

An appeal

- by -

Bradley Shane Morehouse, a Director or Officer of 0789225 B.C. Ltd. carrying on
business as Cash Stor
("Mr. Morehouse")

- 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.: 2009A/129

DATE OF DECISION: December 3, 2009

DECISION

SUBMISSIONS

Bradley Shane Morehouse	on his own behalf
Steven Jerome	on his own behalf
Ed Wall	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Bradley Shane Morehouse (“Mr. Morehouse”) of a Determination that was issued on August 25, 2009, by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Mr. Morehouse was a director or officer of 0789225 B.C. Ltd. carrying on business as Cash Stor (“Cash Stor”), an employer found to have contravened provisions of the *Act*, and was personally liable under Section 96 of the *Act* for an amount of \$2,644.74.
2. In this appeal, Mr. Morehouse says the Director erred and submits there is evidence that has become available which was not available when the Determination was made. While Mr. Morehouse does not say it directly, the appeal effectively seeks to have the Determination against him cancelled.
3. The Tribunal has discretion whether to hold an oral hearing on an appeal. In this case, the Tribunal has reviewed the appeal, the submissions and the material submitted by the parties, including the Section 112 (5) record filed by the Director, and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

4. The issue in this case is whether there is any basis for concluding the Director erred and cancelling the Determination.

THE FACTS

5. The Director issued a Determination against Cash Stor (the “corporate Determination”) on June 4, 2009, in favour of Steven Jerome, a former employee of Cash Stor (the “complainant”) in the amount of \$2,644.74. The unpaid wages of the complainant were earned between October 15, 2007, and June 20, 2008. There was no appeal of the corporate Determination.
6. The Determination under appeal indicates a search of the BC On-line Registrar of Companies showed that Cash Stor was incorporated on April 24, 2007, and that Mr. Morehouse was listed as a director of the company during the period the wages were earned.
7. Based on the above information, the Director found Mr. Morehouse was personally liable under section 96 of the *Act*, which states in part:

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.

8. Mr. Morehouse has filed three documents in support of the appeal. The first is part of a letter from the landlord of the premises from which Cash Stor conducted business. The second is a copy of a statement of account for unpaid rent on those premises. The third is correspondence from the provincial Ministry of Finance notifying Mr. Morehouse that the Registrar of Companies intended to take action under section 422 of the *Business Corporations Act* to dissolve the company if its reporting obligations under the *Business Corporations Act* were not brought up to date.

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. I shall first consider whether the new evidence that Mr. Morehouse has submitted with the appeal should be accepted and considered by the Tribunal.
13. The Tribunal has taken a relatively strict view of what will be accepted as new, or additional, evidence in an appeal. The Tribunal has discretion to allow new or additional evidence. In addition to considering whether the evidence which a party is seeking to introduce on appeal was reasonably available during the complaint process, the Tribunal considers 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).

14. The evidence Mr. Morehouse has provided relating to the arrears in rents was available when the Determination was made and on that ground alone would not be accepted as new evidence. In addition, the information is not relevant to the issue which is considered in an appeal such as this, which is whether Mr. Morehouse was a director or officer of a company found to be liable to an employee under the *Act* for unpaid wages and, as such, is personally liable under section 96 for up to 2 months unpaid wages. For a similar reason, the letter from the Registrar of Companies, while created after the Determination was issued, is also not relevant to the issue and is not accepted for that reason. Mr. Morehouse' liability under section 96 of the *Act* is not dependent on whether the Registrar of Companies intends to strike the company from the corporate registry for non-compliance with the *Business Corporations Act*. The personal liability under the *Act* arises under the provisions of the *Act* when the conditions described in section 96 are found to be present.
15. Mr. Morehouse says that he was a silent partner in the company: "had nothing at all to do with the daily business, employees , etc.". The Director and the complainant dispute that assertion. In the circumstances, however, it does not matter whether he did or didn't take part in the day to day business activities. The test for liability under section 96 is not a functional one where the person is listed as a director or officer in the corporate records, as Mr. Morehouse was in this case: see *Lucille M. Pacey, a Director or Officer of Mosaic Technologies Corporation*, BC EST # D121/04.
16. In the context of the *Act*, a finding that a person is a director or officer of a corporation is a question of mixed law and fact which is predominantly determined on findings of fact. In such circumstances there may be a question about whether the Director has acted in the absence of facts or on an unreasonable view of the facts and so committed an error of law, but those considerations do not arise in this case. Based on the material in the section 112 (5) record there were clear and undisputable facts on which the Director could make the finding that Mr. Morehouse was a director of Cash Stor.
17. While one cannot but feel sorry for the difficulties that have befallen Mr. Morehouse as a result of this venture, the *Act* is clear in its application to his circumstances and compels the conclusion that there is no error in the Determination.
18. Accordingly, the appeal must be dismissed.
19. As a final matter, I note that the submission of the complainant in response to the appeal has raised a dispute with the calculation of wages owed by the Director. That is a matter which properly arises from the corporate Determination but, as noted above, there has been no appeal of the corporate Determination by any party, including the complainant and the time for such an appeal has long since expired. The complainant's concern about the calculation of wages is not before me and I cannot consider it.

ORDER

20. Pursuant to Section 115 of the *Act*, I order the Determination dated August 25, 2009, be confirmed in the total amount of \$2,644.74.

David B. Stevenson
Member
Employment Standards Tribunal