

An appeal

- by -

Bhupinder Nijjar

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

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

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2017A/151

DATE OF DECISION: May 1, 2018

DECISION

SUBMISSIONS

Christopher McHardy	counsel for Bhupinder Nijjar, a Director of 0957080 B.C. Ltd. cobra Hudson's Landing Pub
Mary Walsh	delegate of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Bhupinder Nijjar (“Mr. Nijjar”) has filed an appeal of a Determination issued by Helen Gregg, a delegate (“Delegate Gregg”) of the Director of Employment Standards (the “Director”) on November 21, 2017 (the “Director Determination”).
2. In the Director Determination, Delegate Gregg found that Mr. Nijjar was a director of 0957080 B.C. Ltd. cobra Hudson's Landing Pub (“957”) at the time wages owing to two employees were earned or should have been paid.
3. The Director ordered Mr. Nijjar to pay the amount of \$4,446.01 representing not more than two months' outstanding wages for the two employees, plus interest.
4. Mr. Nijjar appeals the Director Determination contending that the Director erred in law and failed to observe principles of natural justice in making the Determination. Mr. Nijjar also says evidence has become available that was not available at the time the Director Determination was being made.
5. After receiving the appeal, I sought submissions from the Director on what basis the Director associated 957 with 1065528 B.C. Ltd. cobra Hudson's Landing Pub (“1065528 B.C. Ltd.”), and how and when the determination dated September 27, 2017, (the “Corporate Determination”) was served on Mr. Nijjar.
6. This decision is based on the written submissions of the parties, the section 112(5) “record” that was before the Delegate at the time the decision was made (the “Record”) and the Reasons for the Determination.

FACTS AND ARGUMENT

7. Two employees of Hudson's Landing Pub filed complaints alleging that their employer had contravened the *ESA* in failing to pay regular and overtime wages, vacation pay and compensation for length of service.
8. On September 27, 2017, after investigating the complaints, the Director issued the Corporate Determination against 957. Delegate Gregg determined that 957 and 1065528 B.C. Ltd. were associated companies pursuant to Section 95 of the *ESA* and that the employees were entitled to wages and interest in the total amount of \$4,426.58. The Director also imposed administrative penalties in the amount of \$1,500 for the contraventions of the *ESA*.

9. The Corporate Determination, which included a notice to directors and officers regarding their personal liability for wages under the *ESA*, was sent by registered mail to 957's Registered and Records office as well as to 957's officers and directors. The appeal period for the Corporate Determination expired November 6, 2017. The Corporate Determination was not appealed by the appeal deadline and 957 did not pay the amount in the Corporate Determination.
10. An October 28, 2016 Corporate Registry search conducted by the Director indicated that 957 was incorporated on December 7, 2012 and that Mr. Nijjar was listed as a director. A subsequent search conducted on November 15, 2017 indicated that Mr. Nijjar continued to be a director as of November 2, 2017. Delegate Gregg determined that Mr. Nijjar was a director of 957 between July 2016 and November 2017, when the employees' wages were earned or should have been paid.
11. Delegate Gregg found that as a director, Mr. Nijjar was liable for up to two months of the employees' unpaid wages. Delegate Gregg was unable to conclude that Mr. Nijjar authorized, permitted or acquiesced in the contravention and found that he was not personally liable for the administrative penalties.
12. Mr. Nijjar appeals the Director Determination, contending that the Director erred in associating 957 with 1065528 B.C. Ltd. in the Corporate Determination which then led to the Delegate's error in finding Mr. Nijjar liable under Director Determination.
13. Mr. Nijjar says that there was no relationship between 957 and the persons engaged in the business operating Hudson's Landing Pub, that there was no common control or direction of 957 and Hudson's Landing Pub, and that there was no association or relationship between 957 and Hudson's Landing Pub except for an arm's length lease agreement between 957 and 1065528 B.C. Ltd. Mr. Nijjar also argues that, despite being in possession of the lease agreement and being aware of 957 and Hudson's Landing Pub's positions that they were not associated, the Director took no steps to request further information or evidence from Mr. Nijjar.
14. In response to my request to explain the basis for associating 957 and 1065528 B.C. Ltd. pursuant to section 95 of the *ESA*, Mary Walsh, a delegate ("Delegate Walsh") of the Director of Employment Standards, provided a response on behalf of the Director. Delegate Walsh submits that the Director did so based on the operating agreement between the parties. Delegate Walsh states that the Director was satisfied this agreement "reflected sufficient common control and direction to satisfy that required element for association and that the additional elements were met via the existence of two corporate entities and the statutory purpose of ensuring the complainants' wages were collected." Delegate Walsh submitted that the Director was satisfied the Appellants were provided with sufficient opportunity to know and respond to the issue of association. Finally, Delegate Walsh says that, given the "predominant non-participation" of 957 and Mr. Nijjar during the investigation process, the Corporate Determination was issued without reasons and no request for reasons was made by the appeal deadline. Consequently, Delegate Walsh submits that the Director "is not now in a position within this appeal submission to provide substantive reasons for the delegate's findings."
15. Delegate Walsh submits that the Corporate Determination was successfully delivered to 957's business address and deemed served to Mr. Nijjar as well as to 957's Registered and Records office.

ANALYSIS

16. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:
- the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination;
 - evidence has become available that was not available at the time the determination was being made.
17. Section 114 of the *ESA* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the appeal if the Tribunal determines that any of the following apply:
- (a) the appeal is not within the jurisdiction of the tribunal;
 - (b) the appeal was not filed within the applicable time limit;
 - (c) the appeal is frivolous, vexatious, trivial or gives rise to an abuse of process;
 - (d) the appeal was made in bad faith or filed for an improper purpose or motive;
 - (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
 - (f) there is no reasonable prospect the appeal will succeed;
 - (g) the substance of the appeal has been appropriately dealt with in another proceeding;
 - (h) one or more of the requirements of Section 112(2) have not been met.

Failure to observe the principles of natural justice

18. Mr. Nijjar contends that the Director failed to observe the principles of natural justice in failing to make reasonable efforts to give 957 an opportunity to respond to the allegations. Mr. Nijjar argues that, based on this failure, the Director unilaterally and without any evidence, associated 957 with 1065528 B.C. Ltd. in the Corporate Determination, which then led to the Director's error in finding Mr. Nijjar liable under the Director Determination.
19. The Record discloses that corporate searches of 957 were conducted on October 28 and December 1, 2016, and February 2, 2017. The first two Corporate Registry documents indicate that Mr. Nijjar's mailing address was the same as that of the Registered and Records office. A corporate search conducted on November 15, 2017, indicates while the address for 957's Registered and Records office had changed, the mailing address for Mr. Nijjar remained the same.
20. In 2018 BCEST 45, I found that on September 13, 2017, Delegate Gregg notified 957 that she was investigating the complaints of the two individuals, that she had made preliminary findings that the employees were owed wages, that 957 was associated with 1065528 B.C. Ltd, and that the directors of 957 could be held responsible for the outstanding wages. 957 was given the opportunity to respond. Delegate Gregg's correspondence included notice to 1065528 B.C. Ltd., which was also indicated to be carrying on business as Hudson's Landing Pub. Although the sole shareholder and director of 1065528 B.C. Ltd. advised

Delegate Gregg that 957 was not responsible for wage claims, neither Mr. Nijjar nor any corporate representatives of 957 responded to the Delegate's letter.

21. Mr. Nijjar alleges that the Delegate erred in "ignoring evidence from both 957 and Hudson's Landing Pub that they were not related." The record that was before the Director of Employment Standards at the time of the Corporate Determination discloses that no corporate director of 957 responded to the Director's notification of the complaints or the probability of associating the companies.
22. The Record before me indicates that the September 27, 2017 Corporate Determination, which included a notice to directors and officers regarding their personal liability for wages under the ESA, was sent to the business address for 957 as well as the mailing address for 957's Registered and Records office and Mr. Nijjar's mailing address (which were the same as of that date). The Corporate Determination was successfully delivered to 957 at its business address, although the Corporate Determination sent to 957's Registered and Records mailing address and to Mr. Nijjar's mailing address was refused. I find no basis for Mr. Nijjar's argument that the Delegate failed to observe the principles of natural justice. The Corporate Determination associating 957 with 1065528 B.C. Ltd. was successfully delivered to 957 and was deemed to have been served on Mr. Nijjar.
23. Given that Mr. Nijjar did not respond to Delegate Gregg's notices that the Director would be associating 957 and 1065528 B.C. Ltd., I find no basis for concluding that the Delegate failed to "follow up with either party to investigate" the assertions that the entities were not associated.
24. The deadline for filing the appeal of the Corporate Determination was November 6, 2017. Neither Mr. Nijjar nor any other director of 957 took steps to appeal the Corporate Determination until December 29, 2017. I dismissed that appeal in Tribunal Decision 2018 BCEST 45.
25. The Tribunal has long held that once corporate liability has been established, corporate directors cannot, through an appeal of a determination of director liability, reargue the issue of a company's liability for wages unless they can establish fraud or fresh evidence that is decisive to the merits of the issue. (*Steinemann*, BC EST # D180/96). Mr. Nijjar has not established fraud, nor has he provided fresh evidence. Although Mr. Nijjar submitted evidence regarding the relationship between 957 and 1065528 B.C. Ltd. on appeal as "new evidence", that evidence was available during the investigation, and had Mr. Nijjar considered it relevant, it ought to have been provided to the Director at that time. Having failed to do so, Mr. Nijjar is precluded from submitting fresh evidence on this appeal of the Director Determination.
26. The Corporate Registry documents confirm that Mr. Nijjar was a corporate director of 957 during the time the employees' wages were earned and should have been paid. Consequently, I find that Mr. Nijjar is liable for the outstanding wages under section 96 of the *ESA*.
27. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I conclude that Mr. Nijjar has not met that burden and dismiss the appeal.

ORDER

- ^{28.} Pursuant to section 115 of the *ESA*, I Order that the Determination, dated November 21, 2017, be confirmed in the amount of \$4,446.01 together with whatever further interest that has accrued under section 88 of the *ESA* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal