



Reasons for decision

In the matter of an appeal of the Minister's decision under section 14 of the *Wage Earner Protection Program Act*,

Wes Au,

applicant.

Board File: 33310-C

Neutral Citation: 2020 CIRB 931

July 8, 2020

The panel of the Canada Industrial Relations Board (the Board) was composed of Ms. Ginette Brazeau, Chairperson, assigned to this matter pursuant to section 14.1 of the *Wage Earner Protection Program Act (WEPP Act)*.

I. Introduction

On July 29, 2019, the provisions of the *WEPP Act* were amended through the enactment of the *Budget Implementation Act, 2017, No. 1*. These amendments transferred the responsibility for adjudicating appeals filed under the *WEPP Act* to the Board. As this is the first decision of the Board under this Act, we will take the opportunity to review and consider in detail the applicable legislative framework.

II. Nature of the Application

[1] On October 15, 2019, the Board received an application to appeal filed by Mr. Wes Au (the applicant) pursuant to section 14(1) of the *WEPP Act*.

[2] Mr. Au appeals the Minister's review decision which found that he was not eligible to receive a payment under the *WEPP Act* on the basis that his wages were earned while he was a director of his former employer, Innova Global Ltd.

[3] Having reviewed the application, the Board has decided to rescind the Minister's review decision.

III. Background and the Minister's Decision

[4] Mr. Au was employed by Innova Global Ltd. and held the title of Director of International Operations until his former employer became bankrupt. At the time of the bankruptcy, Mr. Au was owed wages within the meaning of section 2 of the *WEPP Act* by his former employer. The trustee in bankruptcy, PricewaterhouseCoopers Inc., sent a letter to Mr. Au to inform him of the Wage Earner Protection Program (WEPP) and to invite him to apply for a payment under the *WEPP Act* for his unpaid wages.

[5] Mr. Au filed an application for payment on July 17, 2019, with Service Canada, who is tasked with administering the WEPP on behalf of the Minister of Labour. In accordance with the process established in the *WEPP Act*, the trustee filed a Trustee Information Form (TIF) with Service Canada. In the TIF, the trustee indicated that Mr. Au was an officer or director of his former employer.

[6] Wages earned while an individual exercised certain functions, including those of director or officer of a former employer, are excluded from payment pursuant to section 6 of the *WEPP Act*.

[7] On July 26, 2019, Service Canada, on behalf of the Minister, issued a decision denying Mr. Au's application for payment because the trustee had indicated that he was registered as an officer or director of his former employer.

[8] On August 19, 2019, Service Canada received Mr. Au's request for a review of that decision. He referred Service Canada to a "Summary of Questions and Answers" filed by the trustee, in which it had indicated that he was not registered as a director or officer of his former employer. He also included corporate records of his former employer including the Registration Statement, which showed that he was not listed as a registered director. Service Canada then proceeded to obtain further information from the trustee and from Mr. Au to determine whether Mr. Au's wages were excluded from payment.

[9] On August 29, 2019, Service Canada issued the review decision and confirmed its initial decision. It stated the following:

Pursuant to Section 6(a) of the *Wage Earner Protection Program Act* (WEPPA), an individual is not eligible to receive a WEPP payment in respect of any wages earned during a period in which he or she was an officer or director of the former employer.

After an evaluation of your file, it was determined that you were an officer or director with your former employer, *Innova Global Ltd.* The Receiver indicated that according to your resignation letter and your job functions you worked as an officer or director of the former employer.

[10] It is this decision that Mr. Au asks the Board to rescind on appeal.

IV. Positions of the Parties

A. Position of the Applicant

[11] The applicant states that he submitted documents and also spoke to Service Canada in order to explain who had the authority to make binding decisions with his former employer. He argues that the review decision was based on information that was not fully understood, incomplete in analysis or misinterpreted. He states that he would have appreciated a phone call to confirm facts and address additional questions before the issuance of the review decision.

[12] He indicates that he submitted a letter of resignation, resigning as officer or director even though he was not an officer or director. He states that the directors of the employer were confirmed in the corporate documents that were provided to Service Canada and that there was no description of any job functions in the resignation letter. He submits that the purpose of the resignation letter was to be a blanket form letter he signed in order to avoid any personal liabilities to employees, as was recommended by the legal counsel. He states that other employees who were not directors or officers also signed the resignation letter.

[13] He provides a summary of the facts that he states he submitted and discussed with Service Canada.

B. Position of the Minister

[14] Although the Minister has the right to make representations to the Board pursuant to section 15(4) of the *WEPP Act*, the Minister declined to do so in this matter.

V. The Board's Role on Appeal

[15] An individual who is unsatisfied with the Minister's review decision may appeal it to the Board, but only on a question of law or jurisdiction (section 14(1) of the *WEPP Act*). The appeal is limited to a review of the information that is contained on the Minister's file:

16 The appeal is to be an appeal on the record and no new evidence is admissible.

[16] Accordingly, the Board is provided with a copy of the file containing all the information and documents that were before the Minister's delegate when the review decision was issued. The Board is prohibited from obtaining additional evidence or documents that would assist it in

clarifying the disputed facts. Its only role is to consider the review decision and the information that was before the Minister's delegate to determine what facts were considered and how the legal questions were analyzed.

[17] In this case, the applicant is basing his appeal on a question of law.

[18] The *WEPP Act* does not provide a definition for a "question of law." It is therefore useful for the Board to review how questions of law have been defined in cases relating to statutory appeals.

[19] In *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, the Supreme Court of Canada (the Court) stated that questions of law are "about what the correct legal test is":

Section 12(1) of the *Competition Tribunal Act* contemplates a tripartite classification of questions before the Tribunal into questions of law, questions of fact, and questions of mixed law and fact. Briefly stated, **questions of law are questions about what the correct legal test is**; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I recognize, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or *vice versa*.

(pages 766–767; emphasis added)

[20] In the same case, the Court added that it is an error of law to ignore an item of evidence that the law requires a decision-maker to consider. However, it also stated that considering the proper evidence but reaching a wrong conclusion does not amount to an error of law, but rather amounts to an error of mixed law and fact:

... If the Tribunal did ignore items of evidence that the law requires it to consider, then the Tribunal erred in law. Similarly, if the Tribunal considered all the mandatory kinds of evidence but still reached the wrong conclusion, then its error was one of mixed law and fact. ...

(page 769)

[21] In *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32; [2017] 1 S.C.R. 688, the Court explained that a question of law can arise when in the course of applying a legal test to the facts, the legal test is altered:

[44] That said, while the application of a legal test to a set of facts is a mixed question, if, in the course of that application, the underlying legal test may have been altered, then a legal question arises. For example, if a party alleges that a judge (or arbitrator) while applying a legal test failed to consider a required element of that test, that party alleges that the judge (or arbitrator), in effect, deleted that element from the test and thus altered the legal test. ...

...

Such an allegation ultimately challenges whether the judge (or arbitrator) relied on the correct legal test, thus raising a question of law (*Sattva*, at para. 53; *Housen*, at paras. 31 and 34–35). ...

[22] In summary, a question of law is a question about a legal test. In the context of an application to appeal pursuant to section 14(1) of the *WEPP Act*, the Board will have to consider:

1. whether the Minister's delegate applied the correct legal test and asked the right questions in coming to the decision;
2. whether all aspects of the legal test were applied to the facts; and
3. whether the Minister's delegate took into account all the key facts and the evidence that the law requires the delegate to take into account in the application of a test.

[23] The Board is limited to reviewing the information that was provided to the Minister's delegate when the review decision was made and cannot obtain new or additional evidence. It is the Minister's delegate who has the authority to gather all relevant facts through the various powers that are conferred on the Minister in the *WEPP Act* (see sections 21 and 23 to 27 of the *WEPP Act*). In other words, the scheme of the *WEPP Act* is such that the Minister's delegate creates the full evidentiary record on which to base the decision. It is not up to the Board to make findings of fact or to review questions of fact in the context of an application to appeal.

[24] Pursuant to section 17 of the *WEPP Act*, the Board has the power to confirm, vary or rescind the Minister's review decision. In other words, the *WEPP Act* empowers the Board not only to confirm or rescind the Minister's decision but also to substitute its decision for that of the Minister in appropriate circumstances.

[25] It is with these principles in mind that the Board will undertake an assessment of the Minister's review decision.

VI. The Record

[26] The record consists of the Review File Summary (the Summary) and the various documents that Service Canada obtained from the trustee and from Mr. Au.

A. The Summary

[27] The Summary is a document prepared by the Minister's delegate that contains a summary of the facts considered as well as the reasoning behind the Minister's review decision.

[28] It appears from the Summary that the Minister's delegate considered the following facts:

- Mr. Au signed a resignation letter in which he resigned from all positions held as an officer or director of the former employer;
- Mr. Au was not a registered officer or director;
- Mr. Au's position title was "Director of International Operations," and he was the only individual in this position;
- Mr. Au's duties consisted of setting up subsidiaries of the company in other jurisdictions, and he described that his job was "to talk to government staff and lawyers to establish office set up and follow through on all of the necessary paperwork in order to accomplish this";
- The trustee indicated in the TIF that Mr. Au was an officer/director.

[29] In her fact-finding efforts, the Minister's delegate contacted the trustee in order to determine whether Mr. Au was an officer or director and/or whether he had the ability to make binding financial decisions at the time of receivership. The Minister's delegate stated that the trustee had been unable to confirm details but had confirmed that Mr. Au did not appear on the Corporate Registry as an officer or director. The Minister's delegate noted that the Officer/Director questionnaire had been emailed to the trustee for completion. There is no indication that the trustee completed the questionnaire; however, it did send an email containing Mr. Au's resignation letter, in which he resigned from all positions he held as an officer or director of his former employer.

[30] The Minister's delegate also stated that Mr. Au had been contacted in order to provide "more detailed information regarding his role as officer/director of the former company" and to complete a fact-finding questionnaire. The applicant had indicated that he was the "*Director of International Operations*" and that he had been in this role for three years. He had previously worked as an accountant for his former employer.

[31] In the Summary, the Minister's delegate described "officers and directors" as follows:

The job title is not always an indication of eligibility the situation is different for Officers and Directors of a company. Officers and Directors of a company discuss the economic situation of the company as a whole, and are in a position to make binding decisions in respect of the economic viability of the company as part of their job. As a rule, the officers/directors of a company would be excluded from the WEPP.

An officer, by definition is an individual appointed by the director(s) of a corporation to manage the day-to-day business of a corporation, such as president, vice-president, secretary, treasurer, etc. The position of officer is distinct from that of director, although in a small corporation one individual very often occupies both positions.

A Director, by definition is an individual elected by the shareholder(s) to supervise the management of a corporation.

[sic]

[32] The Minister's delegate concluded, after having evaluated the file and specifically the discussions with Mr. Au and the trustee as well as the information contained in the questionnaire, that Mr. Au was an officer or director of the former employer. The Minister's delegate noted that both the trustee and Mr. Au had "confirmed he was a Director of the former business" and that further fact-finding with the applicant had confirmed that he was the only employee who worked as the "Director of International Operations."

B. Other Documents

[33] The record includes various documents that the Minister's delegate relied upon to create the Summary.

[34] The record includes a questionnaire entitled "WEPPR Officer/Director Assessment" which appears to have been completed by the Minister's delegate. It contains questions aimed at determining whether an individual was an officer or director. On the questionnaire, "officer" is defined as follows:

An individual appointed by the director(s) of a corporation to manage the day-to-day business of a corporation, such as president, vice-president, secretary, treasurer, etc. The position of officer is distinct from that of director, although in a small corporation one individual very often occupies both positions.

[35] The "no" box next to that definition is checked off.

[36] On that same questionnaire, "director" is defined as "[a]n individual elected by the shareholder(s) to supervise the management of a corporation." Next to that definition, the "yes" box is checked off.

[37] There are then four follow-up questions on the questionnaire. The first is whether the applicant had the power to make binding decisions in regard to the economic viability of the company. The “no” box is checked off, with the explanation that Mr. Au was able to set up new divisions in other jurisdictions; he would set up the legal structures and then the finance department would take over. The second follow-up question is whether Mr. Au had the authority to sign cheques on behalf of the company, and the third is whether Mr. Au managed the day-to-day operations of the business. For both questions, the “no” box is checked off. It is explained that management went to the “Operations people” once Mr. Au had played his part. The last question, which pertains to whether Mr. Au had the power to hire and fire staff, was left unanswered.

[38] In the questionnaire, it is also noted that Mr. Au had the ability to use the company credit card when he needed to make purchases, such as service fees, since company cheques were not accepted internationally. Purchases were rarely over \$500.

[39] The “Supplementary Record of Review” contains the details of the information gathered from the applicant and trustee and the date on which the information was obtained. The Minister’s delegate spoke to Mr. Au on August 23, 2019, and stated the following in this document:

Spoke with the client who confirms his title as “Director of International Operations”. Claims his duty was to set up subsidiaries of the company in other provinces, states or countries. Claims he did not have any staff reporting to him. His job was to talk to government staff and lawyers to establish office set up and follow through on all of the necessary paperwork in order to accomplish this.

As far as his Title, the applicant states that alot of the Salesman were “Directors” in title so he wanted to clarify that the term was used quite loosely and because they are an International Company, it’s easier getting in the door with more descriptive titles as opposed to generic ones. Another example the applicant used was when they would be making cold calls, it was much easier to say they were “Directors” and futher explained that in engineering world it means your’re not right out of school and you have some real work experience.

[sic]

[40] The Minister’s delegate also spoke with the trustee on August 26, 2019, and stated the following in the document:

... [The trustee] confirmed that the title of **Director** for Mr. Au was confirmed as far as they were concerned. It was his title and he resigned in that capacity and the company council administered he was that. Furthermore, he was listed on the company records as such; he was known as a "Director."

[sic]

VII. Analysis and Decision

[41] The applicant challenges the Minister's delegate's decision that he was a director of his former employer. It appears that the Minister's delegate came to this conclusion because the trustee had indicated that based on Mr. Au's resignation letter and his job functions, he worked as a director.

[42] The Board must therefore look at whether the Minister's delegate committed an error of law when she determined that Mr. Au was a director of his former employer.

[43] Wages earned while an individual occupied certain positions are not eligible for payment according to the *WEPP Act*, including wages earned while an individual was an officer or director of the former employer:

6 An individual is not eligible to receive a payment in respect of any wages earned during, or that otherwise relate to, a period in which the individual

(a) was an officer or director of the former employer;

(b) had a controlling interest within the meaning of the regulations in the business of the former employer;

(c) occupied a managerial position within the meaning of the regulations with the former employer; or

(d) was not dealing at arm's length with

(i) an officer or director of the former employer,

(ii) a person who had a controlling interest within the meaning of the regulations in the business of the former employer, or

(iii) an individual who occupied a managerial position within the meaning of the regulations with the former employer.

[44] Neither the *WEPP Act* nor the *Wage Earner Protection Program Regulations* define the words "officer" or "director."

[45] Pursuant to section 2(4) of the *WEPP Act*, when no definition is provided in the Act, words and expressions have the same meaning as in the *Bankruptcy and Insolvency Act* (the BIA).

[46] The BIA does not define the term “officer” but defines “director” as follows:

2 In this Act,

...

director in respect of a corporation other than an income trust, means a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever name called.

[47] The Board understands from this definition that it is an individual’s functions as opposed to their title that make them a director pursuant to the BIA. However, the BIA does not indicate what the functions of a director are.

[48] Before delving further, a clarification is in order. The term “director” is common in organizations and often designates a senior manager. However, this is not the case in the *WEPP Act*, because wages earned by individuals who hold certain managerial positions are already excluded by virtue of section 6(c) of the *WEPP Act*. Furthermore, in section 6(a), the term “director” is used in connection with the term “officer,” and the BIA as well as the *WEPP Act* both translate the term “director” to “administrateur” in their respective French versions. This leads the Board to conclude that “director” is used at section 6(a) of the *WEPP Act* in the sense commonly understood in corporate law and refers to individuals who act as the directing mind of a business and effectively oversee the activities of the corporation.

[49] As a general proposition, directors of a corporation are individuals selected by shareholders to manage the business and affairs of the corporation (see *Halsbury’s Law of Canada—Business Corporations (2018 Reissue) (McGuinness, Hole) VII. The Board of Directors, 1. Nature of Directorship, (2) “Director” Defined, HBC-83 (QL)*):

... In the context of corporate law, the term “director” is used to designate the class of persons given the primary (and in some cases exclusive) responsibility for the management of a corporation. In this respect, s. 102(1) of the *Canada Business Corporations Act* provides that subject to any unanimous shareholder agreement, the directors shall manage or supervise the management of the business and affairs of a corporation. Thus the Act begins with the initial presumption that responsibility for management is normally vested with the directors of a corporation. In managing the corporation, the directors do not act as the delegates or agents of the shareholders who elected or appointed them.

[50] Normally, provincial and federal legislations require businesses to be registered and to register the names of their directors and officers. However, information provided to corporate registrars is not always up to date. Furthermore, an individual who has not been properly appointed or elected as a director can still be considered a director if they act in that capacity (see *Halsbury's Law of Canada—Business Corporations (2018 Reissue) (McGuiness, Hole), VII. The Board of Directors, 2. Appointment or Election, (1) General, HBC-86 (QL)*):

... A director *de jure* is a director who has been formally and legally appointed or elected as a director in accordance with the corporate constitution and applicable statute. A *de facto* director is a person who is not a director (or has ceased to be a director) but who nevertheless purports to act in the capacity of a director; the term includes a person who was ostensibly duly elected but who may lack some qualification under the relevant corporate law, a person who simply assumes the role of director without any pretence of legal qualification, and former directors whose term of office have expired but who have continued to act as directors of the corporation after the expiration of their term of office.

[sic]

[51] Therefore, there is no hard-and-fast rule for determining who is a director. However, some key elements will have to be examined to provide an indication that an individual acts as a director, including whether the individual was appointed by shareholders, whether the individual manages the business and the level of responsibility and supervision that the individual has over the affairs of the corporation.

[52] In the Summary, the Minister's delegate made the following statements with regard to directors:

The job title is not always an indication of eligibility the situation is different for Officers and Directors of a company. Officers and Directors of a company discuss the economic situation of the company as a whole, and are in a position to make binding decisions in respect of the economic viability of the company as part of their job. As a rule, the officers/directors of a company would be excluded from the WEPP.

...

A Director, by definition is an individual elected by the shareholder(s) to supervise the management of a corporation.

[sic]

[53] This description of "director" found in the Summary is broadly consistent with the Board's understanding of the exclusion provided at section 6(a) of the *WEPP Act*. However, it is not clear in the review decision or in the Summary whether the Minister's delegate relied on that

description or took into consideration those key elements that are necessary to determine whether an individual is a director for the purpose of the *WEPP Act*.

[54] The review decision itself indicates that according to the receiver (although in this case, it was a trustee), Mr. Au worked as a director of his former employer based on his resignation letter and his job functions.

[55] However, the Summary states that Mr. Au was not a registered director of his former employer. There is no indication as to whether Mr. Au was selected by the shareholders of the corporation to be a director, and no information was sought regarding the corporate leadership and structure. The Summary lists the job duties that Mr. Au provided to the Minister's delegate, which included setting up subsidiaries of the company in foreign jurisdictions, but then states that according to the trustee, Mr. Au performed the duties of a director. The trustee provided no details or any indication of Mr. Au's actual functions within the company. The Minister's delegate relied on the trustee's opinion that Mr. Au performed the duties of a director without conducting her own analysis and assessment of the actual duties and functions performed by Mr. Au to determine whether they were actually those of a director.

[56] It appears to the Board that the Minister's delegate neither asked herself whether Mr. Au had been appointed by the shareholders to be a director nor asked herself whether his duties amounted to the actual management of the business and affairs of the corporation.

[57] Rather, the Summary emphasizes the fact that Mr. Au's title was that of "Director" without regard to his actual ability to direct the affairs of the corporation. There are several instances in the Summary where it is not clear whether the word "director" is used pursuant to its meaning at section 6(a) of the *WEPP Act*. As explained above, having the title of "director" is not enough to be considered a "director" pursuant to section 6(a) of the *WEPP Act*, as this title can apply to a myriad of positions. A further assessment was therefore necessary. The Board is of the view that the Minister's delegate did not undertake a proper analysis of the relevant facts and the applicable test when she determined that Mr. Au was a director of the former employer.

[58] For all of these reasons, the Board finds that the Minister's delegate committed an error of law when she determined that Mr. Au was a director within the meaning of section 6(a) of the *WEPP Act*.

VIII. Conclusion

[59] Having found that the Minister's delegate made an error of law, the Board may vary or rescind the Minister's review decision.

[60] In this case, the Board does not consider that it would be appropriate for it to vary the decision. Doing so would require it to make further inquiries to determine whether Mr. Au was selected by the shareholders of the corporation and possibly analyze whether Mr. Au's duties amounted to the management of the business and affairs of the former employer. As explained above, it is not the Board's role on appeal to conduct further fact-finding and to draw conclusions of fact. The Board is of the view that the Minister is in a better position to conduct additional fact-finding if necessary and to assess the information in a manner that is consistent with the legal test for determining whether the applicant was a director.

[61] For these reasons, the Board rescinds the Minister's review decision and remits it back to the Minister so that she may review her review decision in accordance with this decision.

Ginette Brazeau
Chairperson