

An appeal

- by -

David Snell
("Snell")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Kenneth Wm. Thornicroft

FILE NO.: 2018A/105

DATE OF DECISION: December 24, 2018

DECISION

SUBMISSIONS

T. Ryan Darby

counsel for David Snell

INTRODUCTION

1. On June 19, 2018, Chantal Webb, a delegate (the “delegate”) of the Director of Employment Standards (the “Director”), issued a determination pursuant to section 79 of the *Employment Standards Act* (the “ESA”) against Fusionpipe Software Solutions Inc. (“Fusionpipe”). I shall refer to this determination as the “Corporate Determination”.
2. By way of the Corporate Determination, Fusionpipe was ordered to pay the total sum of \$29,355.52 on account of unpaid wages (vacation pay) and section 88 interest due to five former employees (the “Complainants”). The Complainants all ceased working for Fusionpipe as of February 27, 2018. In addition, and also by way of the Corporate Determination, the delegate levied two separate \$500 monetary penalties against Fusionpipe (see section 98 of the *ESA*). Thus, the total amount payable under the Corporate Determination is \$30,355.52. Fusionpipe did not appeal the Corporate Determination (the appeal period expired on July 27, 2018) and it now stands as a final order.
3. Subsection 96(1) of the *ESA* provides as follows: “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.” In accordance with this provision, the delegate issued a determination against the present appellant, David Snell (“Snell”), on September 10, 2018. Mr. Snell was identified in the B.C. Corporate Registry as being a Fusionpipe officer (as of the effective date of the initial registry search, February 7, 2018, and he continued to be so listed in a later search conducted on September 5, 2018). I shall refer to the determination issued against Mr. Snell on September 10, 2018, as the “Section 96 Determination”.
4. B.C. Corporate Registry records raise a rebuttable presumption that individuals identified as corporate directors or officers of a particular firm are, in fact, directors or officers as the case may be (see *Director of Employment Standards and Michalkovic*, BC EST # RD047/01, and *Barahmand*, BC EST # RD072/13).
5. By way of the section 96 Determination, Mr. Snell was ordered to pay the total sum of \$29,588.56 on account of unpaid wages and section 88 interest. This liability is in relation to the unpaid wages owed by Fusionpipe to the Complainants. The delegate held that Mr. Snell “was an officer between August 28, 2017 and February 27, 2018, when the Complainants’ wages were earned or should have been paid”, and since the Complainants’ individual unpaid claims all fell below the 2-month threshold, Mr. Snell was personally liable for the full amount of each Complainant’s unpaid wage claim (see “Reasons for the Determination” at page R2).
6. The delegate did not levy any monetary penalties against Mr. Snell because there was insufficient evidence that he authorized, permitted, or acquiesced in Fusionpipe’s contraventions of the *ESA* (see subsection 98(2)).

REASONS FOR APPEAL

7. Mr. Snell appeals the Section 96 Determination on all three available statutory grounds, namely, that the delegate erred in law, failed to observe the principles of natural justice, and on the ground that he now has evidence that was not available at the time the Section 96 Determination was issued (see subsections 112(1)(a), (b) and (c) of the *ESA*). He says that the Section 96 Determination should be cancelled or failing cancellation, that it be varied or referred back to the Director.
8. Although Mr. Snell, through his legal counsel, filed an Appeal Form on October 17, 2018 – one day before the statutory appeal period expired – he nonetheless sought an extension of the appeal period to November 1, 2018 (see subsection 109(1)(b) of the *ESA*) in order to allow his counsel “to consider this matter and prepare appeal materials, so as to ensure that Mr. Snell has access to meaningful legal assistance”.
9. On October 23, 2018, the Tribunal’s Registrar acknowledged receipt of Mr. Snell’s Appeal Form and advised his legal counsel that he had until November 1, 2018, at 4:00 PM to file further materials (with the additional caveat that this request did not constitute an extension of the appeal period). However, neither Mr. Snell nor his legal counsel filed any additional materials.
10. Mr. Snell’s position is quite straight forward – he maintains that he was not a Fusionpipe officer or director when the Complainants’ unpaid wages were earned or should have been paid. He also maintains that the delegate’s unpaid wage calculations are incorrect. Finally, he says that on December 7, 2017, he resigned his positions as Chief Executive Officer and corporate director of Fusionpipe and that these resignations were effective as of December 11, 2017.
11. It should be recalled that the delegate held that Mr. Snell “was an officer between August 28, 2017 and February 27, 2018, when the Complainants’ wages were earned or should have been paid”. Thus, even if Mr. Snell ceased to be a Fusionpipe officer as of December 11, 2017, he would still be personally liable under subsection 96(1) for that portion of the Complainants’ unpaid wages that was earned or became payable between August 28, 2017, and the effective date of his resignation on December 11, 2017.
12. Mr. Snell appended several documents to his Appeal Form – presumably the “new evidence” he relies on in this appeal, although it appears that each of the appended documents was “available” when the Section 96 Determination was issued.

FINDINGS AND ANALYSIS

13. Mr. Snell has submitted his notice of resignation from his “position as Chief Executive Officer and director, effective December 11, 2017”, but that description of the document does not appear to be entirely accurate. Mr. Snell’s resignation letter, addressed to the Fusionpipe board of directors and dated December 7, 2017, states that he is giving one year’s working notice under certain terms and conditions, including the continuance of his salary to July 31, 2018. Further, the appended internal “Register of Directors” shows that he was appointed a director on January 27, 2014, and ceased to be a director as of January 31, 2018. This same record shows that he was appointed Chief Executive Officer on January 27, 2014 and ceased to hold that office as of January 31, 2018. Neither Mr. Snell, nor his legal counsel, has provided an explanation for this inconsistency regarding his service dates.

14. The subsection 112(5) record contains some e-mail communications including an e-mail dated March 27, 2018, from Mr. Snell to an officer at the Employment Standards Branch (not the delegate who issued the determinations) in which he stated that he “resigned as an Officer and Director Monday December 11th 2018 [*sic*; about 20 minutes later, he sent another note clarifying he meant to write “2017”] as outlined in the attached fully executed Notice to the Board of Directors dated December 7th 2017 and as attached”. The record also includes some B.C. Corporate Registry searches. A “Notice of Change of Directors”, filed February 1, 2018, shows that Mr. Snell was listed as a Fusionpipe director as of January 11, 2018, as well as another “Notice of Change of Directors” showing Mr. Snell to have ceased to be a director as of January 31, 2018. Another search conducted on March 9, 2018 (current as of February 7, 2018), lists Mr. Snell as an officer (“CEO, chair”) as of May 21, 2017.
15. The Employment Standards Branch’s own records show that Mr. Snell’s position, as communicated to the Employment Standards Branch, was that he was not a director or officer throughout the entire period spanned by the Complainants’ unpaid wage claim. I can find nothing in the record to indicate that the delegate made an effort, consistent with section 77 of the *ESA*, to obtain any further particulars from Mr. Snell regarding his officer/director status prior to issuing the Section 96 Determination. In issuing the Section 96 Determination, the delegate appears to have relied solely on B.C. Corporate Registry records, but these records, together with other documents contained in the subsection 112(5) record, fall short of unequivocally demonstrating that Mr. Snell was a corporate officer throughout the entire wage recovery period.
16. Further, the delegate never addressed whether Mr. Snell might have been held liable for the entire amount of the Complainants’ unpaid wages as a corporate officer under the functional test – individuals who function as officers or directors may be held liable under subsection 96(1) even if they are not formally recorded as directors or officers in the B.C. Corporate Registry or in internal corporate records (see *Barahmand, supra*).
17. Given that the record before the delegate raised a legitimate question regarding whether Mr. Snell could be held liable for the full amount of the Complainants’ unpaid wages – and the delegate’s failure to address this matter with Mr. Snell prior to issuing the Section 96 Determination, or to address it in her reasons – I am of the view that this matter should be returned to the Director for further investigation.

ORDER

18. Pursuant to subsection 114(2)(a) of the *ESA*, I am referring the matter of Mr. Snell’s personal liability under subsection 96(1) back to the Director for further investigation. The Director shall afford Mr. Snell a reasonable opportunity to participate in the Director’s further investigation. The Director shall have 90 days from the date of this decision to file a report with the Tribunal. The Tribunal, after hearing from the parties, will then issue a final order in this appeal.

19. In the interests of expediting the resolution of this appeal, I encourage the parties to make all reasonable efforts to settle the matter of Mr. Snell's personal liability to the Complainants (see subsections 2(d) and 114(2)(b) of the *ESA*).

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal