

An appeal

- by -

Neil Hummel  
("Hummel")

- 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/106

**DATE OF DECISION:** December 24, 2018

## DECISION

### SUBMISSIONS

T. Ryan Darby

counsel for Neil Hummel

### 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, Neil Hummel (“Hummel”), on September 10, 2018. Mr. Hummel was identified in the B.C. Corporate Registry as being a Fusionpipe officer (“CFO”) – this information was contained in a search conducted on March 9, 2018 (effective as of May 21, 2017). I shall refer to the determination issued against Mr. Hummel 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. Hummel 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. Hummel “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. Hummel was personally liable for the full amount of each complainant’s unpaid wage claim (see “Reasons for the Determination” at page R2).
6. As noted above, a B.C. Corporate Registry search indicated that Mr. Hummel was a corporate officer “as at May 21, 2017”. In her “Reasons for the Determination” at page R2, the delegate stated: “A further search conducted on September 5, 2018 indicates that Neil Hummel was still listed as an officer”.

However, this later September 5 search is not contained in the subsection 112(5) record and, that being the case, I am unable to confirm the accuracy of this assertion (although, I am not, at this juncture, necessarily doubting its accuracy).

7. The delegate did not levy any monetary penalties against Mr. Hummel 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

8. Mr. Hummel 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 the matter be referred back to the Director.
9. Although Mr. Hummel, 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. Hummel has access to meaningful legal assistance”.
10. On October 23, 2018, the Tribunal's Registrar acknowledged receipt of Mr. Hummel'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. Hummel nor his legal counsel filed any additional materials.
11. Mr. Hummel maintains that he was not a Fusionpipe officer or director when the Complainants' unpaid wages were earned or should have been paid (although it should be noted that the Section 96 Determination was issued against Mr. Hummel solely on the basis that he was a Fusionpipe *officer*). He also maintains that the delegate's unpaid wage calculations are incorrect. Finally, he says that on January 11, 2018, he “resigned his position as Chief Financial Officer and director, effective that date”.
12. Mr. Hummel appended several documents to his Appeal Form. Presumably, these documents constitute the “new evidence” upon which he intends to rely although all of these documents were “available” when the Section 96 Determination was issued and, on that basis, some may not be admissible in this appeal. In any event, one of the documents is dated January 11, 2018, and addressed to Fusionpipe's board of directors. This brief letter reads as follows:

I hereby tender my resignation effective today (January 11, 2018) as a director and officer of FusionPipe Software Solutions Inc.

I will continue as an employee and accountant of the Company but no longer as the Chief Financial Officer.
13. It should be recalled that the delegate held that Mr. Hummel “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. Hummel ceased to be a Fusionpipe officer as of January 11, 2018, 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 January 11, 2018.

## FINDINGS AND ANALYSIS

14. The subsection 112(5) record contains some e-mail communications including an e-mail dated March 23, 2018, from Mr. Hummel to an officer at the Employment Standards Branch (not the delegate who issued the determinations) in which he stated: "You should know that I resigned as an officer and director of FusionPipe Software Solutions Inc. on Jan 11, 2018, resignation copy attached...I was only an employee, who is also owed vacation and termination pay, when the company effectively closed down on February 28, 2018". It does not appear that anyone at the Employment Standards Branch had any further communication with Mr. Hummel prior to the issuance of the Section 96 Determination.
15. The record also includes some B.C. Corporate Registry searches. A "Notice of Change of Directors", filed February 1, 2018, shows that Mr. Hummel ceased to be a Fusionpipe director as of January 11, 2018. A second search, conducted March 9, 2018 (effective as of February 7, 2018), shows that Mr. Hummel was listed as an officer ("CFO") "as at May 21, 2017".
16. The Employment Standards Branch's own records show that Mr. Hummel'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. Hummel regarding his officer/director status prior to issuing the Section 96 Determination.
17. 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 record, fall short of unequivocally demonstrating that Mr. Hummel was a corporate officer throughout the entire wage recovery period.
18. Further, the delegate never addressed whether Mr. Hummel 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*). Although Mr. Hummel's resignation letter states that he will no longer serve as "Chief Financial Officer", he agreed to continue "as an employee and accountant of the Company" and, depending on the nature of his duties after January 11, 2018, he may have continued to function in the capacity of an officer.
19. Given that the record before the delegate raised a legitimate question regarding whether Mr. Hummel could be held liable for the full amount of the Complainants' unpaid wages – and the delegate's failure to address this matter with Mr. Hummel 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**

20. Pursuant to subsection 114(2)(a) of the *ESA*, I am referring the matter of Mr. Hummel's personal liability under subsection 96(1) back to the Director for further investigation. The Director shall afford Mr. Hummel 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.
21. 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. Hummel's personal liability to the Complainants (see subsections 2(d) and 114(2)(b) of the *ESA*).

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**Kenneth Wm. Thornicroft**  
**Member**  
**Employment Standards Tribunal**