

An appeal

- by -

Brent Richard Bysouth, an Officer of Canonline Media Corporation  
(“Bysouth”)

- 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:** Robert Groves

**FILE No.:** 2008A/103

**DATE OF DECISION:** December 8, 2008

## DECISION

### SUBMISSIONS

Brent Bysouth	on behalf of himself
Mica Nguyen	on behalf of the Director of Employment Standards

### OVERVIEW

1. Brent Bysouth ("Bysouth") appeals a Determination issued by a delegate (the "Delegate") of the Director of Employment Standards (the "Director") on August 13, 2008 (the "Determination") in which the Delegate decided that Mr. Bysouth was a corporate officer of Canonline Media Corporation ("CMC") and liable in that capacity under section 96 of the *Employment Standards Act* (the "Act") for compensation for length of service, vacation pay, and accrued interest totaling \$10,388.35 found to be owed by CMC to Melanie Thomson ("Thomson") in a Determination dated June 27, 2008 (the "Corporate Determination").
2. The relevant portion of section 96 of the *Act* says this:

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.
3. I have before me Mr. Bysouth's Appeal Form and attached submission, the Determination and the Reasons for the Determination, the Corporate Determination and the Reasons for it, a submission from the Director, and the record the Director says was before the Delegate at the time the Determination was being made, as well as a final submission from Mr. Bysouth.
4. Pursuant to section 36 of the *Administrative Tribunals Act*, 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. I have concluded that this appeal shall be decided having regard to the written materials I have received, without an oral hearing.

### FACTS

5. CMC operates a computer software technology business. Ms. Thomson commenced to be employed on or about December 12, 2002. Initially, she was employed as CMC's human resources manager. Thereafter, she became CMC's chief operating officer, and that was the position she held when CMC terminated her employment on February 21, 2008.
6. Ms. Thomson filed a complaint under section 74 of the *Act* in March 2008. The Corporate Determination was issued following a hearing conducted by the Delegate on June 18, 2008, at which Ms. Thomson was present. No representative of CMC attended at the hearing. CMC did not appeal the Corporate Determination.

7. The Director's submission states that Mr. Bysouth communicated with the Employment Standards Branch on July 24, 2008, advising that he had resigned as an officer of CMC as of January 31, 2008, and was not, therefore, responsible for paying any part, let alone all, of the amount found to be owed to Ms. Thomson in the Corporate Determination. The Director further says that a representative of the Branch invited Mr. Bysouth to provide documentation in support of his assertion that he was not a corporate officer at the relevant times, but that no further communication was received from him prior to the issuance of the Determination that is the subject of this appeal. The Determination resulted from the investigation the Delegate conducted. The Delegate held no hearing before issuing it.
8. The Reasons for the Determination indicate that the Delegate conducted a BC Online Registrar of Companies Corporation Search for CMC, in response to which was received a summary which advised that CMC had been incorporated in 1999, and that as at June 18, 2007, the date of the last annual report filed by the company, Mr. Bysouth was noted as holding the office of president. Not having received any documentation in support of Mr. Bysouth's oral assertion that he had resigned as an officer, or evidence suggesting that Mr. Bysouth was not an officer at a time when Ms. Thomson's entitlement was earned or payable for the purposes of section 96, the Delegate issued the Determination.
9. On appeal, Mr. Bysouth asserts that he submitted his resignation as president of CMC as of January 15, 2008, and had no involvement with the company thereafter. In support he produces a copy of a Form 10 Notice of Change of Directors issued by the Ministry of Finance, BC Registry Services, stating that the Notice was filed on March 4, 2008, and that Mr. Bysouth had ceased to be a director on January 15, 2008. I note in passing that the Notice says nothing about Mr. Bysouth's status as a corporate officer, namely, president.
10. Mr. Bysouth also produces a copy of a letter from him to CMC and an affiliate dated January 2, 2008 which states that effective January 15, 2008:

"...I resign from all positions that I hold with [CMC and two related companies]... This resignation includes the positions as director(s) of all three companies."
11. It appears from emails involving other parties associated with CMC, but not Mr. Bysouth, copies of which Mr. Bysouth also appends to his submission, that his resignation was later made effective on January 28, 2008.
12. A Record of Employment also delivered by Mr. Bysouth reveals that he was employed by CMC as chief software architect from July 8, 2002 until January 31, 2008.

## **ISSUES**

13. Is there a basis for my deciding that the Determination must be varied or cancelled, or that the matter must be referred back to the Director for consideration afresh?

## **ANALYSIS**

14. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:

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 being made.

15. Section 115(1) of the *Act* should also be noted. It says this:

115(1) After considering whether the grounds for appeal have been met, the tribunal may, by order,

- (a) confirm, vary or cancel the determination under appeal, or
- (b) refer the matter back to the director.

16. In his Appeal Form, Mr. Bysouth has indicated that he challenges the Determination on the grounds set out in sections 112(1)(b) and (c) of the *Act*. He contends that the Determination is tainted by a failure to observe the principles of natural justice, and that there is new evidence crucial to the outcome which should be considered.

17. A plea that a delegate has failed to observe the principles of natural justice raises a procedural concern that the proceedings which preceded the making of a determination were in some manner conducted unfairly. Typically, a challenge on this ground asserts that a party did not have an opportunity to know the case against it, or an opportunity to be heard in its own defence. This aspect of the obligation is imported directly into proceedings conducted at the behest of a delegate under the *Act* by virtue of section 77, which requires that if an investigation is conducted, the delegate must make reasonable efforts to give a person under investigation an opportunity to respond.

18. It is clear from the record that Mr. Bysouth knew the case being advanced against him. The Director's submission reveals that there were communications between Mr. Bysouth and the Branch after the Corporate Determination had been issued in which the matter of Mr. Bysouth's liability as an officer of CMC was squarely raised. The Director says that the representative of the Branch with whom Mr. Bysouth spoke requested that he provide documentary proof that he had resigned as an officer, but that Mr. Bysouth did not do so. Mr. Bysouth nowhere disputes the accuracy of the Director's account.

19. What Mr. Bysouth argues is that the Delegate should have confirmed Mr. Bysouth's assertion that he had resigned as a corporate officer with Ms. Thomson, as she was a senior executive with CMC at the relevant time, and therefore she would have been in a position to know whether Mr. Bysouth's statements on the point were true. In addressing this submission, it must be said that there have been decisions of the Tribunal in which failures to observe the principles of natural justice have been identified where delegates conducting investigations do not seek to interview important witnesses, particularly where a party responding to a complaint suggests that they do so (see, for example, *Whitaker Consulting Ltd.* BC EST #D033/06). Whether a failure regarding natural justice will be found in a particular case will always depend on the circumstances, however. Suffice to say, the Tribunal will be more inclined to identify a failure where the evidence of the witness is likely to weigh heavily in determining the outcome, and especially where credibility looms large.

20. In my opinion, a failure on the part of the Delegate to interview Ms. Thomson concerning Mr. Bysouth's resigning as a corporate officer of CMC did not, in the circumstances of this case, amount to a failure on

the Delegate's part to observe the principles of natural justice. My reason for coming to this conclusion is that there is no indication in the material I have received that Ms. Thomson would necessarily have been in any better position than Mr. Bysouth himself to demonstrate that he had resigned from his position as a corporate officer with CMC, and when that occurred. Ms. Thomson was, after all, a party adverse in interest to Mr. Bysouth, and she had been dismissed from her position with CMC. It is unclear to me that she would have had access to CMC's corporate records in a way that Mr. Bysouth would not. The Delegate's obligation to investigate further in this specific way must also I think be balanced by the obligation of a person in Mr. Bysouth's position to bring forth himself all the documents and information necessary to assist the Delegate in determining whether Mr. Bysouth should properly be found liable in his personal capacity as an officer.

21. Nor do I discern a critical question relating to credibility on the facts of this case. The issue is more technical, in my view. Where an individual is recorded as an officer of a company in the records maintained by the Registrar, a rebuttable presumption arises that the individual actually is an officer of the company in question. In the absence of evidence sufficient to rebut that presumption, the Director may presumptively rely on those corporate records to establish the individual's corporate status (see *Wilinofsky* BC EST #D106/99; *Director of Employment Standards (re: Laurent Michalkovic)* BC EST #RD047/01). Here, the Delegate had the evidence of the August 7, 2008 corporate search which identified that as at June 18, 2007, at least, Mr. Bysouth was the president of CMC. In the Determination, the Delegate concluded that Mr. Bysouth had led no evidence sufficient to rebut that presumption. That, in my opinion, was not a conclusion that rested on a finding of credibility, at its heart. Rather, it was based on a determination that Mr. Bysouth had failed to tender evidence adequate to meet the evidentiary effect of the presumption, which I take to be something different. One can hardly blame the Delegate for coming to this conclusion, I think, given that Mr. Bysouth appears merely to have verbally advised the representative of the Branch that he had resigned as a corporate officer as of January 31, 2008, and then failed to follow up by delivering documentary support for this statement, which the Delegate had requested of him, and which he later attempted to tender as new evidence on this appeal.
22. Mr. Bysouth's other ground of appeal is that evidence has become available that was not available at the time the Determination was being made. He alludes to the Form 10, the January 2, 2008 correspondence, the email correspondence, the Record of Employment, and the submissions to which I have referred earlier.
23. The Tribunal's right to allow an appeal based on new evidence incorporates an obligation to exercise a discretion. The discretion must be exercised with caution. One of the criteria that the Tribunal will apply in determining whether an appeal should be allowed on this basis is to ask whether the evidence could not, with the exercise of due diligence, have been discovered and presented to the delegate during the investigation or adjudication of the complaint and prior to the determination being made. In other words, was the evidence really unavailable to the party seeking to tender it? Policy reasons supporting this approach are to be found in section 2 of the *Act*, which identify the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the *Act* as purposes of the legislative scheme. At the same time, even if the evidence was not unavailable in the sense described, the Tribunal may nevertheless consider it if the appellant can demonstrate that the evidence is important, there is good reason why the evidence was not presented at first instance, and no serious prejudice will be visited upon the respondent if it is admitted (see *Re Specialty Motor Cars* BC EST #D570/98).

24. The principal difficulty I have with Mr. Bysouth's appeal on this ground is that I nowhere see any explanation why the evidence to which he alludes was "unavailable" to him, and therefore could not have been communicated to the Delegate prior to the issuance of the Determination. This failure is rendered more stark in the circumstances of this case when one considers that the Director says, and Mr. Bysouth does not deny, that the issue of Mr. Bysouth's resignation as an officer of CMC was discussed prior to the issuance of the Determination, that a representative of the Branch requested that Mr. Bysouth deliver documentary proof of his resignation, and that nothing was heard from him thereafter. It was only after the Determination was made that Mr. Bysouth produced the documents on which he relies in this appeal. As stated by the Tribunal in *Senor Rana's Cantina Ltd.* BC EST #D017/05, the clearer it is that there has been a concerted refusal by a party to participate in an investigation, the less likely it will be that the Tribunal will be disposed to allow an appeal on the basis that new evidence should be considered. While I cannot conclude that Mr. Bysouth's conduct amounts to an outright refusal to participate, it nevertheless falls woefully short of what one would have expected from him once the representative of the Branch requested documentary support for his assertion that he had resigned as a corporate officer of CMC. It follows that I have decided that Mr. Bysouth has not met the burden resting on him to show that the evidence he wishes considered was not available to him at the time the Determination was being made.
25. If I am in error, and if I were to decide to permit Mr. Bysouth to rely on the evidence he suggests is new for the purposes of this appeal, I would still decline to conclude that it demonstrates the Delegate was wrong in deciding that Mr. Bysouth must be found liable pursuant to section 96. As I construe that evidence, it shows that Mr. Bysouth ceased to be a director of CMC in January 2008. I do not see that it demonstrates conclusively that Mr. Bysouth ceased to be an officer, namely president, of that company, although some of the language employed in his January 2, 2008 letter, and the email correspondence, could lead to that inference being drawn.
26. Even assuming for our purposes that the evidence is sufficient to show that Mr. Bysouth resigned as a director and officer of CMC effective January 2008, however, I am of the view that it does not absolve Mr. Bysouth of his responsibilities under section 96.
27. Mr. Bysouth argues strenuously that he had ceased to hold any position of authority at CMC before Ms. Thomson was dismissed, that he therefore did not participate in the events leading to the dismissal, and so was not a party to the decision made regarding the sums to which she might be entitled as a result of it. I infer from this that Mr. Bysouth submits that he should not be found liable pursuant to section 96 because he was not a director or officer of CMC at the time the wages in question *should have been paid*. There is no dispute that the wages the Delegate determined were owed should have been paid when Ms. Thomson was dismissed on February 21, 2008, a date after Mr. Bysouth says he ceased to be an officer or director of CMC. However, section 96 makes it clear that an individual may also be liable for up to two months' unpaid wages if he was an officer or director of the corporation at the time the wages were *earned*. As set out in the Corporate Determination, a decision CMC did not appeal, Ms. Thomson's entitlement to compensation for length of service was calculated on the basis that she had completed between five and six years of employment as at the date of her dismissal, which entitled her to five weeks' wages together with the applicable annual vacation pay. Given that Ms. Thomson commenced to work for CMC on or about December 12, 2002, it follows that she had *earned* her five weeks' wages as compensation for length of service, and annual holiday pay, by December 12, 2007, or a date close by. There is no evidence that Mr. Bysouth had ceased to be a director, let alone an officer, of CMC, on that date, or for many weeks thereafter. On that evidence, it would not in my opinion have been an error for the Delegate to have concluded that Mr. Bysouth continued to be a director or officer of CMC when the wages in question were *earned*.

**ORDER**

28. I order that the Determination dated August 13, 2008 be confirmed.

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**Robert Groves**  
**Member**  
**Employment Standards Tribunal**