

An appeal

- by -

Richard Welsh a Director and Officer of Cantech Manufacturing Ltd.
(“Mr. Welsh”)

- 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: Carol L. Roberts

FILE No.: 2014A/87

DATE OF DECISION: December 12, 2014

DECISION

SUBMISSIONS

Richard Welsh	on his own behalf, as a Director and Officer of Cantech Manufacturing Ltd.
Dallas Pylypow	on his own behalf
Greg Smithman	on his own behalf
Sean Wright	on his own behalf
Teri Mutter	on her own behalf
Tracy Regier	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Richard Welsh has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on June 12, 2014.
2. Fifteen employees filed a complaint with the Director alleging that Daveco Holdings Ltd. (“Daveco”) and Jada Holdings Limited (“Jada”) carrying on business as Stony Creek Cabinet Company (“Stony Creek”) and Cantech Manufacturing Ltd. (“Cantech”) (collectively, “the Employer”) had contravened the *Act* by failing to pay regular wages, overtime wages, vacation pay, and compensation for length of service. The complainants also alleged that the Employer had required them to pay business costs.
3. On June 25, 2013, the Director’s delegate advised Mr. Welsh by registered letter that she was considering finding Stony Creek and Cantech to be associated companies under section 95 of the *Act* and noted that Mr. Welsh had been appointed as a Director of Cantech on May 10, 2013. Cited in the June 25 letter was section 96 of the *Act* which sets out a director or officer’s personal liability under the *Act*. The letter was also sent to Daveco and Jada carrying on business as Stony Creek and Cantech, with copies to the registered and records offices, and to the directors and officers of both companies.
4. On June 12, 2014, the Director issued a Determination (the Corporate Determination) finding the Employer in contravention of section 18 of the *Act* in failing to pay wages and accrued interest in the total amount of \$89,059.30. The Director also imposed a \$1,000 penalty on Stony Creek and Cantech for the contraventions, pursuant to section 98 of the *Act*.
5. The delegate issued a parallel Determination (the Director Determination) finding Mr. Welsh to be a director of Cantech between May 10, 2013, and June 3, 2013, when the Complainants’ wages were earned and payable. She determined that Mr. Welsh was personally liable to pay \$80,367.12 representing two months’ unpaid wages and interest, pursuant to section 96 of the *Act*. The delegate concluded that there was insufficient evidence that Mr. Welsh authorized, permitted or acquiesced in Cantech’s contraventions, and found him not personally liable for the administrative penalties.

6. Mr. Welsh filed an appeal on July 18, 2014, contending that the Director erred in law in making the Determination and failed to observe the principles of natural justice. Mr. Welsh also alleges that evidence has become available that was not available at the time the Determination was being made.
7. These reasons are based on the written submissions of Mr. Welsh, the delegate, and five of the fifteen employees, the section 112(5) “record” that was before the delegate at the time the decision was made, and the Reasons for the Determination.

FACTS AND ARGUMENT

8. The delegate’s June 25, 2013, letter requested that Mr. Welsh provide her with information regarding a possible association between Daveco Holdings Ltd, and Jada Holdings Limited, partners carrying on business as Stony Creek Cabinet Company and Cantech Manufacturing Ltd. no later than July 5, 2013. The letter also cited section 96 of the *Act* which explains director/officer liability.
9. A June 19, 2013, BC Online Corporate Registry search indicated that Cantech was incorporated April 3, 2001. Dave Kieselbach and Mr. Welsh were listed as the directors and officers. The Corporate Registry indicates that Mr. Welsh became a director effective May 10, 2013. A May 23, 2014, search disclosed that Mr. Welsh continued to be a Cantech director.
10. After receiving the June 25, 2013, letter regarding his personal liability as a director and officer of Cantech, Mr. Welsh informed the delegate that he was not involved in the company, that he did not apply to be a director of Cantech and that he did not sign any documents consenting to be a director. He acknowledged that for a three month period just before the business shut down, he assisted Mr. Kieselbach with the operation of Cantech, as one of the other directors had resigned. He asserted that Cantech had no employees and that it only owned equipment. Mr. Welsh also acknowledged that Cantech was bankrupt and that wages were likely outstanding.
11. The delegate found that Mr. Welsh had not provided any evidence that he did not consent to, or have any knowledge of his appointment as a director despite being provided with an opportunity to do so. The delegate also found that Mr. Welsh acknowledged his responsibility to one of the employees by way of an June 17, 2013, email:

I am really sorry all this happened. I really enjoyed working with you too. Regarding pay, we are working through things right now and considering some options. We’re hoping to do something but I can’t say for sure right now.

12. The delegate found Mr. Welsh personally liable for up to two month’s unpaid wages for each employee.
13. In his appeal submission, Mr. Welsh repeats the statements he made to the delegate; that is, that he was not asked, and did not consent to be a director of Cantech. He asserts that he was hired as an employee of Stony Creek to assist its owner, Dave Kieselbach, with some aspects of its operations. Mr. Welsh repeats his assertion that he was not a director of Cantech and had no say in the operations of the company. He further says that he did not manage or supervise the management of the business or affairs of Stony Creek or Cantech. He contends he had no say in “cash flow planning, movement of funds or input in the strategic direction of the company,” was not a signing authority, had no access to financial statements and was not involved in financial decisions.

14. Attached to Mr. Walsh's written submission is a letter from Mr. Kieselbach in which Mr. Kieselbach seeks to:
- ... clarify the circumstances that led to Mr. Richard Welsh being listed as a director of Cantech Manufacturing Ltd. by BC Registry Services.
- In March of 2013 Mr. Welsh was hired by Stony Creek Cabinet Company to assist with payroll and operations. In early May, Mr. Jeff Venos, a partner of Cantech Manufacturing asked me to remove him as a director of Cantech as he no longer wished to be actively involved with the company.
- On May 10, 2013 I logged on to B.C. Corporate Online and removed Mr. Venos as director and replaced him with Mr. Welsh. Mr. Welsh was not informed either formally or informally of this action. As such, Mr. Welsh did not accept this appointment either formally or informally. At no time was Mr. Welsh in a position to have any control or influence over Cantech.
15. The delegate submits that during the investigation, Mr. Welsh advised her that he assisted Mr. Kieselbach after another individual stepped down as a director and that he was involved in the operations of Stony Creek. The delegate says that on July 5, 2013, Mr. Welsh telephoned her to advise her he had insufficient time to provide his written submission as he had been out of town. The delegate says that at no time did Mr. Welsh either advise her or provide her with any documentation in support of his assertion that he had no management or supervisory responsibilities in the affairs of Stony Creek or Cantech.
16. The delegate also says that at no time did Mr. Welsh advise her that he had no involvement in the finances of Stony Creek. She says that he advised her that he would speak to Mr. Kieselbach and assured her that they would both call her back. The delegate said that Mr. Welsh left messages requesting a return call, and that she attempted to reach him on July 10 and was unable to do so. The delegate further submits that on July 11, 2013, Mr. Welsh inquired about the possibility of a settlement and told her that he would contact her no later than July 17, 2013, after speaking to Mr. Kieselbach. She said that neither Mr. Welsh nor Mr. Kieselbach contacted her.
17. In his reply, Mr. Welsh says that he had no say in the day-to-day operations of Stony Creek. He says that while he assisted Mr. Kieselbach with Stony Creek operations, that assistance did not constitute acting as a director of the company.
18. Mr. Welsh says that he did not respond to the delegate in writing until July 14, 2013, because he did not appreciate his personal liability until receiving the Determination. Until that time he says, he believed he was an employee. He further says that when he spoke with the delegate about his involvement, he had little to tell her. He says that although she may have advised him about the possibility of associating Daveco Holdings, Jada Holdings and Cantech Manufacturing, because he was unaware of the corporate structures Mr. Kieselbach established, he was unconcerned about her comments. He says he was completely unaware what would transpire three months later.
19. Finally, Mr. Welsh says that he cannot prove that he did not have signing authority, have access to company bank accounts and no control over cash flow. He submits that he became involved in the company on the strength of his friend Mr. Kieselbach and that he was as blindsided as the other employees when he lost his investment.
20. The former employees say that Mr. Welsh was introduced to them as an investor in the company and that he was Mr. Kieselbach's good friend. They say that Mr. Welsh invested significant sums in the business and that he, along with Mr. Kieselbach, assured the employees that they were doing what they could to maintain the business as a going concern.

ANALYSIS

21. Section 112(1) of the *Act* provides that a person may appeal a determination on 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.

22. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds. I find that Mr. Welsh has not met that burden. I will address each of the grounds of appeal.

Failure to observe the principles of natural justice

23. Natural justice is a procedural right, designed to ensure that the parties know the allegations against them and have the opportunity to respond. Mr. Welsh does not say how the delegate failed to observe natural justice and there is no evidence of any denial of natural justice in the record. Mr. Welsh received the June 25, 2013, letter regarding his possible liability for wages by registered mail and communicated his position to the delegate. That position was reflected in the Determination. The delegate “heard” Mr. Welsh, and rejected his assertion that he ought not to have been listed as a director, in the absence of any evidence. I find no basis for this ground of appeal.

Error of Law

24. The Tribunal as 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.

25. Having considered the record and the submissions of the parties, I am not persuaded that the Director erred in law. In my view, there was a factual basis before the delegate in which she could conclude that Mr. Welsh was a director and officer at the time the Employees’ wages were earned.

26. Section 96 of the *Act* provides as follows:

- (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.
- (2) Despite subsection (1), a person who was a director or officer of a corporation is not personally liable for:

- (a) any liability to an employee under section 63, termination pay or money payable in respect of an individual or group terminations, if the corporation is in receivership,
- (b) any liability to an employee for wages, if the corporation is subject to an action under section 427 of the *Bank Act (Canada)* or to a proceeding under an insolvency Act

...

27. Section 126 of the *Business Corporations Act* [SBC 2002] c. 57 provides that:

A company must keep a register of its directors and enter in that register

- (a) the full name and prescribed address for each of the directors,
- (b) the date on which each current director became a director,
- (c) the date on which each former director became a director and the date on which he or she ceased to be a director, and
- (d) the name of any office in the company held by a director, the date of the director's appointment to the office and the date, if any, on which the director ceased to hold the office.

28. The corporate records establish that Mr. Welsh was a director and officer of Cantech at the time the employees' wages were earned.

29. Corporate records, primarily those available through the Corporate Registry or at the corporation's registered and records office, raise a rebuttable presumption that an individual is an officer or director of a company. The Director may rely on those records to determine officer and director status. It is then open for an individual who is recorded as an officer or director to provide credible and cogent evidence to prove that the Registrar's records are inaccurate. The burden of proving that one is not a corporate director or officer rests with the individual who denies such status. (*Wilnofsky* (BC EST # D106/99) and *Michalkovic* (BC EST # RD047/01)).

30. The record indicates that Mr. Welsh invested a significant sum of money in the company and was presented to the employees by Mr. Kieselbach as an investor and new business partner. The record also indicates that Mr. Welsh and Mr. Kieselbach made assurances to the employees that the company's financial difficulties were being addressed. The record also contains an email from Mr. Welsh to one of the employees with what appears to be an assurance that wages would be paid. This evidence is strongly suggestive that Mr. Welsh was far more involved in the company than he asserts in his appeal.

31. Mr. Welsh provided no evidence to the delegate that the corporate records were incorrect during the investigation. Although he asserted that he did not "apply" to be a director and did not consent to being one, he provided no evidence that the records were inaccurate. Although Mr. Welsh asserts that he could not "prove a negative", the fact is that there was a presumption, based on the corporate records, that he was a director. Certainly it was open to him at that time to refute that presumption, as he has attempted to do with the "new evidence". Instead, he failed to return promised telephone calls and attempted to settle the matter with the delegate.

32. For the first time on appeal, Mr. Welsh submits a letter from Mr. Kieselbach who says that he "appointed" Mr. Welsh as a director without his knowledge and consent.

33. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four part test for admitting new evidence on appeal:
- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - (b) the evidence must be relevant to a material issue arising from the complaint;
 - (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
 - (d) the evidence must have high probative value, in the sense that, if believed, it could, on its own, or when considered with other evidence, have led the Director to a different conclusion on the material issue.
34. Not only is the evidence not new, as it was clearly available at the time the delegate was investigating the complaint, in my view, it would not have led the delegate to a different conclusion in any event.
35. Although the *Business Corporations Act* provides that directors may be appointed or elected to a company's board (s. 122), no election or appointment is valid unless the individual consents (s. 123), I do not find Mr. Kieselbach's letter to be sufficient to rebut the presumption of Mr. Welsh's status.
36. Mr. Kieselbach's letter is unsworn. Furthermore, there are no corporate records attached to it, such as shareholder or director resolutions.
37. Additionally, although Mr. Welsh was notified of his status as a director of Cantech in July 2013, he took no steps to remove himself from that position. Indeed, he continued to be a director one year later, giving rise to an inference that he consented to being a director for at least that period.
38. I am unable to conclude that the Director's Determination as to Mr. Welsh's liability is in error. However, it appears that the delegate's calculations are in error. The delegate calculated two months wages for each of the employees when the evidence was that Mr. Welsh was a director from May 10, 2013, until June 3, 2013, or slightly less than one month. As each director or officer is personally liable for amounts earned only while they were a director, I find that the delegate erred in calculating the amount of Mr. Welsh's liability. I therefore confirm the Determination as to liability, but refer that Determination back on the quantum.

ORDER

39. Pursuant to section 114(1)(f) of the *Act*, I deny the appeal. I Order that the June 21, 2014, Determination as to Richard Welsh's liability be confirmed. However, I refer the issue of the amount of that liability back to the delegate for re-calculation.

Carol L. Roberts
Member
Employment Standards Tribunal