

An appeal

- by -

578047 B.C. Ltd. carrying on business as Pro Gas & Heating also known as Pro
Tel

- and –

Edward Terrance Lowe, Director and Officer of 578047 B.C. Ltd. carrying on
business as Pro Gas & Heating also known as Pro Tel

- 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.: 2009A/58 & 2009A/59

DATE OF DECISION: August 26, 2009

DECISION

SUBMISSIONS

Edward Terrance Lowe	on his own behalf and on behalf of 578047 B.C. Ltd.
Grant Nickolas Gordon	on his own behalf
Johnson Varghese	on his own behalf
Karpal Singh	on behalf of the Director of Employment Standards

OVERVIEW

1. Edward Terrance Lowe appeals two Determinations of the Director of Employment Standards issued March 30, 2009 (collectively, the “Determinations”), pursuant to section 112 of the *Employment Standards Act* (the “*Act*”). He appeals both on his own behalf and also on behalf of 578047 B.C. Ltd., doing business as Pro Gas & Heating (“Pro Gas” or the “Employer”). Both Determinations were issued by a delegate of the Director of Employment Standards (the “Director”) after an investigation of complaints filed under section 74 of the *Act* against the Employer by four employees: Johnson Varghese, Daryl McMillan, Grant Gordon, and Margaret Cook (collectively, the “Employees”). The Employees variously alleged in their complaints that wages, overtime, vacation pay, statutory holiday pay, compensation for length of service, and other monies were owing to them by Pro Gas.
2. One Determination was issued against the Employer, i.e. 578047 B.C. Ltd. carrying on business as Pro Gas & Heating, also known as Pro Tel (the “Corporate Determination”). This determination was for an amount of \$23,000.24 in wages payable to the Employees and an amount of \$1,500.00 in administrative penalties, for a total of \$24,500.24.
3. The other Determination was issued against Edward Terrance Lowe, Director and Officer of 578047 B.C. Ltd. carrying on business as Pro Gas & Heating, also known as Pro Tel (the “Lowe Determination”). The delegate found that as a director/officer of the Employer, Mr. Lowe was personally liable under section 96 of the *Act* for wages that remain unpaid to the Employees. Further, the delegate also found that Mr. Lowe was the controlling mind of the Employer when the Employees were employed by the Employer, and that he permitted or acquiesced in the contraventions by not paying the wages earned even after he acknowledged that wages were owed. Therefore, the delegate found that Mr. Lowe was personally liable to pay any administrative penalties levied against the Employer (as provided under section 98 of the *Act*). The Lowe Determination was for an amount of \$18,801.68 payable to the Employees in wages and an amount of \$1,500.00 in administrative penalties, for a total of \$20,301.68.
4. Mr. Lowe appeals both Determinations on the grounds that the Director erred in law; that the Director failed to observe the principles of natural justice in making the Determinations; and that evidence has become available that was not available at the time the Determinations were being made.
5. I am able to decide this appeal on the basis of the written materials submitted before me, namely: the appeal form, submissions, and correspondence; the submissions of the Director, Mr. Varghese, and Mr. Gordon; and the Record forwarded by the Director under section 112(5).

ISSUES

6. Did the delegate, on behalf of the Director, fail to observe the principles of natural justice in making the Determinations?
7. Did the delegate err in law?
8. Has evidence become available that was not available at the time the Determinations were being made?

ARGUMENT AND ANALYSIS

9. It should be noted that the onus is on Mr. Lowe to establish the grounds of the appeal on behalf of himself and the Employer. In this decision I will address the submissions of the parties only to the extent they are relevant to the issues being decided.

Principles of Natural Justice

10. The principles of natural justice refer to the procedural rights to which a party to a dispute is entitled, such as: the right to know the case against oneself; the right to have an opportunity to respond; the right to have the matter decided by an unbiased decision maker; and the right to be given reasons for the decision.
11. Mr. Lowe's primary argument with respect to this ground of appeal is that no investigation was done of his contention that 578047 B.C. Ltd. was not the employer. He says it was unfair of the delegate to continue in his investigation once Mr. Lowe informed him that he would not be cooperating in the investigation because 578047 B.C. Ltd. was not the employer.
12. The delegate says that Mr. Lowe was afforded all procedural rights – he was told of the complaints against the Employer and provided with the information and documents provided by the complainants. Further, he was given multiple opportunities to respond to the allegations in the complaints and the delegate's inquiries.
13. Mr. Lowe's arguments fail to support this ground of appeal in any way. There is no indication that the delegate acted unfairly or deprived Mr. Lowe of his procedural rights in the investigation. I find that the Director did not fail to observe the principles of natural justice in making the Determinations.

Error of Law

14. In *Britco Structures Ltd.*, BC EST # D260/03, the Tribunal 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), [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, this may also be expressed as exercising discretion in a fashion that is wrong in principle: *Jane Welch operating as Windy Willows Farm*, BC EST # D161/05).
15. In his submissions, Mr. Lowe denies that 578047 B.C. Ltd. is the employer of the Employees and says the delegate provides no evidence to that effect. He says that 578047 B.C. Ltd. cannot be the employer because it was dissolved in July 2004. He further says that he ceased being a director of the company in July 2004. Mr. Lowe says it was wrong for the delegate to have proceeded with an investigation of wages and make the Determinations in light of Mr. Lowe's information that 578047 B.C. Ltd. was not the employer.
16. The delegate submits in reply that at no time in his numerous telephone conversations and written correspondence with Mr. Lowe did Mr. Lowe "question, dispute or challenge" the identity of the employer. Specifically regarding written correspondence, a number of letters, such as the Notice of Mediation and Demand for Employer Record, were served on the Employer, and as a result Mr. Lowe had numerous opportunities to challenge the identity of the Employees' employer. The delegate says Mr. Lowe did not do so.
17. Mr. Lowe's submissions basically boil down to the contention that 578047 B.C. Ltd. was not the employer of the Employees and that he is not a director of 578047 B.C. Ltd. at the relevant time. In other words, he is disputing two fundamental findings of fact made by the delegate in the Determinations. Under *Britco*, above, findings of fact are not found to amount to an error of law unless the delegate acted without evidence or on a view of the facts which cannot be reasonably entertained. In this case, the delegate had evidence to support the finding of fact that during the relevant time, 578047 B.C. Ltd. was correctly identified as the Employer and Mr. Lowe was correctly identified as a director/officer of 578047 B.C. Ltd. The evidence includes but is not limited to statements of the Employees and BC Online Corporate Registry searches. Given the submissions and the Record I find it was not an error of law for the delegate to make the findings of fact contained in the Determinations.
18. This ground of appeal fails.

Evidence Not Available at the Time of Determination

19. In his submissions, Mr. Lowe makes the following statements that may be construed as the basis of appeal on the ground of new evidence becoming available:
- 578047 B.C. Ltd. ceased business in July 2004;
 - Mr. Lowe ceased being a director of 578047 B.C. Ltd. in July 2004;
 - "A Revenue Canada statement will be forth coming showing 578047 BC Ltd ceased operation July 2004".
20. With respect to the Revenue Canada statement referred to by Mr. Lowe, by letter dated June 8, 2009, Mr. Lowe requested an extension from the Tribunal for "sufficient time in order to allow Revenue Canada documentation to be provided" to the Tribunal. The Tribunal replied by letter dated June 10, 2009 that as a matter of course, the Tribunal does not grant indefinite extensions and based on the information provided at the time, the Tribunal declines to grant an extension. The Tribunal suggested that Mr. Lowe may wish to contact Revenue Canada to ask when the information would be forthcoming and if it appeared that the additional information would not be forthcoming before the deadline set for a final reply, Mr. Lowe was at liberty to request an extension at that time. The Tribunal received no extension request from Mr. Lowe. On July 21, 2009, the Tribunal sent Mr. Lowe a package containing a letter and documents (the "July Package"). The letter indicated that on July 9, 2009, the Tribunal had received as undeliverable a package of documents it

had sent to Mr. Lowe on June 10, 2009; that this package of documents was being re-sent to Mr. Lowe, along with a number of other documents that were disclosed after June 10, 2009; and that he had until 4:30 p.m. on August 4, 2009 to file a final reply. On July 21, 2009, the courier company confirmed the delivery of the July Package to “Eddie” at the address provided by Mr. Lowe in his appeal form.

21. It should be noted that the Tribunal has not received a Revenue Canada statement from Mr. Lowe, nor any final reply.
22. With respect to this ground of appeal, the Delegate says that when he was conducting the investigation of the Employees’ complaints, Mr. Lowe did not provide any information or details regarding the alleged dissolution of 578047 B.C. Ltd. or Mr. Lowe’s resignation as a director. Further, the Delegate points out that the Determination outlined the BC Online Corporate Registry searches which were conducted that showed the company was dissolved on July 14, 2008 at which time Mr. Lowe was listed as a director/officer. Finally, the Delegate says that the Revenue Canada statement described by Mr. Lowe would have been available during the investigation and Mr. Lowe could have provided this information during the investigation.
23. In order for evidence to be accepted as new evidence that was not available at the time of the investigation, all of the following four conditions must be met before the evidence will be considered:
 1. the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 2. the evidence must be relevant to a material issue arising from the complaint;
 3. the evidence must be credible in the sense that it is reasonably capable of belief; and
 4. the evidence must have high probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

(Bruce Davies and others, Directors or Officers of Merilus Technologies Inc., BC EST # D171/03).

24. Mr. Lowe asserts that the Employer was dissolved in July 2004 at which time he ceased being a director. However, he provides no evidence to support his assertions. In any event, even if he had put forward actual evidence of his assertion, it would not be acceptable under the test in *Bruce Davies*, because if it were true that the company was dissolved in July 2004, the evidence could surely have been discovered and presented to the delegate prior to the Determination being made in March 2009.
25. This ground of appeal fails.

Disposition of the Appeal

26. The appeal fails on all grounds.

ORDER

27. Pursuant to Section 115 of the *Act*, I order that the Determinations dated March 30, 2009, be confirmed, along with any interest that has accrued pursuant to section 88 of the *Act*.

Yuki Matsuno
Member
Employment Standards Tribunal