

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

Frank Folino

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATORS:

John M. Orr
David Stevenson
John McConchie

FILE No:

1999/6

DATE OF DECISION:

April 22, 1999

DECISION

OVERVIEW

This is an application by Frank Folino ("Folino") under Section 116 (2) of the *Employment Standards Act* (the "Act") for a reconsideration of Decision #D261/98 (the "Folino Decision") which was issued by the Tribunal on July 02, 1998.

This case involved a finding that Folino was an officer or director of a company D.E. Installations Ltd. ("DEI"). The Director determined that Folino was a director or officer of DEI against which company a determination had been made for a substantial sum of money owed to employees in unpaid wages. Pursuant to section 96 of the *Act*, as an officer or director, Folino was found to be personally liable for \$70,280.15 of these unpaid wages. Folino appealed to the Tribunal and the Adjudicator (decision #D261/98), on July 02, 1998, found that Folino was not an "officer" but upheld the finding that Folino was a "director" and referred the matter back to the Director to review the quantum owing.

It is significant that there was a companion determination relating to another alleged officer and director, Mike Gabriele ("Gabriele"), in which the Director determined that Gabriele was also an officer and director of DEI and was also jointly and severally liable for the unpaid wages. Gabriele also appealed to the Tribunal and his appeal was heard at the same time, by the same Adjudicator, and a decision rendered on the same date as the Folino decision. We shall refer to this other decision (#D260/98) as the "Gabriele Decision". The Adjudicator found that Gabriele was not an officer or director of DEI and cancelled the Director's determination.

Folino applied, on July 24, 1998, for a reconsideration of the finding of liability but the Tribunal declined to reconsider liability until the quantum issues were resolved. The quantum issues have now been resolved and Folino has asked the Tribunal to reconsider the finding of personal liability.

Folino submits in his application that the Folino and Gabriele Decisions are irreconcilable on the facts and law and that there was no substantive difference in the evidence with respect to Folino's involvement in the affairs of DEI and that with respect to Gabriele. He also submits that the Decision by the Adjudicator for the Tribunal that Folino was a director of DEI is "manifestly unjust and supported neither by the law nor the facts".

ANALYSIS

The current suggested approach to the exercise of the reconsideration discretion under section 116 of the *Act* was set out by the Tribunal in *Milan Holdings Ltd.*, BC EST #D313/98 (applied in decisions BC EST #D497/98 and #D498/98). In *Milan* the Tribunal sets out a two stage analysis in the reconsideration process. The first stage is for the panel to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. In deciding this question the Tribunal should consider and weigh a number of factors such as whether the application is timely,

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whether it is an interlocutory matter, and whether its primary focus is to have the reconsideration panel effectively "re-weigh" evidence tendered before the adjudicator.

The Tribunal in *Milan* went on to state that the primary factor weighing in favour of reconsideration is whether the applicant has raised significant questions of law, fact, principle or procedure of sufficient merit to warrant the reconsideration. The decision states that "at this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general". Although most decisions would be seen as serious to the parties this latter consideration will not be used to allow for a "re-weighing" of evidence or the seeking of a "second opinion" when a party simply does not agree with the original decision.

It is one of the defined purposes of the *Act* to provide a fair and efficient procedure for resolving disputes and it is consistent with such purposes that the Tribunal's decisions should not be open to reconsideration unless there are compelling reasons: *Khalsa Diwan Society* BCEST #D199/96. The circumstances in which an application for reconsideration will be successful will be limited. In a Reconsideration decision dated October 23, 1998, *The Director of Employment Standards*, BCEST #D475/98, the Adjudicator sets out those limits as follows:

Those circumstances have been identified in several decisions of the Tribunal, commencing with Zoltan Kiss, BCEST #D122/96, and include:

- original*
- * *failure to comply with the principles of natural justice;*
 - * *mistake of law or fact;*
 - * *significant new evidence that was not reasonably available to the panel;*
 - * *inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;*
 - * *misunderstanding or failure to deal with a serious issue; and*
 - * *clerical error*

In this case the grounds for the application for reconsideration are that there is a mistake in law in interpreting the term "director" and that the two decisions are irreconcilable. We are satisfied that the applicant has passed the first hurdle of the process as set out in *Milan*. The application was timely, raises a significant point of law, is a serious matter relating to substantial personal liability, and the primary focus of this application is to ensure that there is not inconsistency between decisions of the Tribunal that are indistinguishable on the critical facts.

Inconsistency Of The Two Decisions:

As noted above the two appeals in question were heard by the same Adjudicator at the same time and the decisions were rendered on the same day. It is evident on the face of the two decisions that the Adjudicator heard substantial evidence about the involvement of Folino and Gabriele in the operations of DEI. The Adjudicator applied the same law and the same analysis in both cases but came to different conclusions. The question is whether this means necessarily that the decisions are inconsistent or, as the appellant says, irreconcilable.

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The Adjudicator clearly analyzed the role of each appellant carefully and individually. He found real differences in the degree of involvement between Folino and Gabriele. He very carefully put his mind to the issue. He heard and assessed the evidence before him at the hearing and concluded that, while Folino fell within a broad interpretation of director, Gabriele did not.

I do not intend to restate here each analysis in full but, in part, the Adjudicator found that Folino performed the functions of a director by the following actions:

- * his personal guarantee of a bank 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 the principals of another company DGS in an effort to resolve an ongoing dispute;
- * his holding himself out as a DEI "partner";
- * his occasional discussions with Robert Docherty (another signing officer) about the business affairs of DEI by which Folino had a general knowledge of the larger jobs DEI was doing.

On the other hand, the Adjudicator states that the uncontradicted evidence before him was that Gabriele, other than signing some cheques, played no role whatsoever in DEI's day to day operations. The Adjudicator points out that, at the hearing, three witnesses were called by the Director. Two of these witnesses never even mentioned Gabriele's name during the course of their testimony and the other was unable to point to any event that suggested Gabriele had any role in managing DEI's affairs other than signing some cheques. The Adjudicator concluded, on a careful analysis of the evidence, that *"Gabriele had literally nothing to do with the business affairs of DEI"*.

There are substantial and significant differences between Folino and Gabriele on the facts found by the Adjudicator. The Adjudicator did not apply the law differently but found that the role played by the two men was markedly different and clearly distinguishable. As stated earlier it is not appropriate for the reconsideration panel to re-weigh the evidence but to assess whether the decision is well founded on the facts as found by the Adjudicator. On the evidence as found in these two cases we can not say that they are inconsistent because they are distinguishable on their facts.

The Interpretation of "Director":

Folino submits that the Adjudicator is wrong in law in finding on the facts before the Tribunal that he was a "director" of DEI. We do not address the definition of "officer" in this re-consideration as the Adjudicator found that Folino was not an officer and no re-consideration has been requested on this point by the parties.

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The Adjudicator quite properly refers to Section 96 of the *Act* which provides that a person who was a director of a corporation is personally liable for certain wages owing to employees. The Adjudicator also points out that the *Act* does not contain its own definition of the term "director". The Adjudicator then turns to the definition section of *Company Act* which provides that:

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

While the definition in the *Company Act* is not incorporated into the *Employment Standards Act* it is certainly a useful guide for this Tribunal to consider.

The Adjudicator applied the *Company Act* definition and found that Folino was a director of DEI. The only issue to be reconsidered then is whether Folino should, in law, on the facts as found by the Adjudicator, be considered a "director" under the *Employment Standards Act*.

On the facts as found by the Adjudicator it appears that Folino was not identified as a director on any corporate documents or any documents filed with the registrar of companies.

The Adjudicator refers to a number of decisions which have held that a person may be a director without having been formally designated as such. He refers to *G.Elmitt Construction Ltd v. Kaplan* (1992) 1 C.L.R.(2nd) 219 and three of his own decisions on this issue on behalf of the Tribunal, *Penner, Kovacs, and Okrainetz*. Although not referred to in the Folino decision the Adjudicator refers to *Canadian Aero Service Ltd v. O'Malley et al* (1973), 40 D.L.R.(3rd) 371, in the companion Gabriele decision.

The Adjudicator found that Folino performed the functions of a director for the following reasons: Folino signed a personal guarantee of a line of credit for DEI (he received shares in DEI as consideration); he was one of three persons with signing authority at the Bank (two signatures were required); he signed a number of cheques; he met with the senior manager on occasion to discuss company business; and he met on one occasion with the principals of another company to help to resolve a dispute.

The definition in the *Company Act* contemplates that a person, not formally designated as a director, is nevertheless a director if he performs the functions of a director. If this definition is applied, or used as a guide, the question remains whether, by doing the acts as found by the Adjudicator, Folino was "performing the functions of a director".

The *G. Elmitt Construction* decision referred to by the Adjudicator does not help in this regard. It was a case where Mr Elmitt was the sole shareholder of a corporation who commenced a lawsuit to collect a debt on behalf of the company but had failed to hold the necessary meetings to officially have himself elected a director. The Court held that he could function as a director despite this problem. The decision has been interpreted ever since as standing for the principle that official designation is not always necessary to carry out the functions of a director. The case is of no assistance in defining the scope or limitations of those functions. It also does not deal with the personal liability of directors.

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The Supreme Court of Canada decision in *Canadian Aero Service* is also not specifically on point. It deals with the fiduciary duty owed by senior management of a company to the company. The Supreme Court referred to the *Aero Service* decision in *McClurg v. Canada* [1990] 3 S.C.R. 1020 saying:

In considering for the first time that the fiduciary duty owed by directors to the corporation should be extended to senior officers of the corporation as well, this Court focused upon the degree of control that the officers were in a position to exercise in that case.

The two individuals in issue in *Aero Service* were the former president and vice-president of the company and they continued to act in that capacity, despite having resigned, and continued to receive remuneration as such. The Court held that they essentially still controlled the functioning of the company and owed a fiduciary duty to the company. While holding that senior management owes a similar fiduciary duty to the Company as directors the Court does not go so far as to say that senior managers are therefore to be considered *de facto* directors. The case does not help in defining the scope or limitations of a director's functions and it does not deal with the personal liability of directors which might be created by statute.

So what are the functions of a director ? Section 141 of the *Company Act* provides that the directors shall manage or supervise the management of the affairs and business of the company. It is important to note that there is a distinction between company "affairs" and "business" - see *Beatty v. First Exploration Fund 1987 & Co.* (1988) 25 B.C.L.R. (2nd) 377. It is the function of the directors to manage or supervise both aspects. The distinction between the business and the affairs of a company is also illustrated in the definition of the word "affairs" in s.2 of the *Canada Business Corporations Act*, as follows:

2(1) "affairs" means the relationship among a corporation, its affiliates and the shareholders, directors and officers of such bodies but does not include the business carried on by such bodies corporate;

We do not mean to imply that we should apply definitions in the *Canada Business Corporations Act* to this case but the definition is simply noted to illustrate that there is a distinction between the "business" of a corporation and its "affairs".

The directors of a company must manage or supervise the business carried on by the company but it is also their function to manage or supervise the affairs of the company. In managing or supervising the "business" of the company they must act honestly and in good faith and in the best interests of the company. They must exercise due care and diligence. They must disclose other direct or indirect interests. The day to day operations of the business is certainly the responsibility of the directors but is most often the function of the officers and senior managers.

In managing or supervising the "affairs" of the company the directors must elect the officers of the company. To exercise their authority they sit as a Board. Sitting as a Board, they have the functions, inter alia, of appointing signing officers, transfers and allotments of shares, fixing the

price for shares, authorizing dividends, appointment of auditors, determining fees, and approving the form of share certificates. The Board is responsible for the management structure, the election of officers and appointment of senior management staff. Directors are elected at the annual general meeting of the members of the corporation and are accountable to the members at the following annual general meeting.

The above is not intended to be an exhaustive description of the functions of a director for as Romer J. said in *Re: City Equitable Fire Insurance Co.* (1925) Ch.407:

It is indeed impossible to describe the duties of directors in general terms whether by way of analogy or otherwise. The position of a director of a company carrying on a small retail business is very different from that of a director of a railway company.

The point is that mere involvement in the day to day operations of a business does not mean that a person is "performing the functions of a director". A bookkeeper who is given bank signing authority does not thereby become a director. A guarantor of a loan for the company does not thereby become a director. A business partner does not *per se* become a director of the company. A shareholder is not necessarily a director. A manager does not necessarily become a director (although he may owe the same fiduciary duty to the company as a director). The C.E.O. of a company, while certainly having the same fiduciary duty as a director is not a *de facto* director unless also involved in the affairs of the company. It is a question of control of both the business and affairs of the Company that are the distinguishing characteristics of a director.

In this case there was no finding that Folino exercised any control over the "affairs" of the company. He signed some cheques and some guarantees but there is no evidence that he was involved in authorising or negotiating those matters. There is no evidence that he attended meetings of the Board, voted for the election of officers, signed minutes, or approved resolutions. In fact, he had business dealings with the company in which he could not have functioned as a director for DEI.

There is no evidence, or findings by the Adjudicator, that Folino regularly attended the offices of DEI, hired or fired employees or gave instructions to others as in *Kovacs* BCEST #D076/97. There was no evidence that Folino signed and cancelled agreements on the company's behalf, reviewed financial reports, provided money for payroll, received money from the sale of company assets or generally participated in the management of the company as in *Penner* BCEST #D371/96. There is no finding that Folino ran DEI's business on a day to day basis, dealt with customers, ordered equipment, or generally took care of the financial matters of the company as found in *Adrenaline III Sports Ltd.* BCEST #D110/97. Even if there had been such evidence here, there was no evidence, as noted before, of Folino's involvement in the "affairs" of the company.

On the basis of the evidence before the Adjudicator and his findings of fact we can not agree that there is sufficient evidence to support the legal conclusion that Folino "performed the functions of a director" and therefore came within the definition of director in the *Company Act*. He did not manage, supervise, or control the business and affairs of DEI.

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In providing for some degree of liability for directors in the *Employment Standards Act* the Legislature must have intended that the individuals controlling the corporate entity have some responsibility to ensure that employee wages are paid by the company in some priority to other corporate expenditures. It is consistent with this intent that the definition of director in the *Act* be limited to persons who are in a position to control, or participate in the control of, the business and affairs of the company. In our opinion it is not intended to cast such a wide net as to include everyone in the management system of a company who has some day to day involvement in its business operations.

We conclude that Folino was not a director of DEI and therefore the Decision BC EST #D261/98, the *Folino* Decision, will be varied to cancel the Determination No.DDET 00956 under file number 024-470 dated August 25, 1997 which found that Folino was personally liable as a director of DEI for certain unpaid wages.

ORDER

This Tribunal orders, pursuant to section 116 (1)(b), that Decision BC EST #D261/98 is varied to cancel the Determination.

John M. Orr
Adjudicator
Employment Standards Tribunal

David Stevenson,
Adjudicator
Employment Standards Tribunal

John L. McConchie
Adjudicator
Employment Standards Tribunal