

An appeal

- by -

Samuel Nam a Director or Officer of Teles Training Inc.

- 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: John M. Orr

FILE No.: 2004A/72

DATE OF DECISION: June 8, 2004

DECISION

SUBMISSIONS

Samuel Nam	On his own behalf
Lucio Teles	President of Teles Training Inc.
Murray N. Superle	Delegate on behalf of the Director

OVERVIEW

This is an appeal by Samuel Nam (“Nam”) pursuant to Section 112 of the Employment Standards Act (the “*Act*”) from a Determination dated March 12, 2004 by the Director of Employment Standards (the “Director”) finding him personally liable as a Director or Officer of Teles Training Inc. (“Teles” or “the corporation”) for a wage liability incurred by the corporation.

In the exercise of its authority under section 107 of the *Act* the Tribunal has concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

By way of background to the determination against Nam, a determination (“the corporate determination”) was issued against Teles in November 2003 finding that the corporation was liable to wages to an employee, Bat-Sheva Levy, in the amount of \$32,230.55. During the investigation of the corporate liability a hearing was held in June 2003.

Subsequently, on March 12, 2004, the Director issued a determination against Nam assessing him personally liable as a “director/officer” of the corporation for two months wages of the employee in accordance with Section 96 of the *Act*. The Director’s delegate relies upon a corporate record search that indicates that Nam was listed as the corporate “Secretary”.

The two-month wage liability for directors or officers of the corporation would have accrued in the period from May 16, 2002 to July 16, 2002.

It appears from the file material before me that Teles did not appeal the corporate liability determination. However Nam has appealed the determination made against him personally. Nam asserts that his only involvement with the corporation was as an independent contractor for a two-year period ending in August 2001. He asserts he has had no involvement with the corporation since that time. He asserts he never was an officer or director of the corporation.

The grounds for appeal state that there is new evidence that has become available that was not available at the time the determination was being made.

ISSUE

The issue in this case is firstly whether the new evidence is admissible and secondly, whether the appellant was a Director or Officer of the corporation at the time that the wage liability accrued.

ANALYSIS

The first issue in this case is whether ‘new’ evidence should be admitted at this stage in the proceedings. The new evidence tendered consists of two sworn statutory declarations.

The first declaration is from Nam in which he attests that he provided consulting services to the corporation from January 1st, 1999 to August 31st, 2001. He further attests that since August 31st, 2001 he has had no involvement with the corporation in any capacity. He further declares that he has never, to his knowledge, been duly and validly appointed as an officer or director nor has he ever functioned as such. He swears that if he is shown as a director or officer such appointment was made without his knowledge or consent.

The second declaration is from Lucio Teles, the President and a director of the corporation, in which he confirms that Nam only worked for the corporation as a consultant from January 1999 to August 2001. He also swears that Nam never functioned as an officer or director. Lucio Teles swears that any records or corporate filings that indicated that Nam was an officer or director were made in error. No explanation for the error is given.

The appeal, along with these documents, was shared with the delegate. The delegate has made no submission opposing the admission of this new evidence but relies upon the corporate records.

On reviewing the “record” that has been provided by the delegate it appears that there may have been no opportunity for Nam to produce this ‘new’ evidence at any earlier point in the process. It appears that he was not involved in the corporate investigation in any way. He was not given any notice nor was he involved during the hearing process. Nam is not even referred to in the reasons for the corporate determination. The corporate determination that was issued in November gave notice to the directors and officers of the corporation that they may be found personally liable. However there is no evidence that Nam was served with a copy of the corporate determination or had any opportunity whatsoever to respond to it prior to the issuing of the determination against him personally.

Section 77 of the *Act* provides that if an investigation is conducted, the Director (or her delegate) must make reasonable efforts to give a person under investigation an opportunity to respond. In addition, natural justice requires that when any individual is to be held personally liable for a corporate liability, be they employees, directors, officers, or agents, they must be given a meaningful opportunity to respond: *Competition Towing Ltd*, (1999) BCEST #D392/99.

In this case it appears that the first opportunity for Nam to respond was after he was served with the determination assessing him as personally liable. His only means of response was to file an appeal. Accordingly, I conclude that this is a very appropriate and proper case to admit the new evidence.

The question then remains as to whether there is a substantial basis for a finding that Nam was an officer or director of the corporation. The delegate relies on a “BC OnLine” corporate search that shows that Nam was an officer and listed as the Secretary. The delegate refers to Nam as a director/officer but the search indicates on its face that Nam was not a director so it is more proper to simply refer to whether he was at the relevant time an “officer” of the corporation.

The BC OnLine search certainly indicates Nam was an officer and he is listed as the secretary at the time the search was done. The date of the search is significant because the liability for officers under Section 96 is for wages that were earned or payable at a time when the person was an officer or director. In this case this liability accrued in May, June and July of 2002. The search was conducted online in September 2002.

The Tribunal has held that the Director may rely upon corporate records to identify the persons who are directors and officers of a corporation and that those records give rise to a rebuttable presumption that the person so named is in fact a director or officer: *Wilinofsky*, BCEST #D106/99 et al.

A problem may arise however where the delegate relies upon an “on-line” search. The search ‘on-line’ gives a current snapshot of the corporate records. It may not give the history of appointments. In this case the ‘on-line’ search portrays a state of corporate affairs that existed on September 17, 2002. It does not give any information about who may have been an officer or director of the corporation between May and July of 2002. It may be that a search could have been conducted on-line that was date sensitive to the appropriate and material time period or it may have been necessary to have accessed the corporate records book to identify the directors and officers at the material time.

In this case the September on-line search is certainly some evidence that might give rise to a reasonable assumption that the directors and officers listed at that time were the directors and officers between May and July but it is not conclusive evidence that should give rise to a ‘presumption’ of that fact.

In face of the sworn evidence from Nam and the President of the corporation the assumption that the September search was relevant becomes extremely tenuous. Even if there were a ‘presumption’ arising from the searches I conclude that the presumption is clearly rebutted by the sworn evidence presented by and on behalf of Nam.

Apart from the corporate records it is clear that a person may be a director or officer without being recorded as such, *Michalkovic*, BCEST #RD047/01 (Reconsideration). The Tribunal has indicated that a functional test may be used to assess whether or not a person has acted as an officer or director of a company at the material time. The sworn evidence of Nam and the President of the corporation is that Nam never acted in the capacity of director or officer of the corporation.

I have reviewed the ‘record’ provided by the delegate and there is no evidence in either the corporate determination or the personal determination that Nam performed any of the functions of an officer or director. The delegate did not make any submissions on this basis in the course of this appeal.

Accordingly, I conclude that Nam has met the onus of establishing that the determination against him personally as a director or officer of the corporation should be cancelled.

ORDER

I order, under section 115 of the *Act*, that the Determination herein dated March 12, 2004 is cancelled.

John M. Orr
Member
Employment Standards Tribunal