

An appeal

- by -

Dale Thomas Malloch, a Director or Officer of Emerald Coast Timber Ltd.

- 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: Carol L. Roberts

FILE No.: 2004A/111

DATE OF DECISION: August 31, 2004

DECISION

SUBMISSIONS

Timothy E. Dunford, Barrister & Solicitor	On behalf of Dale Thomas Malloch
Ed Wall	On behalf of the Director of Employment Standards
Ruth Black	On her own behalf

OVERVIEW

This is an appeal by Dale Thomas Malloch, pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued May 19, 2004.

Ruth Black, Stuart Middleditch and Ian Middleditch filed complaints with the Director alleging that Emerald Coast Timber Ltd. ("Emerald Coast") failed to pay them all wages owing. In a Determination issued February 24, 1999, the Director's delegate found that Emerald Coast contravened Sections 18 and 58 of the *Act*, and Ordered that it pay \$21,585.79 in wages and interest to the Director on behalf of the complainants. The Determination indicated that "Directors and officers of companies can also be required to pay wages owed to employees."

In a Determination issued May 19, 2004, the Director's delegate found that Emerald Coast had not filed an appeal of the February, 1999 Determination, and that the Determination had not been satisfied. The delegate further determined that Emerald Coast was not in liquidation or receivership, and that Mr. Malloch was a Director and Officer of the company at the time the complainants' wages were earned and payable. The delegate therefore determined that Mr. Malloch was personally liable to pay \$21,585.79, which represented not more than two months' unpaid wages for each of the employees. The Determination contained the following "Notice to Directors/Officers":

A Director/Officer cannot argue the merits of the Determination against the company after its appeal period has expired. After that time, there are only two grounds for appeal:

- 1) whether you were a Director of the company at the time wages were earned or should have been paid, and
- 2) whether the calculation of your personal liability is correct.

Mr. Malloch alleges that the delegate erred in law, and that new evidence has become available that was not available at the time the Determination was made.

The appellant did not seek an oral hearing, and I have determined, based on the submissions of the parties, that the matter can be adjudicated based on their written submissions.

ISSUE

Did the delegate err in law in concluding that that Mr. Malloch was personally liable for the Middleditch's wages?

Is there new evidence that the Middleditch's wages were not employees of Emerald Coast but D. R. Daylight Tree Services such that the Determination should be changed?

FACTS

Emerald Coast operated a logging company in the Golden and Revelstoke areas, and sold its logs to Evans Forest Products Ltd. ("Evans")

The February 24, 1999 Determination indicated that there had been a dispute between Evans and Emerald Coast regarding "the claw-back of an alleged overpayment by Evans". I infer from Mr. Malloch's submissions that, as a result of that dispute, Emerald Coast was left with virtually no assets or resources. The delegate noted that Emerald did not dispute the wage claims, but contended only that it had no money to pay them because of its dispute with Evans. The delegate determined that the Employment Standards Branch would have to proceed with the investigation of the complaints despite Emerald Coast's dispute with Evans, and that was communicated to Emerald Coast.

The February 24, 1999 Determination concluded that Emerald Coast was indebted to the claimants in the amount of \$21,585.79.

In the May 19, 2004, the delegate found that the February 24, 1999 Determination had not been appealed or satisfied, and that Mr. Malloch was a Director and Officer of Emerald at the time the wages were earned. The delegate determined that, as a Director and Officer, Mr. Malloch was personally liable for two month's wages, pursuant to section 96 of the Act.

ARGUMENT

Counsel for Mr. Malloch submits that, at the time of the 1999 Determination, Emerald Coast's Directors were preoccupied with the dispute with Evans, and, accordingly, did not "formally participate" in the investigation or Determination process. Counsel further submits that Emerald Coast's Directors arranged for its employees to file liens pursuant to the *Woodworker Lien Act* against timber seized by held by Evans. He submits that Mr. Malloch encouraged Ms. Black to pursue this remedy, and that she declined.

Counsel for Mr. Malloch further contends that Stuart Middleditch and Ian Middleditch were never employees of Emerald Coast. He says that they were employees of D. R. Daylight Tree Service, which contracted tree falling services to Emerald Coast. In support of that assertion, counsel for Mr. Malloch submitted a copy of a Notice of Claim filed in the Provincial Court Registry on January 5, 1999, by D. R. Daylight Tree Service against Emerald for money owed under a contract.

The Director's delegate submits that Emerald received the February 1999 Determination, and did not appeal it. He further submits that he found no evidence that Emerald Coast was subject to an action under section 427 of the Bank Act or a proceeding under an insolvency Act. He further notes that Mr. Malloch

was a Director of Emerald Coast at the time the Determination was issued, and remains so. The delegate sought confirmation of the Determination.

Ms. Black states that she was asked to pay a lawyer \$500 to file a woodworker's lien, and that, since she had not been paid for three months, she was unable to afford to do so. Further, she says that she was not a woodworker, and was of the view that she would not be covered by such a lien.

ANALYSIS

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;
or
- (c) evidence has become available that was not available at the time the determination was being made

The burden of establishing that the Determination is incorrect rests with an Appellant. Having reviewed the submissions of the parties, I am unable to find that the appellant has discharged that burden.

Mr. Malloch's appeal raises issues that relate largely to the February 1999 Determination against Emerald, which was never appealed.

Once corporate liability has been established, directors cannot, through an appeal of a determination of director liability, reargue the issue of a company's liability for wages unless they can establish fraud or fresh evidence that is decisive to the merits of the issue. (*Steinemann*, BC EST #D180/96). Given that Emerald neither disputed the initial claims of the employees nor appealed the corporate determination, Mr. Malloch cannot now re-argue the issue of Emerald's liability for wages.

The May 19, 2004 Determination relates to the personal liability of Mr. Malloch, as a Director and Officer of Emerald.

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

Mr. Malloch does not deny that he is, or continues to be a Director or Officer of Emerald. He also does not deny that the wages found to be owed are for a two month period in which he was a Director or

Officer. Furthermore, Mr. Malloch does not argue, or present any evidence to suggest that subsection 96(2) applies.

Mr. Malloch contends that Ms. Black failed to exercise due diligence in pursuing other remedies against third parties to recover money that was owed to her by Emerald. The Act does not impose any duty on an employee, once a Determination regarding liability for wages has been issued, to “mitigate” any award by attempting to recover wages from a third party.

In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

- 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;
- the evidence must be relevant to a material issue arising from the complaint;
- the evidence must be credible in the sense that it is reasonably capable of belief; and
- the evidence must have high potential 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.

Although Emerald did not dispute that Ian Middleditch and Stuart Middleditch were owed wages at the time of the investigation leading to the February 1999 Determination, Mr. Malloch now submits that the Middleditches were employees of D. R. Daylight Tree Service, based on a Notice of Claim filed in the Provincial Court Registry in January, 1999. This evidence ought to have been available to Emerald, and thus to Mr. Malloch, with the exercise of due diligence, at the time the delegate was investigating the wage claims against Emerald.

In any event, a Notice of Claim is not evidence that the Middleditches were contractors rather than employees. There is also no evidence that issue was decided by the Court. Had Mr. Malloch raised that issue before the delegate, it could have been adjudicated upon. It was not, and, as noted, no appeal of the Determination was made even though the Notice of Claim was filed in January 1999.

In the absence of any evidence that is decisive of the issue of whether the Middleditches were employees or contractors, I decline to allow the appeal on this basis.

The appeal is dismissed.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination dated May 19, 2004 be confirmed in the amount of \$21,585.79, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal