

An appeal

- by -

Edward McHollister a Director or Officer of Trukquip Sales Ltd.
("McHollister")

- 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/77

DATE OF DECISION: October 7, 2008

8. McHollister has submitted some documents with the appeal that are not included in the Section 112 record. The Director has not taken a position on them. I will briefly address the effect of the inclusion of these documents with the appeal in my analysis.

ARGUMENT AND ANALYSIS

9. 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.*

10. 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.

11. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law (see *Britco Structures Ltd.*, BC EST #D260/03). 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.

12. As indicated above, McHollister has provided some material with the appeal that is not included in the Section 112 record. There is always a question whether this new or additional material should be accepted and considered. The Tribunal has taken a relatively strict view of what will be accepted as new, or additional, evidence in an appeal, indicating in several decisions that this ground of appeal is not intended to be an invitation to a dissatisfied party to seek out additional evidence to supplement an appeal if that evidence could have been acquired and provided to the Director before the Determination was issued, 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). The Tribunal has discretion to allow new or additional evidence.

13. In this case, the additional material are documents from the corporate records: a copy of the Incorporation Application for a numbered company, which later changed its name to Trukquip; a Notice of Change of Directors, which is said to have occurred on October 11, 2005 and which was filed with the Registrar of Companies on July 20, 2006; a copy of the minutes of the numbered company dated October 11, 2005; and a copy of the Articles of Trukquip. While they are not included in the Section 112 record, that may simply have been an oversight by the Director, as the reply submission made by the Director on the appeal says the corporate records have been reviewed and infers that only select documents were taken from those records and submitted to the Tribunal as the Section 112 record. In these circumstances, I will accept and consider the additional material provided with the appeal.
14. The appeal raises four arguments against the Determination:
1. McHollister was induced to execute a Consent to Act as a Director of Trukquip as a result of misrepresentation and/or fraud by two individuals who were, at the time McHollister signed the Consent, directors and shareholders of Trukquip;
 2. McHollister was not properly elected or appointed as a director of Trukquip;
 3. the records of the Registrar of Companies showing McHollister to be a director of Trukquip were incorrect; and
 4. McHollister did not exercise the functions, tasks or duties of a director or officer of Trukquip.
15. The last argument only becomes relevant if McHollister can show the Registrar's records are inaccurate. The fact that McHollister never acted as a director or officer is legally irrelevant to his liability under Section 96 where he was listed as a director or officer in the corporate records and the presumption of correctness is not rebutted: see *Lucille M. Pacey, a Director or Officer of Mosaic Technologies Corporation*, BC EST #D121/04.
16. In respect of the first argument, the Tribunal has not accepted that a director or officer of a corporation may be relieved of liability under Section 96 based on oppressive conduct. In *Guiying Jiang, a Director or Officer of Grand East Supermarket Inc. and Di Liu, a Director or Officer of Grand East Supermarket Inc.*, BC EST #D074/06, the Tribunal, at paras. 77 and 78, made the following observations:
- There are four general exceptions to personal liability which are enumerated in subsections 96(2)(a), (b), (c) and (d). None of those subsections are applicable here. Nor do any of these provisions grant the Tribunal the discretion to relieve against the liability of directors based on oppression or due diligence. There is nothing in the *Administrative Tribunals Act* that confers discretion on this Tribunal in such matters.
- The jurisdiction of the Tribunal is set out in Parts 12 and 13 of the *Act*. An examination of the powers of this Tribunal does not reveal any general power to relieve a person from the consequences of breaches of the *Act*.

See also *Peter Stursberg, a Director or Officer of Cypress Park Auto Services Ltd.*, BC EST #D380/01.

17. The second and third arguments are related. The argument is that McHollister was never properly or validly appointed as a director of Trukquip and, consequently, the Registrar of Companies' records showing him to be a director of Trukquip were inaccurate. The argument relies on section 122 of the *Business Corporations Act*, SBC 2002, ch. 57; the Articles of Incorporation of Trukquip and the Tribunal's decision in *Stephen E. Gates, a Director or Officer of Ezebiz Software (Canada) Inc.*, BC EST #D064/02, where the Tribunal accepted that a person listed as a director with the Registrar of Companies could avoid the effect of the presumption of correctness by demonstrating, on a balance of probabilities, that the corporate record was inaccurate because the consent to act as a director had ceased to be effective and the registration of the individual as a director after expiry of the consent was legally invalid. The circumstances of the *Gates* decision were somewhat different than the circumstances here, as there is no indication that the consent signed by McHollister was conditional. Notwithstanding the different circumstances, the *Business Corporations Act* is clear that to be valid, the election or appointment of a director must be accord with that Act and with the memorandum and articles of the company: see section 122(1) and 123(2).
18. On the basis of the material and submissions before me, I agree with the argument that McHollister was not validly elected or appointed. I am satisfied that he has, on a balance of probabilities, met the onus of establishing that his appointment as a director of Trukquip was not legally valid, that he should not have been recorded as a director of the Company and that the Company records are inaccurate. The presumption of correctness of the corporate records has been rebutted and the Director may not rely on the Registrar of Companies' records to establish his liability under Section 96 of the *Act*.
19. The Director may still establish liability by showing McHollister actually performed the functions of a director or officer of Trukquip. The Tribunal has consistently indicated that an individual, even if not registered as a director or officer, can in fact be found liable under section 96 if that individual performs the functions of a director: see *Director of Employment Standards (Re Michalkovic)*, BCEST #RD047/01. In the argument submitted by the Director on this appeal, it is alleged that McHollister was performing the functions of a director; that allegation is denied by McHollister. The Determination does not consider McHollister's liability under section 96 on a functional analysis and I would not presume to address it without ensuring there is an opportunity for McHollister to be heard on that matter and without the benefit of analysis by the Director.
20. I conclude the Determination must be cancelled. In respect of the allegation that McHollister performed the functions of a director or officer of Trukquip, there is no prohibition in the *Act* against the Director investigating his liability from that perspective and analyzing that issue in another Determination. Nor is there any prohibition against the Tribunal referring the matter back to the Director to consider that issue. The authority of the Tribunal under Section 115 contemplates a Determination may be both cancelled and the matter be referred back to the Director for further investigation.

ORDER

21. Pursuant to Section 115 of the *Act*, I order the Determination dated May 28, 2008 be cancelled and the matter be referred back to the Director for further investigation.

David B. Stevenson
Member
Employment Standards Tribunal