

An appeal

- by -

John Moore
a Director or Officer of Sync2 Agency Ltd.
("Mr. Moore")

- 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: Shafik Bhalloo

FILE No.: 2011A/93

DATE OF DECISION: September 8, 2011

DECISION

SUBMISSIONS

Sukh Kaila

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 John Moore (“Mr. Moore”), a Director or Officer of Sync2 Agency Ltd. (“Sync2”), of a determination that was issued on June 3, 2011, (the “Determination”) by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Mr. Moore was a Director or Officer of Sync2 (an employer found to have contravened provisions of the *Act*) and, pursuant to section 96 of the *Act*, was ordered to pay an amount of \$50,665.66 representing two months’ unpaid wages for eight (8) employees of Sync2.
2. Mr. Moore appeals the Determination on two grounds; namely, the Director erred in law and failed to observe the principles of natural justice in making the Determination.
3. While Mr. Moore has checked off all three (3) boxes on the Appeal Form indicating what remedies he is seeking, his appeal submissions appear to be asking the Tribunal to cancel the Determination against him.
4. Pursuant to section 36 of the *Administrative Tribunals Act* (the “*ATA*”), which is incorporated into these proceedings by section 103 of the *Act*, and Rule 17 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings in deciding appeals. In my view, this appeal can be adjudicated on the basis of the section 112(5) “record”, the written submissions of the parties and the Reasons for the Determination.

ISSUES

5. Did the Director err in law or fail to observe the principles of natural justice in making the Determination? Is there any basis under either of the two grounds of appeal invoked by Mr. Moore for this Tribunal to relieve him of his liability under section 96 of the *Act*?

FACTS

6. On November 10, 2010, after an investigation into the complaints lodged by eight (8) former employees of Sync2, the Director issued a determination against Sync2 (the “Corporate Determination”) in the total amount of \$50,005.51 for wages owing to these employees, including accrued interest. The Director also levied three (3) administrative penalties of \$500 each under the *Employment Standards Regulation* for contraventions of the *Act* by Sync2.
7. Subsequently, the Corporate Determination, which contained a notice to directors and officers explaining their personal liability under the *Act*, was sent to Sync2 and copies to the registered and records office of Sync2 and to Ms. Jacqui Bauer (“Ms. Bauer”), a director of Sync2, and to Mr. Moore, an officer of Sync2.
8. Mr. Moore on behalf of Sync2 later appealed the Corporate Determination. However, this Tribunal, on March 9, 2011, dismissed the appeal and confirmed the Corporate Determination.

9. When subsequently Sync2 failed to pay the amount ordered in the Corporate Determination, the Director, under section 96 of the *Act*, issued two (2) determinations, one against Mr. Moore and another against Ms. Bauer. The determination against Ms. Bauer has also been appealed and will be dealt with under a separate decision by this Tribunal.
10. With respect to the Determination against Mr. Moore, the delegate performed a corporate search on BC Online on January 5, 2010, which revealed Sync2 was incorporated on January 29, 2009. While the corporate search did not show Mr. Moore as a Director or Officer of Sync2, the delegate, based on a functional analysis of Mr. Moore's role during the material period in question, concluded that Mr. Moore exercised functions and duties of a Director or Officer in relation to Sync2. More particularly, the delegate reasoned:

The functional analysis examines whether that person exercised the typical functions, tasks, or duties that a corporate Director or Officer would exercise. Those activities include regular attendance at the place of business, direction of employees, representing the company to creditors, suppliers and customers and holding oneself out to be in charge of the company.

Mr. Moore indicates he was the Chief Executive Officer of Sync Networks Corporation which was the parent corporation of Sync2 Agency Ltd. However, Mr. Moore was the sole contact for Sync2 Agency Ltd. with regard to the investigation of the complaints. Mr. Moore corresponded, attended meetings and provided corporate details and commitments on behalf of Sync2 Agency Ltd. Mr. Moore was the individual who met with the employees in regard to their termination of employment. Mr. Moore wrote and signed agreements with the employees on behalf of Sync2 Agency Ltd. Some of these agreements were signed by Mr. Moore as the President or the CEO of Sync2 Agency Ltd. Mr. Moore conducted the appeal of the Corporate Determination on behalf of Sync2 Agency Ltd. In light of the above I find Mr. Moore was a director or office [sic] of Sync2 Agency Ltd.

11. Mr. Moore, in the Determination, was held personally liable for up to two (2) months' unpaid wages for each employee, which, as previously indicated, totalled \$50,665.66 including accrued interest
12. With respect to the administrative penalties levied against Sync2 in the Corporate Determination, the delegate did not find sufficient evidence that Mr. Moore "authorized, permitted or acquiesced" in the contraventions of Sync2 and therefore, the Director did not hold Mr. Moore liable for those penalties under the *Act*.

SUBMISSIONS OF MR. MOORE

13. Mr. Moore's written submissions are very brief and I propose to set them out verbatim below:

July 7, 2011

SYNC2 AGENCY LTD.
#205 2922 Glenn Drive
COQUITLAM DRIVE, BC V3B 2P5

Dear Sirs and Madames:

These attachments and statements re: SYNC2 Agency Ltd. Appeal are:

1. I John Moore have NEVER be an Officier or Director of SYNC2 Agency Ltd. [sic] I made that very clear to Jim Dunne six months ago with my first meeting with him. Check the corporate registry. I am not an officer or director
2. Delete my name from the Determination ORDER!!

3. I provided Jim a detailed account of what was agreed to when we shut-down
 4. Copy of My Letter [sic] attached for your reference.
 5. The Parent Company of SYNC2 Agency LTD: SYNC2 Network Corp position is that the staff voluntarily took the computers as partial payment net of CRA deductions based on the FMV of the computers and the software they had with both the IMB and MAC operating systems
 6. The EST Appeal Statement [referring to the Corporate Determination made by this Tribunal] which I obtained which was submitted by Shafik Bhalloo was very informative.
 7. Net cheques will be issued for November 30 and December 15 pay based on CRA deductions and deductions for computers and IBM and MAC operating software which were taken as part payment of outstanding pay
 8. Call me at [number omitted]
14. Mr. Moore also encloses a five (5) page undated letter with attachments (the “Letter”) that appears to have been previously disclosed in the earlier corporate proceeding against Sync2 wherein he appears to respond to some preliminary determinations by the delegate of amounts owing to the eight (8) employees of Sync2 and the offsets against the wages owing to them due to the company’s computers the employees continued to have in their possession. The only pertinent submission in the Letter that relates to the s. 96 Determination against him is the following statements he makes:

I as CEO of SYNC Networks Corp. and not an Officer or Director of SYNC2 Agency Ltd. [sic] The only Director is Jacqui Bauer and there are no officers as the Company is currently inactive.

I [sic] been asked to respond to the information sent to both Jacqui Bauer and the Company’s registered office.

SUBMISSIONS OF THE DIRECTOR

15. The Director submits that the Determination be confirmed and Mr. Moore’s appeal dismissed. In support of its position, the Director states that it relies on “the Delegate’s original submission addressing Tribunal File Number: 2010A/181” which led to the Corporate Determination. However, the submissions of the delegate in the corporate proceeding do not really address the dispute raised in the appeal of Mr. Moore of the s. 96 Determination made against him.
16. Having said this, I note in the email of June 23, 2010, to Mr. Moore, before the Corporate Determination was made, the delegate, in expressing his intention to proceed and issue a determination against Sync2, states:

In addition please be advised that Directors/Officers are liable for wages earned that remain outstanding. Each Director is liable for up to two months wages for each employee. As the Determination will include administrative penalties for contraventions of the Act – the Directors and officers would also be liable for the penalties occurred as a result of the contraventions. If the Director or Officer authorized, permitted or acquiesced in a contravention then they would be liable for the administrative penalties. This is your opportunity to provide information that your involvement did not give rise to the complaints, and how that involvement supports a conclusion that as a director/officer you did not authorized [sic], permit or acquiesced in the contraventions.

Please provide your written responses by June 30, 2010. If I have not heard from you then I will issue the Determination without your further input.

ANALYSIS

17. Section 96(1) of the *Act* imposes liability upon a person who was a director “at the time wages of an employee of the corporation should have been paid”. The section reads:

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.

18. The *Act* does not define “director” or “officer” as those terms are used in context of section 96. However, the *British Columbia Business Corporations Act* (the “*BCA*”), in section 1, defines “director” as follows:

"director" means,

(a) in relation to a company, an individual who is a member of the board of directors of the company as a result of having been elected or appointed to that position, or

(b) in relation to a corporation other than a company, a person who is a member of the board of directors or other governing body of the corporation regardless of the title by which that person is designated;

19. While the *BCA* does not define “officer” in section 1, it offers a definition of “senior officers” as follows:

"senior officer" means, in relation to a corporation,

(a) the chair and any vice chair of the board of directors or other governing body of the corporation, if that chair or vice chair performs the functions of the office on a full time basis,

(b) the president of the corporation,

(c) any vice president in charge of a principal business unit of the corporation, including sales, finance or production, and

(d) any officer of the corporation, whether or not the officer is also a director of the corporation, who performs a policy making function in respect of the corporation and who has the capacity to influence the direction of the corporation;

20. One of the ways of identifying whether an individual is a director or officer of a corporation is by looking at the corporate records available through the Registrar of Companies or at a corporation’s registered and records office which may show that the individual is recorded as a director or officer (See *Re British Columbia (Director of Employment Standards)*, BC EST # RD047/01). If the corporate records do not show the individual as a director or officer, the Tribunal, when faced with the question of determining whether an individual is a director or officer, will use a functional approach. The functional approach entails an examination of the actual role of the individual in relation to the corporation. Does the individual exercise the typical functions, tasks, or duties that a corporate director or officer would exercise in the normal or usual course of events? While no one function is determinative of an individual’s status as a director or officer under the functional approach, the existence of such, non-exclusive, factors as the following are taken into consideration in the determination: participation in the management of the corporation; signing and cancelling of agreements on the employer’s behalf; reviewing or overseeing financial reports or financial matters of the corporation; handling the corporation’s payroll; dealing with the corporation’s creditors; establishing policies and objectives of the corporation; directing employees of the corporation and approving corporate budgets.

21. In this case, the delegate, in conducting a functional analysis of Mr. Moore’s role and concluding that the latter was a director or officer of Sync2, noted that he was the sole contact for Sync2 in the investigation of the complaints lodged by employees of Sync2 and leading to the Corporate Determination. The delegate also

noted it was Mr. Moore who exclusively corresponded, attended meetings and provided corporate details and commitments on behalf of Sync2 in the investigation. It was also Mr. Moore who met with the employees when terminating their employment. Mr. Moore also wrote and signed agreements with the employees on behalf of Sync2, some of which agreements were signed by him as the President or the CEO of Sync2, according to the delegate. It was also Mr. Moore who advanced the appeal of the Corporate Determination on behalf of Sync2.

22. In my view, the delegate's determination that Mr. Moore was a director or officer of Sync2 is not without any basis. This is not a case of the delegate acting without any evidence or acting on a view of the facts that could not be reasonably entertained. To the contrary, I find there is sufficient evidence upon which the delegate concluded that Mr. Moore was functioning in the capacity of an officer or director of Sync2 and I find there is no basis to find that the delegate or the Director erred in law in making the Determination.
23. I also note that Mr. Moore has not addressed or challenged the factual basis upon which the delegate found him to be a director or officer of Sync2 under the functional approach employed by the delegate. Mr. Moore simply denies that he was a director or officer of Sync2 because he is not shown as one in the corporate records of Sync2, unlike Ms. Bauer. However, as indicated previously, a review of the corporate records is but only one way of establishing if an individual is a director. It is not, however, a reliable way for excluding an individual as a director or officer of a corporation. Where one's name does not appear in the corporate records, as in Mr. Moore's case, it is the functional approach that allows the Tribunal to properly determine if one is an officer or a director. In this case, I find the delegate's analysis and conclusion under the functional approach persuasive, as indicated previously.
24. With respect to the natural justice ground of appeal, Mr. Moore has not advanced any argument or evidence in support of this ground. Further, based on my review of the section 112(5) "record", I do not find any evidence of a breach of natural justice in this case and therefore I reject this ground of appeal.
25. In the result, I dismiss Mr. Moore's appeal.

ORDER

26. Pursuant to Section 115 of the *Act*, I order the Determination dated June 3, 2011, be confirmed in the amount of \$50,665.66, together with any interest that has accrued pursuant to section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal