his consent to act as a director or officer of the company.
8. Westcoast changed its name to Imagika in April 2009.

9. Cummings was listed as an officer of Westcoast in April 2, 2008, and continued to be listed as an officer of Imagika when the Director conducted an On-Line search of the Registrar of Companies in June 2010. The officer information in the Corporate Registry contains information “as at April 02, 2008”.
10. The wages of Ms. Nicoara and Mr Zamani were earned, or should have been paid, between June 5, 2009, and December 23, 2009. Based on the information found in the corporate registry, the Director found Cummings was an officer of Imagika during that period of time and personally liable under section 96 of the *Act*, which states in part:

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.*

ARGUMENT

11. In his appeal, Cummings submits that he sold his shares in Westcoast on November 12, 2008, and, pursuant to the execution of the share purchase agreement, revoked his consent to act as a director or an officer of Westcoast. He says it was the responsibility of the new owners to update the corporate records in the Corporate Registry and, while they removed him as a director, they failed to remove him as an officer of the company. He says he gave no permission to the new owners of Westcoast, who are also the owners of Imagika, to continue to list him as an officer. He says he performed no duties for Imagika during the wage claim period.
12. The Director relies on the information found in the Corporate Registry. The Director also says Cummings “did not provide any information at any time during the investigation to indicate he was not an officer of Imagika.” She submits that Cummings provided her with payroll information about the complainants and that his “access to such information supported the information from the Registrar of Companies – that he was an officer and maintained some involvement with Imagika.”
13. In his final reply, Cummings comments on the above points made by the Director. He says the first comment misses two important facts: that the Director never asked him whether he was a director or officer of Imagika or attempt to verify with him her conclusion that he was an officer of the company; and that he had indicated on at least two occasions that had sold his shares in the company and was not responsible for the complainants’ wages. He says the second comment fails to note that the Director never asked him how he came to be in possession of the payroll records for Ms. Nicoara and Mr. Zamani. If he had been asked, he would have explained that he had the shares of the parent company of Imagika seized by a Bailiff and put up for auction in an effort to recover some \$200,000.00 that was owed to him by Imagika at the time. He was compelled to purchase those shares and, as a result gained access to the remaining assets of the company, one of which was the computer and the installed software. He says the Director’s conclusion he was maintaining “some involvement” with the company could not be farther from the truth; he was, “in fact scrambling to see what was left of Imagika and what could be salvaged to offset” the money owed to him.

ANALYSIS

14. 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.*

15. Cummings contends the Director made an error of law in concluding he was an officer of Imagika. 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.
16. As a matter of law, there are three main principles that operate in this appeal.
17. The first is that the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings are shown by the appealing party to raise an error of law. In the context of a finding that an individual is personally liable for the wages of an employee under section 96 of the *Act*, this principle meshes with the second principle.
18. The second principle 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 a director or officer of a company in the records maintained by the Registrar, a rebuttable presumption of fact 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.
19. The third principle is that a person challenging a director/officer Determination is limited to arguing those issues which arise under section 96: whether the person was a director/officer when the wages were earned or should have been paid; and whether circumstances exist that would relieve the director/officer from personal liability under subsection 96(2). Cummings has confined himself to those matters. He does not challenge the corporate Determination. Rather, he agrees with the calculations for the wages owed and believes the claims made by Ms. Nicoara and Mr. Zamani are legitimate.
20. Cummings has provided information that was not included in the section 112(5) Record. However, no issue has been raised by the Director about whether this information ought to be accepted by the Tribunal in this appeal. In any event, I would not consider this information to be “new”, but rather to be explanatory of information provided to the Director during the investigation, as well as being relevant and cogent to the issue raised in this appeal. Accordingly, I would accept this information and will consider it in this appeal.
21. I find Cummings has rebutted the presumption created by his inclusion in the Corporate Registry as an officer of Imagika.
22. All of the documents he has provided are consistent with his having sold his shares in Westcoast on November 12, 2008, and ceasing to be involved in the corporate affairs of that company. None of the

documents that have been provided to support that assertion look contrived. As a whole, they appear to support each other as a unified set of documents that one would expect to find in a share transfer. Of particular relevance is the document entitled “Revoking Consent to Act as Director”, which is dated November 12, 2008, and contains the wording:

. . . I hereby revoke my consent to act as a director or an officer of the Company as of the date shown below.

23. The information in the Corporate Registry confirms that part of the revocation relating to his position as a director of Westcoast was given effect and in that respect lends support to Cummings’ assertion that the new owners should also have ensured his name was removed from the corporate records as an officer, but failed in that regard.
24. The Director’s assumption that Cummings “had maintained some involvement with Imagika” based on his access to payroll information for Ms. Nicoara and Mr. Zamani is, in my view, not a correct assumption. It is credibly explained by Cummings in his reply submission on this appeal and is supported by documents filed with the appeal that confirm the explanation.
25. For the above reasons, I find the Director erred in relying on the information found in the Corporate Registry; Cummings was not an officer of Imagika during the relevant period and the Determination made against him should be cancelled.

ORDER

26. Pursuant to section 115 of the *Act*, I Order the Determination dated March 4, 2011, imposing a personal liability on Cummings under section 96 be cancelled.

David B. Stevenson
Member
Employment Standards Tribunal