

An appeal

- by -

Mark Landy, a Director and Officer of MIV Therapeutics Inc. carrying on
business as MIVI Technologies Inc.

(“Landy”)

- 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: Carol L. Roberts

FILE No.: 2010A/92

DATE OF DECISION: September 15, 2010

DECISION

SUBMISSIONS

Stephen R. Klorfein	on behalf of Mark Landy, a Director and Officer of MIV Therapeutics Inc. carrying on business as MIVI Technologies Inc.
Maurice Lien	on his own behalf
Victor Lee	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Mark Landy, a Director and Officer of MIV Therapeutics Inc. carrying on business as MIVI Technologies Inc. (“Landy”), pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued June 11, 2010.
2. Maurice Lien was employed by MIV Therapeutics Inc. (“MIV”) from August 23, 1999, until February 27, 2009. The records suggest that MIV laid him off due to financial difficulties. Mr. Lien filed a complaint alleging that MIV carrying on business as MIVI Technologies Inc. (“MIV or the employer”) had contravened the *Act* in failing to pay him regular wages, vacation pay and compensation for length of service. Following an investigation into Mr. Lien’s complaint, the Director’s delegate determined that the employer had contravened the *Act* in failing to pay Mr. Lien wages. The delegate concluded that Mr. Lien was entitled to wages and accrued interest in the total amount of \$59,489.20. The delegate also imposed an administrative penalty in the amount of \$500 for the contravention, pursuant to section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”).
3. The Determination was sent to the employer with a copy to Mr. Landy, President and CEO of MIV, along with a notice to directors and officers setting out their personal liability under the *Act*. The employer’s appeal period expired on May 31, 2010.
4. On June 11, 2010, when the Determination remained unsatisfied, the Director’s delegate issued a Director Determination against Mr. Landy in the amount of \$20,070.57, representing two months of Mr. Lien’s unpaid wages. The delegate determined that MIV was a non-Canadian company incorporated in the USA, and a parent company of MIVI Technologies, an extra provincially registered company. MIV’s corporate counsel indicated that Mr. Landy was a director, President and CEO of MIV. The delegate concluded that, as Mr. Landy was a director and officer of MIV, he was personally liable for two months wages.
5. Counsel for Mr. Landy contends that the delegate erred in law and failed to comply with the principles of natural justice in finding Mr. Landy responsible for Mr. Lien’s wages.
6. This decision is based on the section 112(5) “record”, the submissions of the parties and the Reasons for the Determination.

ISSUES

7. Whether or not the delegate erred in law in finding that Mr. Landy was an officer of MIV and thus personally liable for Mr. Lien's unpaid wages.
8. Whether or not the delegate failed to comply with the principles of natural justice in concluding that Mr. Landy was personally liable for Mr. Lien's unpaid wages.

FACTS AND ARGUMENT

9. The corporate Determination was not appealed and was not before me. However, the information provided with the appeal submissions discloses that MIV, a company incorporated in Nevada, was extra provincially registered in British Columbia. MIV is the parent company of MIVI. MIVI was incorporated in the Yukon and extra provincially registered in British Columbia. MIVI was struck from the corporate registry in April 2007 for failure to file company reports. The delegate submits that MIV was registered in British Columbia on May 28, 2007, so that MIVI could continue to operate under the control of MIV. Accordingly, the delegate treated MIV and MIVI as one employer.
10. There is no dispute that Mr. Landy was the President and CEO of MIV at all material times. However, Mr. Landy says that he was never a Director or Officer of MIVI Technologies. Mr. Landy contends that because MIV and MIVI are separate corporate entities, the delegate erred in finding him personally liable for Mr. Lien's wages.
11. Counsel for Mr. Landy further argues that the delegate erred in finding that MIV was carrying on business as MIVI. He says that MIVI owned MIV, but that each corporation had separate functions, with MIV's role being to seek regulatory approval and then sell the product while MIVI's role was to engineer and develop the products that MIV would sell.
12. Counsel submits that Mr. Landy was never a Director or Officer of MIVI and never performed any services or duties that could be construed as managerial. Specifically, counsel says, Mr. Landy never attended any board or officer's meetings, was never involved in any financial decisions and never held himself out as an officer or director of MIVI. Finally, he submits that Mr. Landy was an employee of MIV while Mr. Lien was an employee of MIVI.
13. The delegate submits that although Mr. Landy, the President and CEO of MIV at the time Mr. Lien's wages were earned, may not have had managerial duties, he was one of the controlling minds of MIVI. Further, he asserts that even though Mr. Landy may not have been listed as an officer or director of MIVI, his participation in MIVI would satisfy the "functional test" set out in the Tribunal's decision in *Michalkovic* (BC EST # RD047/01).
14. The delegate submits that Mr. Landy issued MIV share certificates to MIV and MIVI employees, including Mr. Lien, in lieu of wages. He contends that Mr. Landy cannot now deny this status in the face of a Determination finding him liable to pay wages.
15. Mr. Lien seeks to have the Determination confirmed. He submits that MIVI was a subsidiary of MIV and that MIV managed, operated and controlled MIVI. He says that all MIVI employees received MIV employee stock options signed by Mr. Landy. Finally, Mr. Lien says that his layoff notice was issued by a director/officer of MIV. In noting this fact, I infer that Mr. Lien is arguing that both corporate entities were controlled by the same individuals.

ANALYSIS

16. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- the director erred in law
 - the director failed to observe the principles of natural justice in making the determination; or
 - evidence has become available that was not available at the time the determination was being made.
17. Mr. Landy has the burden of showing, on persuasive and compelling evidence, that there were errors of law in the Determination, as alleged, or that the delegate failed to observe the principles of natural justice.

Error of Law

18. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:
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 be reasonably entertained; and
 5. Exercising discretion in a fashion that is wrong in principle
19. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.*, BC EST # D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.
20. The Tribunal must defer to the factual findings of a delegate unless the appellant can demonstrate that the delegate made a palpable or overriding error.
21. Section 96 of the *Act* provides as follows:
- 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.
22. Section 96(2) sets out certain exceptions to section 96(1). Counsel for Mr. Landy did not contend that any of these exceptions were applicable to Mr. Landy, nor does a review of the facts indicate that they are.
23. As noted above, although the Corporate Determination is not before me, I infer that the delegate found MIV and MIVI to be associated under s. 95 of the *Act*. There was no appeal of that Determination and on the evidence before me, there appears to have been sufficient information before the delegate for him to arrive at the conclusion he did.
24. In *Archibald* (BC EST # D090/00) the Tribunal held that because the imposition of a personal unpaid wage liability on corporate officers and directors is an extraordinary exception to the general principle that directors and officers are not personally liable for corporate debts, these provisions must be narrowly construed.

25. The *Act* does not define “director” or “officer”. In *Michalkovic*, the Tribunal incorporated the definitions of officer and director set out in the *Company Act*. The Tribunal also concluded that the definition of senior officer in the *Company Act* implied a functional test and that an individual could be deemed to be an officer if they exercised the functions, duties or tasks that a corporate officer would exercise.
26. There is no dispute that Mr. Landy was not a director of MIVI. At issue is whether or not he was an officer of the employer and therefore personally liable for wage claims.
27. Since the Tribunal decided *Michalkovic*, the *Company Act* has been replaced by the *Business Corporations Act* (“*BCA*”) (S.B.C. 2002, c. 57). The *BCA* defines senior officer as
- (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 office 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.
28. The evidence is that MIVI was wholly owned by MIV, of which Mr. Landy was the President and CEO. Mr. Landy was thus a senior officer of the employer by virtue of his position ((b) and (d)).
29. Although I find the delegate erred in finding that Mr. Landy was a Director of MIV, I am unable to conclude that he erred in concluding that Mr. Landy was a senior officer of the employer and thus personally liable for unpaid wages. I dismiss the appeal on this ground.

Natural Justice

30. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker.
31. Mr. Landy’s appeal submission contained no evidence that he was denied natural justice. There is no evidence Mr. Landy was denied the right to respond to the claim or the Corporate Determination. The record discloses no evidence of a denial of natural justice. I find no basis for this ground of appeal.
32. The appeal is denied.

ORDER

33. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated June 11, 2010, be confirmed, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal