

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

Frank Folino

(“Folino”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 97/682

DATE OF HEARING: May 20th, 1998

DATE OF DECISION: July 2, 1998

DECISION

APPEARANCES

Richard C. Baker for Frank Folino

Catherine Hunt &
Dave MacKinnon for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Frank Folino (“Folino”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from Determination No. DDET 00956 issued by the Director of Employment Standards (the “Director”) on August 25th, 1997 under file number 024-470 (the “Determination”).

The Director’s delegate determined that Folino was a director or officer of D.E. Installations Ltd. (“DEI”) and by reason of that status, and in accordance with section 96 of the *Act*, was liable for \$70,280.15 in unpaid wages owed to 22 former DEI employees.

This appeal and an essentially identical appeal involving Mike Gabriele (“Gabriele”)--who was also found liable for \$70,280.15 in unpaid wages by reason of his status as a director or officer of DEI--were heard at the same time. Both Folino and Gabriele were represented by the same legal counsel, Richard C. Baker, and it was agreed between Mr. Baker and counsel for the Director, Catherine Hunt, that all of the evidence submitted by the parties would be common to both appeals.

ISSUES TO BE DECIDED

Folino’s appeal is based on the following grounds:

1. Folino is neither an officer nor a director of DEI;
2. In any event, the Director erred in calculating the amount due to the former DEI employees and, therefore, the Director erred in calculating Folino’s liability under section 96 of the *Act*; and
3. Further, and in any event, the Director’s interpretation of section 96 is in error; specifically, Folino says that under section 96 “the maximum liability is not two months wages, but rather the amount unpaid for a two month period”. Thus, Folino can only be liable for “the difference between what the employee was paid and he should have been paid for a two month period”.

FACTS AND ANALYSIS

A determination was issued against D.E. Installations Ltd. under number CDET 006434 on June 20th, 1997 in the amount of \$96,207.26 representing unpaid wages owed to some 22 former D.E. Installations Ltd. employees. These wages were found to be due and payable in accordance with the *Skills Development and Fair Wage Act* and the *Skills Development and Fair Wage Regulation*. I shall hereafter refer to this latter determination as the “corporate determination”.

Subsequently, D.E. Installations Ltd. appealed the corporate determination and following four days of hearings (resulting in two separate Tribunal decisions--D397/97 issued January 14th, 1998 and D165/98 issued April 21st, 1998), the corporate determination was varied to reflect a total liability to the 22 employees named in the determination of \$87,532.46 plus some additional accrued interest (see section 88 of the *Act*). Thus, the question with respect to the total liability to the 22 employees is now *res judicata*. The only remaining “quantum” issue that might arise is whether or the Director properly calculated Folino’s “two-month wage” liability under section 96 of the *Act*.

Section 96 of the Act

As noted above, Folino asserts that the Director’s delegate misinterpreted section 96 of the *Act* which provides as follows:

Corporate officer's liability for unpaid wages

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.

(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 under a collective agreement in respect of individual or group terminations, if the corporation is in receivership or is subject to action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act,

(b) vacation pay that becomes payable after the director or officer ceases to hold office,
or

(c) money that remains in an employee's time bank after the director or officer ceases
to hold office.

(3) This Act applies to the recovery of the unpaid wages from a person liable for them under subsection (1).

None of the limitations set out in subsection 96(2) is relevant here.

Folino submits that section 96(1) of the *Act* creates a statutory liability for unpaid wages based on the total amount owed to an employee in any 2-month period, although which 2-month period one is supposed to choose was not made clear to me --presumably, the 2-month period that leaves the greatest wage liability.

This latter argument was also raised by Tracey Docherty in her appeal of an essentially identical determination in which she was also held liable, under section 96 of the *Act*, as an officer or director of DEI for \$70,280.15 in unpaid wages. For the reasons set out in my decision in Ms. Docherty's appeal (EST Decision No. D248/98) I cannot accede to Folino's submission with respect to the proper interpretation of section 96 of the *Act*.

Given the Tribunal's earlier variance (from \$96,207.26 to \$87,532.46) of the amount due under the corporate determination (EST Decision No. D165/98), it may be that Folino's current liability as set out in the Determination (\$70,280.15) is not accurate. Accordingly, I believe it appropriate to refer that matter back to the Director for review, and if appropriate, recalculation provided that Folino is an officer or director of DEI for purposes of section 96 of the *Act*. It is to this issue that I now turn.

Is Folino an officer or director of DEI?

Folino is not named in any document filed with the B.C. Registrar of Companies as either an officer or director of DEI. Nevertheless, this Tribunal has consistently held that that in order for a person to be held liable under section 96 of the *Act*, it need not be established that the individual is specifically named in corporate records as an officer or director. Although the terms "director" and "officer" are not defined in the *Employment Standards Act* one can look to the *Company Act* for guidance. In this latter enactment, the terms "director" and "senior officer" are defined in section 1(1) as follows (the term "officer" is not defined):

"director" includes every person, *by whatever name he is designated, who performs the functions of a director;*
(emphasis added)

"senior officer" means the chairman or any vice-chairman of the board of directors, the president, any vice president, the secretary, the treasurer or the general manager of the corporation *or any other individual who performs functions of the corporation similar to those normally performed by an individual occupying any of those offices,* and the 5 highest paid employees of the corporation, including any individual referred to in this definition;
(emphasis added)

Thus, a person may be a corporate officer or director without having been formally designated as such. The key point is not whether an individual is formally named in the corporate records as an officer or director but, rather, whether that person exercises the typical functions, tasks, or duties that a corporate director or officer would, in the usual course of events, exercise [see *G. Elmitt Construction Ltd. v. Kaplan* (1992) 1 C.L.R. (2d) 219; see also *Penner and Hauff*, EST Decision No. D371/96; *Kovacs*, EST Decision No. D076/97; *Okrainetz*, EST Decision No. D354/97].

In determining that Folino was an officer or director of DEI, the Director's delegate relied on the following documents:

- i) a Canadian Imperial Bank of Commerce ("CIBC") form letter, dated May 9th, 1989 and signed by Tracey Docherty as president and secretary and Robert Docherty as "signing officer", "certifying" that Tracey Docherty, Frank Folino, Robert Docherty and Mike Gabriele [sic] were "officers" of DEI--Tracey Docherty was stated to be the president and secretary, the other three gentlemen were named as "signing officers".
- ii) a written direction, in the form of a director's resolution, to the CIBC dated May 9th, 1989 in which Folino was appointed as one of three individuals authorized to sign cheques and other instruments on behalf of DEI (two signatures were required). This resolution is signed by Tracey Docherty as president and secretary of DEI and by her husband, Robert Docherty, as a DEI "signing officer".
- iii) an agreement apparently registered under the provisions of the Personal Property Security Act pursuant to which Tracey Docherty, Robert Docherty, Gabriele and Folino personally guaranteed DEI's indebtedness to the CIBC.

In addition to the foregoing documents, the Director also relies, *inter alia*, on the fact that Folino had signed a number of DEI cheques; the fact that Folino entered into some sort indemnification bond relating to DEI; as well as the relationship between a company known as McRae Electric Ltd. ("McRae)--in which Folino holds a majority share interest via a holding company--and DEI.

DEI is a commercial electrical subcontractor; some ten years ago DEI found itself in a financial bind and approached McRae for some assistance. McRae--an electrical installation and repair company, primarily in the marine sector--has been in business since 1947; Folino became involved with McRae in the latter part of 1980 and is currently McRae's president, secretary and "general manager" as well as being a director. Folino, through a holding company, owns 52% of McRae's shares; Gabriele, via a holding company, owns 24% of McRae's shares as does a third party.

Upon being approached by DEI, McRae provided some security by guaranteeing a DEI \$100,000 line of credit with the CIBC. This guarantee was not only given by McRae but also by Folino and Gabriele in their respective personal capacities. In consideration of their respective guarantee obligations, both Folino and Gabriele's personal holding companies were issued DEI shares although I understand both holding companies, taken together, only held a minority position in DEI. No dividends have ever been issued and there is no evidence before me that Folino ever received any sort of financial return for his guarantee. There is no evidence before me that Folino ever

received any monies from DEI, whether it be on account of wages, expenses, loans or any other account.

Upon signing the personal guarantee in favour of the CIBC, Folino was also given signing authority on DEI's CIBC account and, in that capacity, signed a number of cheques drawn on DEI's account.

According to Folino's sworn testimony he became involved in DEI some some years ago via a company related to DEI known as Evans Fire Protection. At that time one or both of Evans Fire Protection and DEI were in financial difficulty. Neither Folino nor McRae made a direct investment in DEI; rather both McRae and Folino (in his personal capacity) agreed to guarantee a \$100,000 line of credit issued to DEI by the CIBC. In return for his personal guarantee, Folino obtained some DEI shares (held in a holding company known as Folino Investments) and was designated a "signing officer" on DEI's CIBC operating account. It should be noted that Folino was one of three such "signing officers" and that two signatures were required on all DEI cheques drawn on the CIBC account.

McRae owns the building in which DEI's offices are located although there has not been a sharing of staff or other resources (telephones, office equipments, services) between the two firms. From time to time, Folino did sign DEI cheques. Folino testified that he never participated in the management of DEI and specifically:

- never hired or fired any DEI staff or participated in their evaluation or the setting of their pay and benefits;
- did not receive DEI financial statements;
- never attended DEI management or directors' meetings;
- never attended a DEI job-site or participated in a DEI job tender; and
- never provided any services to, or received any remuneration from, DEI.

In essence, Folino characterized his role with DEI as that of an "investor" (although in fact he never advanced any funds in exchange for his "beneficial" minority shareholding in DEI) and that DEI's day-to-day management was the sole responsibility of Robert Docherty. Folino also acknowledged that he did meet with Mr. Robert Docherty on occasion to discuss DEI business matters.

During the course of his cross-examination by Ms. Hunt, Folino acknowledged that:

- DEI has fallen into arrears on its office rent and that McRae has yet to take any collection proceedings;
- DEI is indebted to McRae by reason of some wiring material that was purchased by DEI using McRae's account with a supplier known as Westburne Electric;

- he attended at least one meeting where DEI's performance on a job known as the "Matheson School Project" was discussed--Folino characterized his role at this meeting as that of a "mediator" rather than as a direct representative of DEI; and
- he, as well as Folino Investments, both executed some sort of guarantee of a performance bond relating to a project undertaken by DEI.

The Director called three witnesses--Messrs. Dennis and George Rossi and the delegate who issued the Determination, Mr. Dave MacKinnon. Dennis Rossi is a principal in a firm known as DGS Construction Ltd. ("DGS"), a firm that has an ongoing dispute with DEI arising from the ill-fated "Matheson School Project". As I understand the situation, DGS was the project general contractor and DEI was the electrical subcontractor. Although DGS dealt primarily (indeed, almost exclusively) with DEI through Robert Docherty, on one occasion DGS and DEI representatives met in an effort (unsuccessful) to resolve their dispute and at this meeting Folino acted on behalf of DEI. Dennis Rossi's evidence on this point was as follows:

"I requested the meeting with Folino. The relationship with DEI was in dispute; I wasn't too successful with Rob Docherty so I went to Folino directly--I knew he was one of the owners, the boss of the company [DEI]."

In cross-examination, Dennis Rossi admitted that he only requested the meeting with Mr. Folino when the project "went sideways" and that up to that point, he had dealt exclusively with Robert Docherty.

George Rossi, a co-principal in DGS with his brother Dennis, corroborated Dennis' version of the meeting attended by Folino and that Robert Docherty had described Folino as "the boss" and that Folino attempted to put the relationship between DGS and DEI "back on track". During the meeting, according to George Rossi, Folino characterized himself as one of the DEI "partners" (a representation that was not challenged by Folino by way of rebuttal).

In a modern corporation, the directors are usually elected by the shareholders and owe a fiduciary responsibility to the corporation itself. This fiduciary duty is, in part, crystallized in the *Company Act* provisions that require directors to "manage or supervise the management of the affairs and business of the company" [section 117(1)] and to "act honestly and in good faith and in the best interests of the company" while exercising "the care, diligence and skill of a reasonably prudent person" [section 118(1)]. While directors can, and usually do, delegate the day-to-day management authority over the affairs of the corporation to officers and employees, the ultimate residual authority to manage the business rests with the directors. Directors could be said to be charged with the responsibility for the strategic decisions of the business and for ensuring that such decisions are implemented. Usually, the implementation of such strategic decisions will be the responsibility of officers and other corporate employees with the directors maintaining an ongoing monitoring function.

In my view, there is sufficient evidence before me upon which one could reasonably conclude, as the Director did in this case, that Folino performed the function of a DEI director. While it is clear that Folino did not play any role in the day-to-day management of DEI, the same could be said of

any number of corporate directors, especially those who are characterized as “outside” directors (that is, they do not hold any office or employment with the corporation). While Folino may not have acted as a DEI “officer”, I am of the view that the following actions on the part of Folino, considered collectively, could properly be characterized as “performing the functions” of a DEI director:

- his personal guarantee of the CIBC line of credit,
- his personal guarantee of the performance bond relating to work undertaken by DEI,
- his cheque-signing authority,
- his meeting (on DEI’s behalf) with principals of DGS in an effort to resolve an ongoing dispute between DGS and DEI;
- his holding himself out as a DEI “partner”,
- his occasional discussions with Robert Docherty about the business affairs of DEI (see also paragraph 6(e) of his November 5th, 1997 affidavit, submitted into evidence, where he acknowledged that he had “a general knowledge of the larger jobs it [DEI] was doing from time to time”).

ORDER

The Determination is confirmed with respect to the finding that Folino was a director of DEI; the Determination is varied to delete the Director’s finding that Folino was an officer of DEI. Pursuant to section 115 of the *Act*, I order that the within Determination be referred back to the Director solely for the purposes of recalculating the appellant’s wage liability in accordance with section 96 of the *Act* and the Tribunal’s decision with respect to the appeal of the corporate determination.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal