

An appeal

- by -

Michael Bishop, a Director or Officer of Mosaic Technologies Corporation  
("Bishop")

- 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:** David B. Stevenson

**FILE No.:** 2004A/47

**DATE OF DECISION:** July 6, 2004



office of the corporation within the province and to registered the directors and officers of the corporation, including Bishop. No appeal of the Determination was filed by the corporation.

A BC On-line search of the Registrar of Companies showed Mosaic Technologies Corporation was incorporated on July 19, 1983 and listed Bishop as one of its directors.

The wages of the affected employees were earned prior July 11, 2003. The Determination refers to a letter from Richard Buckingham, President of Mosaic Technologies Corporation, indicating that Bishop had given verbal notice of his intention to resign as a director of the corporation in May 2003 and provided written notice of his resignation on July 31, 2003.

The Director found that Bishop was a director of Mosaic Technologies Corporation at the time wages were earned and payable.

The Director also found that Bishop had “authorized, permitted or acquiesced in” a contravention of Sections 18, 45, 58 and 63 of the *Act* and was liable for the administrative penalty imposed on Mosaic Technologies Corporation in the corporate Determination.

## ARGUMENT AND ANALYSIS

The burden is on Bishop to persuade the Tribunal that the Determination was wrong and justifies the Tribunal’s intervention. An appeal to the Tribunal is not a re-investigation of the complaint nor is it intended to be simply an opportunity to re-argue positions taken during the complaint process.

The grounds upon which an appeal may be made are 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.*

Counsel for Bishop raises each of the above grounds of appeal and has provided a brief submission of the elements of each ground. The submission provides little in the way of substantive argument and adds nothing to the position taken on behalf of Bishop during the complaint process. The record contains letters dated January 22, 2004 and February 4, 2004 from counsel for Bishop to the Director, the latter attaching a statement from Richard Buckingham, President of the corporation, that Bishop gave “notice of his intention to resign as a director of Mosaic Technologies Corporation in May 2003” and “written notice of his resignation on July 31, 2003”.

Counsel says the Director erred in law in finding Bishop was a director of Mosaic Technologies Corporation for the purposes of the *Act* because he was not legally appointed, he *de facto* resigned in May 2003 and none of the corporation’s procedures, filing and documentation were up to date. It is unclear from the submission whether any of those arguments are interrelated.

In reply, counsel for the Director submits that Bishop has not offered any explanation, or support, for the assertion he was not legally appointed as a director of Mosaic Technologies Corporation and in the absence of some evidence rebutting the presumption raised by the corporate records, which showed Bishop as a director of the corporation at the time wages were earned and payable, those records are determinative. The Director also submits that a verbal resignation has no legal effect under either the provincial or federal company legislation; that to be effective, a director's resignation must be in writing and delivered to the corporation. Bishop has not provided a copy of the written resignation which, in any event, was apparently not delivered to the corporation until July 31, 2003, some time after the wage liability was incurred. Finally, counsel for the Director argues that the failure of Mosaic Technologies Corporation to keep its procedures, filings and documentation up to date is irrelevant unless Bishop is able to show the corporate record is inaccurate and that has not been done.

I agree with counsel for the Director on this aspect of the appeal. In *Director of Employment Standards (Re Michalkovic)*, BC EST #RD047/01, the Tribunal confirmed that while corporate records, primarily those available through the Registrar of Companies, are presumptively reliable, that presumption can be rebutted by the putative director or officer showing the corporate records are inaccurate or that there are circumstances that which would make it inappropriate to find that person is a director or officer for the purposes of the *Act*. That decision makes it clear the burden is on the person recorded as a director or officer to rebut the presumption.

Counsel for Bishop has provided nothing to support the reasons given for asserting the Director erred in law and has not rebutted the presumption raised by him being recorded as a director of Mosaic Technologies Corporation. He has not met the burden on him and this ground of appeal is dismissed.

The appeal says the Director failed to observe principles of natural justice in making the Determination. Specifically, counsel for Bishop submits the Director determined that Bishop permitted or acquiesced in a contravention of the *Act* by Mosaic Technologies Corporation without any evidence and failed to give Bishop an opportunity to be heard on that matter. In reply, counsel for the Director disputes the relevancy and accuracy of the assertion that Bishop was unaware of the contraventions of the *Act* by Mosaic Technologies Corporation. Counsel says it is improbable that Bishop was unaware of the corporation's financial circumstances. Alternatively, counsel for the Director argues that if Bishop was unaware of the corporation's financial circumstances, it was because Bishop wilfully chose to remain ignorant of that state of affairs or was negligent in failing to properly review the financial statements of the corporation and neither provides a basis for exempting a director and/or officer of a corporation from personal liability for unpaid wages.

Counsel for the Director's submissions on this ground of appeal are directed at the personal liability under Section 96(1) of the *Act* and I generally agree with those submissions as it applies to that provision. There is ample in the record to show Bishop was provided a reasonable opportunity to respond to a potential liability under Section 96(1). As argued by counsel for Bishop, however, this ground of appeal is related to the liability imposed by the Director under Section 98(2) of the *Act*, which reads:

*98 (2) If a corporation contravenes a requirement of this Act or the regulations, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the contravention is also liable to the penalty.*

As indicated above, the Director imposed administrative penalties on Mosaic Technologies Corporation in the amount of \$2000.00. The Director imposed personal liability on Bishop for those administrative

penalties under Section 98(2). The following excerpts from the Determination address that aspect of the Determination:

Mosaic Technologies Corporation has contravened sections 18, 45, 58 and 63 of the Act which has resulted in the issuance of an administrative penalty. To date, the administrative penalty has not been paid.

Pursuant to Section 98(2) of the Act if a corporation contravenes a requirement of this Act or the Regulations a director or officer of the corporation who authorizes, permits or acquiesces in the contravention is also liable to pay the penalty.

Michael Bishop is, therefore, personally liable for the administrative penalty.

Although this ground of appeal is framed in terms of natural justice, it could also have been framed as an error of law, as it raises a question of the sufficiency of the evidentiary foundation and the reasons for the decision made by the Director under Section 98(2). Failing to frame this aspect of the appeal as an error of law does not prohibit the Tribunal examining the appeal on this basis. As the Tribunal stated in *J.C. Creations Ltd. o/a Heavenly Bodies Sport*, BC EST #RD317/03, given the purposes and provisions of the Act, an overly legalistic and technical approach to Section 112(1) is inappropriate; it is the substance of an appeal, not its form, that should be addressed.

I accept this ground of appeal on the basis that the Director failed to observe principles of natural justice in making the Determination and on the ground that the Director erred in law in concluding Bishop had authorized, permitted or acquiesced in a contravention of the Act by the corporation.

In *Competition Towing Ltd.*, BC EST #D392/99, the Tribunal said the following about the standard of proof which must be met by the Director under Section 98(2):

However, looking at the construction of Section 98(2) of the Act and, ignoring the reference to employees or agents of the corporation for the time being, it is only those directors or officers who have *authorized, permitted or acquiesced* to the violations of the Act that can be held liable for penalties imposed on corporations. Simply being a director or officer when a violation of the Act or of the Regulations occurs is not in itself sufficient to attract liability for penalties. In short, there is a defence for directors or officers under Section 98(2) of the Act which is not there under Section 96.

There is therefore a higher standard of proof that the Director must meet under Section 98(2) of the Act when assigning personal liability for penalties to directors or officers of corporations as opposed to assigning liability to directors or officers for unpaid wages. Consequently, before the Tribunal confirms a determination assigning personal liability for a penalty under Section 98(2) of the Act, it must ensure that the Director has taken those extra steps to determine if the persons named in the determination have in fact *authorized, permitted or acquiesced* in the contravention. At the very least, in the interests of natural justice, the Tribunal should be satisfied that such persons have been given a meaningful opportunity to respond to any assertion by the Director that they had in fact *authorized, permitted or acquiesced* in the contravention. The Determination must also be clear as to the reasons why those named are being held liable.

There is nothing in the record indicating Bishop had any meaningful opportunity to respond to the question of whether he authorized, permitted or acquiesced in a contravention of the Act by the corporation. As well, there is no evidence in the Determination, or in the record, upon which such a finding could be made by the Director. It is an error of law to reach a conclusion of fact on no evidence. Finally, the director has also erred in law by failing to provide reasons why Bishop was being held liable

(see *R. v. Sheppard*, 2002 SCC 26, 162 C.C.C. (3d) 298). As in the *Competition Towing* case, the Director seems to have assigned liability to Bishop as though it was a liability under Section 96.

This ground of appeal succeeds. The liability imposed on Bishop under Section 98(2) of the *Act* is cancelled.

The final ground of appeal is based on new evidence. It is unclear from the appeal precisely what this new evidence is. The appeal submission simply states that the procedures, filings and documentation of the corporation was not up to date and that Bishop had no knowledge of the true position of the company. The appeal submission on this ground then states what appears to be the legal conclusion, rather than a fact, that these omissions were equivalent to non-disclosure and deception having the effect of absolving Bishop of any personal liability.

There are two principal reasons why I reject this ground of appeal: first, the appeal does not show there is any evidence now available which was not reasonably available to Bishop, and which could have been provided to the Director, during the process leading to the Determination that was made against him; and second, to the extent such evidence may exist (none is provided with the appeal), it is irrelevant to Bishop's liability under Section 96 of the *Act*. On the former point, I note once again that counsel for Bishop filed two submissions to the Director relating to Bishop's potential liability as a director of Mosaic Technologies Corporation. On the latter point, the Tribunal has on more than one occasion endorsed the position that persons who agree to be appointed as directors or officers of corporations are considered to be aware of their responsibilities and of the potential risks of holding such positions. The potential for liability under the *Act* for unpaid wages cannot be avoided by a director showing he or she was uninformed, misinformed or misled about those risks. Absent fairly clear evidence of some concerted plan on the part of other directors to deceive Bishop about the state of the corporation, if he was unaware of the true financial position of the corporation, that can only be because he chose not to inform himself. If there was some scheme by other directors to deceive him about the true position of the corporation - and there is no evidence of that - I agree with the observation made by counsel for the Director that while such matters may support a cause of action by Bishop against Mosaic Technologies Corporation and those other directors, it does not allow Bishop to avoid liability under Section 96 of the *Act*.

This ground of appeal is dismissed.

## **ORDER**

Pursuant to Section 116 of the *Act*, I order the Determination date February 20, 2004, be varied to exclude liability for administrative penalties in the amount of \$2000.00. In all other respects, the Determination is confirmed in the varied amount, together with any interest that has accrued under Section 88 of the *Act*.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**