

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-

Robert Docherty

(“Docherty”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 97/683

DATE OF HEARING: May 20th, 1998

DATE OF DECISION: July 2, 1998

DECISION

APPEARANCES

Robert Docherty on his own behalf

Catherine Hunt &
Dave MacKinnon for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Robert Docherty (“Docherty”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from Determination No. DDET 00957 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 Docherty 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.

ISSUES TO BE DECIDED

Mr. Docherty advised me at the outset of the appeal hearing that while he was prepared to acknowledge that he was a “signing officer” of DEI, he was not prepared to concede that he was a “director or officer” of DEI. It should be noted that Docherty is not named in any documents filed with the B.C. Registrar of Companies as a DEI director or officer.

In a letter dated September 10th, 1997 addressed to the Tribunal, and appended to his appeal form, Mr. Docherty asserts that the Director’s delegate erred in calculating the unpaid wage liability of D.E. Installations Ltd. and that, accordingly, his own liability is similarly in error. Additionally, Docherty asserts that the Director’s delegate misinterpreted section 96 of the *Act* and that, in any event, he is not a DEI director or officer.

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*). It should be noted that Mr. Docherty represented DEI in each of the two hearings and was also DEI's principal spokesperson during the investigation of the complaints that resulted in the issuance of the corporate determination.

Docherty 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,

(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.

Mr. Docherty submits that the effect of section 96(1) is to create 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 although in his September 10th letter to the Tribunal he suggested that the liability would be based on the "last two months of employment for each employee".

This latter argument was also raised by Mr. Docherty's wife, 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 Mr. Docherty's submission

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 Mr. Docherty'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 Mr. Docherty is an officer or director of DEI for purposes of section 96 of the *Act*. It is to this issue that I now turn.

As noted above, and so far as I can gather, Mr. Docherty 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].

Based on the evidence before me, it is abundantly clear that although Mr. Docherty's wife, Tracey Docherty, was named as DEI's president and secretary, Robert Docherty was DEI's principal "operating mind". For example, the evidence before me, provided entirely by Docherty himself, is that Docherty:

- acted as the principal spokesperson for DEI during the original investigation that ultimately resulted in the issuance of the corporate determination, as well as acting as DEI's representative at the two appeal hearings with respect to that corporate determination;
- was one of only three designated "signing officers" on DEI's corporate bank account;
- executed several statutory declarations under the *Fair Wage and Skills Development Act* as the "treasurer" of DEI (N.B. that a "treasurer" is defined as a "senior officer" in section 1 of the *Company Act*);
- exercised the authority to hire and fire DEI employees;
- was "in charge of day to day projects" and supervised DEI's "on-site" operations;
- negotiated with DEI customers when disputes arose;
- prepared bids for potential projects to be undertaken by DEI and determined which projects DEI would bid on; and
- signed DEI payroll cheques.

I might add that the above represents only the "highlights" of Mr. Docherty's testimony. At one point, Mr. Docherty was making so many incriminating statements that, as an adjudicator, I felt it my duty to caution him and suggest that he obtain legal counsel--he refused and pressed on with a further litany of incriminating statements. Mr. Docherty appears to labour under the misapprehension that because he is not officially recorded as an officer or director in any document filed with the Registrar of Companies, he is, therefore, beyond the reach of section 96 of the *Act*. Of course, his view is not reflected in either previous Tribunal decisions, nor in the decisions of our courts.

In my opinion, the evidence before me very clearly demonstrates that throughout his tenure with DEI, Mr. Docherty carried out the functions that one would normally ascribe to a corporate officer and director.

ORDER

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. The Determination is confirmed in all other respects.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal