

An appeal

- by -

Lisa Reid

- 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)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE NO.: 2017A/130

DATE OF DECISION: January 23, 2018

DECISION

SUBMISSIONS

Micah Goldberg

counsel for Lisa Reid

INTRODUCTION AND BACKGROUND FACTS

1. This is an appeal filed by Lisa Reid (“Reid”) under subsection 112(1) of the *Employment Standards Act* (the “*ESA*”).
2. On September 27, 2017, Chantal Webb, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”), issued two separate determinations under section 79 of the *ESA* regarding the unpaid wage claims of Hayan Seo and Lindsay R. Caird (the “complainants”), former employees of Elane’s Little Stars Childcare Association (“Little Stars”).
3. The Delegate determined that the complainants were jointly owed \$8,303.41 on account of unpaid wages and section 88 interest. This latter amount was reflected in a determination issued against Little Stars together with a further \$2,000 in administrative penalties (see section 98 of the *ESA*). I shall refer to this determination, in the total amount of \$10,303.41, as the “Corporate Determination”. The complainants’ wages were earned and/or should have been paid during the period from February 16 to May 8, 2017.
4. The Delegate, noting BC Corporate Registry records indicated that Ms. Reid was a director of Little Stars when the complainants’ wages were earned or should have been paid, and further noting that Little Stars “is out of business”, issued a second determination, also on September 27, 2017, against Ms. Reid under subsection 91(1) of the *ESA*: “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”.
5. This latter determination, which I shall identify as the “Section 96 Determination”, is the subject of the present appeal. The Section 96(1) Determination is in the total amount of \$8,303.41 and does not include any administrative penalties as the Delegate found insufficient evidence that Ms. Reid “authorized, permitted or acquiesced in the contravention(s) of [Little Stars]” (Reasons for the Corporate Determination, page R3).

REASONS FOR APPEAL

6. As previously noted, the Section 96 Determination was issued against Ms. Reid on the basis that she was a director of Elane’s Little Stars Childcare Association when the complainants’ unpaid wages were earned or became payable.
7. Ms. Reid, through her legal counsel, seeks a declaration that she “was not a director of [Little Stars]...at the time of the contraventions underlying the [Section 96 Determination]”. Ms. Reid further says “that [Little Stars] did not employ [the complainants]” and, as such she should be “relieved of personal liability”. Despite this allegation regarding the status of the two complainants, Ms. Reid, in a memorandum appended to her

Appeal Form, concedes that each of the complainants was “a former employee of [Little Stars]” (see paras. 7 and 8).

8. According to Ms. Reid in or around August 2014 “Brown asked Reid to become a director of her non-profit organization, and told Reid that she would carry no responsibilities as a director of the society” and that “Reid was appointed a director of [Little Stars but] did not receive any legal advice prior to becoming a director of [Little Stars]”.
9. The subsection 112(5) record before me indicates that Little Stars, as of August 11, 2017, had four directors, namely, Ms. Reid, Elane Brown (“Brown”), Willi Elizabeth Welton and William Ernest Welton. Little Stars is a society that was incorporated on September 15, 2014.
10. Ms. Reid maintains that she was an inactive or passive director and that she did not “participate in the governance of [Little Stars]”, “discuss her status as a director of [Little Stars] with any other individuals”, “receive notices of any meetings in relations to [Little Stars], including annual general meetings”, or “receive financial statements relating to [Little Stars]”.
11. Ms. Reid maintains that she was an employee of Little Stars until she was terminated “in or around August 2015” and that “following the Termination, Reid did not undertake any action on behalf of [Little Stars] either as a director or in any other capacity”. I note, however, that Ms. Reid does not assert, and there is nothing in the record to show, that she ever formally resigned her position as a Little Stars director.
12. Ms. Reid says that both complainants were hired some time after her termination. I note that neither complainant identified Ms. Reid in their complaint, referring solely to Ms. Brown as the “employer”.
13. Ms. Reid’s legal counsel, under the heading “Erred in Law & New Evidence”, advances the following assertions:
 - “The effect of the Termination caused Reid’s resignation as a director of [Little Stars] effective in or around August 2015 as Reid no longer consented to remain a director of [Little Stars]”;
 - Little Stars failed in its statutory obligations by failing to provide Ms. Reid with meeting notices and financial statements and, that being the case, “as a result of [these] Failures, in or around August 2015 Reid ceased to be a Director pursuant to the Old [Society] Act’s regime”.
14. A new *Societies Act*, S.B.C. 2015, c. 18, came into effect on November 28, 2016, and section 48 of the new statute states:

48 (1) A director of a society ceases to hold office when

 - (a) the director’s term of office, if any, expires,
 - (b) the director ceases, in accordance with the bylaws, to hold office,
 - (c) the director resigns or dies, or
 - (d) the director is removed from office in accordance with section 50 (1) [*removal of directors*].

- (2) Unless the bylaws provide otherwise, for the purposes of subsection (1)(a), a director's term of office expires at the close of the next annual general meeting after the director's designation, election or appointment.

15. Ms. Reid's counsel, citing this provision – and particularly subsection 48(2) – submits “a director's term of office expires at the close of the next annual general meeting after the director's appointment” and that Ms. Reid “ceased to be a director of [Little Stars] on January 31, 2017, as a result of the AGM”.
16. Finally, under the “error of law” heading, Ms. Reid's counsel submits that the complainants contracted with Ms. Brown in the latter's capacity as a sole proprietor and that, accordingly, neither Little Stars nor Ms. Reid, as a Little Stars director, can be held liable for the complainants' unpaid wages. I note that this assertion stands in obvious conflict with paras. 7 and 8 of Ms. Reid's counsel's memorandum (referred to above), in which he states that both complainants are former employees of Little Stars.
17. There is nothing in the material before me to suggest, even on a *prima facie* basis, that Ms. Brown personally employed the complainants.
18. Ms. Reid also asserts that the Section 96 Determination should be set aside because the Delegate failed to observe the principles of natural justice (see subsection 112(1)(b) of the *ESA*). The Section 96 Determination was not issued following a complaint hearing, but rather issued concurrently with the Corporate Determination, presumably following a section 76 investigation into the two complaints. Ms. Reid's counsel says that Ms. Reid “was not provided with the opportunity to adduce evidence during the course of the Investigation, or the opportunity to dispute her status as a former director of [Little Stars]”.

FINDINGS AND ANALYSIS

19. I have reviewed the record and I am unable to determine if one or both complainants presented Ms. Reid with a “self-help kit” prior to filing a complaint although it would seem that Ms. Reid was never presented with a self-help kit from either complainant. The two complaints specifically indicate that a self-help kit was not provided to Ms. Brown because the Employment Standards Branch did not require it to be used in light of the closure of the business.
20. The two complaints identify Ms. Brown as each complainant's “supervisor” and the business “owner”, and neither complainant referred to Ms. Reid in any capacity. On June 19, 2017, another delegate of the Director (not Ms. Webb) sent a letter to Little Stars, to the attention of Ms. Brown, advising her about the Hayan Seo complaint (but not the Lindsay Caird complaint), and requesting that Little Stars, through Ms. Brown, provide certain payroll records (a Demand for Employer Records was also enclosed). This June 19 letter was copied to the other three Little Stars directors. It is my understanding that the registered letter sent to Ms. Reid was returned to the Employment Standards Branch as “unclaimed”.
21. On August 15, 2017, the Delegate sent another letter to Little Stars, to the attention of Ms. Brown, setting out her preliminary findings regarding both complaints and seeking a voluntary resolution. The Delegate, in her letter indicated that she had been trying to contact Ms. Brown, without success, but did not detail any efforts to contact the other directors and, in particular, Ms. Reid. As was the case with the June 19 letter, the Delegate's August 15 letter was copied to the other three Little Stars directors.

22. On September 27, 2017, both the Corporate Determination and the Section 96 Determination were issued. So far as I am aware, the Corporate Determination has not been appealed.
23. There is nothing in the record to indicate that the Delegate ever communicated directly with Ms. Reid (apart from the two letters to Little Stars/Ms. Brown that were copied to Ms. Reid, one of which was returned as “unclaimed”) regarding her possible liability under section 96(1) of the *ESA*. It appears that the Delegate never communicated with Ms. Reid directly by either electronic mail or telephone.
24. I do not consider Ms. Reid’s argument regarding her “passive” status as a director (see *Director of Employment Standards and Michalkovic*, BC EST # RD047/01), or her subsection 48(2) argument to be persuasive. Regarding the latter, there is no evidence before me that Ms. Reid was appointed as a corporate director for a fixed term of office and, as such, subsection 48(2) has no bearing on her status. Further, even if Little Stars did not provide Ms. Reid with appropriate information and/or documentation that failing, in my view, does not affect her status as a corporate director. There is no evidence before me that she was appointed as a director without her knowledge or consent, or that she ever formally resigned.
25. Individuals, such as Ms. Reid, who agree to serve as a corporate director must be cognizant of their legal obligations, including the possibility of personal liability for various corporate debts (including unpaid wages), and a person is not relieved from section 96(1) liability simply because he or she was not actively engaged in the business affairs of the corporation.
26. However, I am persuaded that there is presumptive merit to Ms. Reid’s “natural justice” ground of appeal.
27. Section 77 of the *ESA* states: “If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond”. In my view, the record does not provide sufficient evidence demonstrating that the Delegate complied with this latter provision. I do not consider providing a copy of the letter to the employer regarding the unpaid wage claims of the two complainants, in the circumstances of this case, to be sufficient section 77 notice to Ms. Reid. In particular, I note that Ms. Reid was never named in the original complaints, was never provided with a self-help kit, and was never formally notified that the Delegate was considering issuing a subsection 96(1) determination against her.
28. Subsection 114(2) of the *ESA* provides as follows:
- Before considering an appeal, the tribunal may
- (a) refer the matter back to the director for further investigation, or
 - (b) recommend that an attempt be made to settle the matter.
29. In my view, the most fair and efficient way to address this appeal, at this stage, is to refer the matter back to the Director so that Ms. Reid is afforded a reasonable opportunity to present her evidence and argument regarding her possible subsection 96(1) liability.

INTERIM ORDER

30. Pursuant to subsection 114(2) of the *ESA*, this matter is referred back to the Director for further investigation in accordance with these reasons.
31. The Director shall complete this further investigation and report, in writing, to the Tribunal by no later than 90 days from the date of these reasons.
32. Upon receipt of the Director's report, and after hearing from the parties, I will issue my final reasons for decision, and a final order, with respect to this appeal.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal