

An appeal

- by -

Jarmo Laine, a Director or Officer of Millennium Compact Disc Industries Inc.
("Laine")

- 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.: 2005A/125

DATE OF DECISION: September 14, 2005

DECISION

SUBMISSIONS

Jarmo Laine	on his own behalf
Wendy Jones	on behalf of the Director of Employment Standards
Darlene Mellesmoen	on her own behalf

OVERVIEW

1. This decision addresses an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Jarmo Laine, a Director or Officer of Millenium Compact Disc Industries Inc. (“Laine”) of a Determination that was issued on June 14, 2005 by a delegate of the Director of Employment Standards (the “Director”). The Determinations concluded that Laine was a director/officer of Millenium Compact Disc Industries Inc., an employer found to have contravened provisions of the *Act*, and, under Section 96 of the *Act*, was ordered to pay an amount of \$7,538.48.
2. The Determination against Millenium Compact Disc Industries Inc. related to the employment of Darlene Mellesmoen (“Mellesmoen”) with Millenium Compact Disc Industries Inc.
3. Laine submits the Director erred in finding he was a director or officer of Millenium Compact Disc Industries Inc. at the time the wages of Mellesmoen were earned or should have been paid. Laine says there is new evidence relating to this finding that was not available at the time the Determination was made.
4. The Tribunal has reviewed the appeal and the materials submitted with it and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

5. The issue here is whether Laine has show the Director erred in finding he was liable under Section 96 of the *Act* for wages owed to Mellesmoen.

THE FACTS

6. The Determination set out the following findings of fact:

The BC On-Line: Register of Companies - “Corporation Search”, indicates that MCDI (Millenium Compact Disc Industries Inc.) was incorporated on January 21, 1998. on July 5, 2004, Jarmo Laine (“Laine”) became a Director/Officer of MCDI at his request and by resolution of the other Directors/Officers, Wolfgang Burandt and Kenneth William Spence. At the time wages were owing to Mellesmoen, July 29, 2004, Laine was a Director/Officer.

Mellesmoen's wages were earned during her last 6 month's of employment. Laine became a Director/Officer of MCDI effective July 5, 2004, and is liable for wages owed to Mellesmoen that were earned and should have been paid from July 5, 2004 onwards, to an amount not exceeding two month's wages. The regular wages owing to Mellesmoen as set out in the Determination issued to MCDI on March 17, 2005, are within Laine's liability for the period July 5, 2004 onwards, totalling \$2890.44. Laine is also liable for the vacation pay and compensation for length of service portion of the MCDI Determination, as these amounts were payable upon termination.

ARGUMENT AND ANALYSIS

7. The burden is on Laine to show the Director erred in finding he was a Director/Officer of Millenium Compact Disc Industries Inc. when Mellesmoen's wages were earned or should have been paid.
8. Laine argues he was not an "actual" Director/Officer of Millenium Compact Disc Industries Inc. until August 6, 2004, which was subsequent to the termination of Mellesmoen's employment with Millenium Compact Disc Industries Inc. In support of this position, Laine has submitted a Notice of Change of Directors, which was filed with Ministry of Finance, Corporate and Personal Properties Registry on August 13, 2004. The relevant part of the document, from Laine's perspective, shows the date of the change of director as August 6, 2004. Laine also says he "was not fully informed of the circumstances being an outside director". He has also included a fax message sent to him by Wendy Jones, Employment Standards Officer, on June 20, 2005. That fax message has no apparent relevance to the issue raised in the appeal.
9. The Director and Mellesmoen have filed responses to the appeal.
10. The Director submits that the evidence provided during the investigation of Mellesmoen's complaint showed that Laine. was appointed to the Board of Directors of Millenium Compact Disc Industries Inc. effective July 5th, 2004 and had been acting as a Director/officer of Millenium Compact Disc Industries Inc. even before that time. The submission of the Director reads, in part:

Laine held himself out to be a Director/Officer of MCDI during the time Mellesmoen earned or received wages. In July, 2004, when Mellesmoen was still employed, Laine represented MCDI as a Director/Officer with regards to an early complaint received by the branch on June 22, 2004 from another MCDI employee, Gernot Hielscher. Laine participated in the education and mediation process, informing me he was newly added as a Director of the company. Prior to the mediation date, I conducted a Registrar of Companies search, but could not locate his name as a Director. When I contacted him and asked him to explain why he was not yet showing on the Registrar of Companies Search, he faxed me confirmation that he had been appointed a Director/Officer of MCDI effective July 5, 2004. His fax to me of July 20, 2004, is Attachment F. On July 21, 2004, Laine came to my office along with Ken Spence (another Director/Officer) and signed a settlement agreement as a Director/Officer. Laine made the payments on that settlement agreement, on behalf of MCDI. The settlement agreement regarding the complainant, Gernot Hielscher, is Attachment G.
11. Mellesmoen's submission echoes that of the Director. She says Laine was "in complete control of MCDI personnel, finance (and operations through his business partner, John Allen) and Wolfgang Burandt" as early as April 2004.
12. The Tribunal also received a submission from Wolfgang Burandt, a Directors/Officers of Millenium Compact Disc Industries Inc. It is enough to say he is not supportive of the appeal.

13. On August 29, 2005, the Tribunal received a reply submission from Laine, in which he says, “I became a director of MCDI in July 2004 and was registered into the BC directory in August 2004. . . . It is not fair to me to be asked to pay for past wages when I was an outside director for such a short time.”
14. Laine has grounded this appeal on the assertion that evidence has come available that was not available when the Determination was made. The Tribunal has taken a relatively strict view of this ground of appeal. The Tribunal has a discretion to allow new evidence on appeal, but in exercising that discretion considers whether the evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint and if it is credible, in the sense that it is reasonably capable of belief.
15. Laine has not established any evidence has come available that was not before the Director when the Determination was made or that the evidence is relevant to the central issue decided in the Determination.
16. The Notice of Change of Directors filed with Ministry of Finance, Corporate and Personal Properties Registry on August 13, 2004 adds nothing to the facts that were before the Director when the Determination was made. While the specific document is not in the Record, the information provided by that document is in the Record and was, quite correctly, not considered by the Director to be relevant to the finding made in the Determination about Laine’s status a Director/Officer of Millenium Compact Disc Industries Inc. at the relevant time.
17. The date on which Laine was formally recorded as a Director/Officer with the Registrar of Companies is not, in any event, determinative of his liability under Section 96 of the *Act*. It is clear from decisions of the Tribunal that a person may be found to be a Director or Officer for the purposes of the *Act* without being recorded as such with the Registrar of Companies if the facts show that person exercises functions, tasks or duties typical of those which a corporate director or officer, in the normal course of events, would exercise (see *Penner and Hauff*, BC EST #D371/96). In this case, there was ample support for the finding that Laine was a Director/Officer of Millenium Compact Disc Industries Inc. Of particular relevance is the Consent to Act as Director, signed by Laine on July 2, 2004, the July 5, 2004 resolution of the members of Millenium Compact Disc Industries Inc. adding Laine to the number of directors, the signing of the Settlement Agreement by Laine as a Director/Officer of Millenium Compact Disc Industries Inc. on July 21, 2004 and Laine’s admission in his submission to the Tribunal that he became a director of Millenium Compact Disc Industries Inc. in July of 2004.
18. Laine also says he was “not fully informed of the circumstances being an outside director”. It is not clear from the appeal what bearing being that should have on the Determination. This part of the appeal is not supported by any assertions of fact or analysis nor is it related to any ground of appeal found in Section 112 of the *Act* and it is rejected on that basis.
19. If there is some suggestion in this comment that Laine should not be liable for wages under Section 96 because he was only a Director for a short period of time, there is no basis for such a proposition in fact or law.
20. For the above reasons the appeal is denied.

ORDER

21. Pursuant to Section 115 of the *Act*, I order the Determination dated June 14, 2005 be confirmed in the total amount of \$7,538.48, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal