

An appeal

- by -

Gavin Wilding  
("Mr. Wilding")

- 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:** Shafik Bhalloo

**FILE NO.:** 2018A/62

**DATE OF DECISION:** July 30, 2018

## DECISION

### SUBMISSIONS

Gavin Wilding on his own behalf as a Director of Pool Pond Productions Inc.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Gavin Wilding (“Mr. Wilding”), the sole Director of Pool Pond Productions Inc. (“PPP”), has filed an appeal of a section 96 determination issued by a delegate (the “delegate”) of the Director of Employment Standards (the “Director”) on April 26, 2018 (the “S. 96 Determination”).
2. By way of background, Raynor Wiklund (“Mr. Wiklund”) filed a complaint under the *ESA* on November 1, 2017 (the “Complaint”), alleging that his employer, ultimately determined to be PPP (and not Rampage Productions as named by Mr. Wiklund in the Complaint), contravened the *ESA* by failing to pay him regular wages.
3. The delegate conducted an investigation of the Complaint and issued a determination against PPP on April 26, 2018 (the “Corporate Determination”) finding wages and interest were owed to Mr. Wiklund in the total amount of \$3,617.64. The Corporate Determination also levied administrative penalties in the amount of \$1,000 under section 29 of the *Employment Standards Regulation* (the “Regulation”) for contraventions of sections 17 and 18 of the *ESA*. The total amount of the Corporate Determination is \$4,617.64.
4. The Corporate Determination, which included a notice to directors and officers explaining their personal liability under the *ESA*, was sent by registered mail to its mailing and records office address on West 8th Avenue, Vancouver and to Mr. Wilding at the same address provided for him in the B.C. Online Corporate Registry search of PPP conducted on April 13, 2018, by the delegate.
5. The Director also issued the S. 96 Determination against Mr. Wilding on the same date as the Corporate Determination. In the Reasons for the S.96 Determination (the “Reasons”), the delegate states that this was done because Mr. Wilding advised that PPP will not pay the amount ordered in the Corporate Determination and he (the delegate) was “satisfied that he [Mr. Wilding] was given an opportunity to respond regarding his personal liability as a director of the Employer.”
6. The S. 96 Determination held that Mr. Wilding is personally liable for up to two (2) months’ unpaid wage for each employee. As Mr. Wiklund was employed for less than two months; the Determination held that Mr. Wilding was personally liable for the full amount of wages owed to Mr. Wiklund in the amount of \$3,529.81, plus interest of \$87.83 for a total of \$3,617.64. The delegate found sufficient evidence to conclude that Mr. Wilding authorized, permitted or acquiesced in the contraventions of the *ESA* specified in the Corporate Determination and therefore, held him responsible for the administrative penalties totaling \$1,000 issued against PPP in the Corporate Determination. The total amount of the S.96 Determination is \$4,617.64.

7. In his appeal, Mr. Wilding alleges the Director failed to observe the principles of natural justice in making the S.96 Determination and he is seeking the Tribunal to cancel the S. 96 Determination.
8. In correspondence dated June 11, 2018, the Tribunal notified the parties that it had received Mr. Wilding's appeal and was enclosing the same for informational purposes only. The parties were also advised that no submissions were being sought from any of them at this time. The Tribunal also requested from the delegate a copy of the section 112 "record" (the "Record").
9. On June 19, 2018, the Tribunal received the Record from the Director and forwarded a copy of the same to Mr. Wilding and Mr. Wiklund. Both were provided an opportunity to object to its completeness but neither did. Accordingly, the Tribunal accepts the Record as complete.
10. Section 114(1) of the ESA permits the Tribunal to dismiss all or part of an appeal without seeking submissions from the other parties. I have decided that this appeal is appropriate to consider under section 114(1). Accordingly, I will assess the appeal solely on the basis of the S. 96 Determination, Mr. Wilding's submissions, and my review of the Record when the Corporate Determination and the S. 96 Determination were being made. If I am satisfied that Mr. Wilding's appeal or part of it has some presumptive merit and should not be dismissed under section 114(1) of the ESA, the Tribunal will invite Mr. Wiklund and the Director to file reply submissions on the merits of the appeal. Mr. Wilding will then be given an opportunity to make a final reply to the submissions, if any.

## **ISSUE**

11. The issue of this appeal is whether Mr. Wilding has shown any basis for this Tribunal to cancel the S. 96 Determination.

## **SUBMISSIONS OF MR. WILDING**

12. Mr. Wilding has made written submissions in support of his appeal. The submissions may be categorized into two separate categories: (i) Submissions disputing the merits of the Corporate Determination and (ii) allegations of bias against the delegate in the conduct of the investigation and making of the Corporate Determination.
13. With respect to the merits of the Corporate Determination, Mr. Wilding submits that "it remains [his] position" that Mr. Wiklund is an unpaid volunteer and was not an employee of PPP. In support of his position, he submits:

...I'd like to provide specific information here for the tribunal to consider:

1. There is no agreement, contract, deal memo, email, to support a formal 'employee/employer' relationship.
2. The original filing on the Claimant & Information form (attached) refers to 'Rampage Productions', which is incorrect. This entity has no relationship to this matter whatsoever, which further supports that the Claimant had no formal relationship to myself or Pool Pond Productions or the project in question.

3. The Claimant was not legally available to hire because his immigration status was in question. (See email "SIN for payment")
4. There are no time sheets, signs offs or any other typical industry standard documents to support Claimant's claims to hours worked.
5. Personal Liability. I cannot understand Mr. Carmody's assessment of my 'personal liability' in this matter, and there is no evidence to support that I was acting 'personally' on this matter. Furthermore, it is customary to have a single purpose corporation created for each film and television project we engage in.
6. NEW INFORMATION: The 'project' in question has no commercial value or exposure. Meaning, this initiative was merely a "proof of concept", and all people involved were volunteers except ONE PERSON (the editor). So, given this was not a professional endeavour, in the traditional sense, and there is no commercial activity to speak of, this should further support our claim that the Claimant was helping on the project as an unpaid intern. Otherwise, we'd have paperwork to support this.

It is not uncommon in the film and television business to have unpaid volunteer interns, whom often times, after a successful trial period, ultimately become part or full time employees. This is especially after graduating from school, because they have little or no professional track record to reference. By interning, they have the opportunity to gain professional-like experience, and that's the trade off.

14. Mr. Wilding further submits that Mr. Wiklund "was not competent to warrant a professional role when/if this project became commercial" because he was "failing on his intern efforts". In support of this submission Mr. Wilding submits some emails he sent to Mr. Wiklund including one sent by an editor working with PPP that are critical of Mr. Wiklund.
15. Mr. Wilding also contends that PPP could not have hired Mr. Wiklund as an employee because:

... any time we formally hire an individual, we need to have it documented and signed off on, and we strictly only hire BC Residents and/or Canadian citizens so we can access the available film and television tax credits. These make up a significant portion of our incentives for producing projects in BC and we simply cannot hire someone without bonafide paperwork.

Therefore, it would not be possible for us (or anyone, for that matter) to hire an employee without the appropriate paperwork, SIN, proper immigration status, proof of citizenship, etc. We have none of this, with respect to the Claimant. [underline in original]
16. Mr. Wilding next goes on to allege bias on the part of the delegate in the investigation and in the decision making. He presents three instances of what he refers to as evidence of bias. The first instance, he states, is when he joined the telephone call for the scheduled mediation of the Complaint against PPP on February 6, 2018. He states:

When I joined the call, I indicated that I could not proceed as the company referenced on the Complaint & Information Form form (enclosed) was incorrect. Mr. Carmody seemed to feel that was merely a minor point, and that we should proceed regardless. I indicated that I cannot represent 'the wrong company' on a mediation call. Mr. Carmody indicated that it was not

uncommon for employees to 'not' know who their employer was. I have been in business for 30 years and I find this extremely hard to believe that this is the case... *Who doesn't know who their employer is?*

Nonetheless, it was at this point that I noticed Mr. Carmody become noticeably "frustrated", in my opinion, and his consequent emails suggested to me that he was not evaluating this matter in a fair, impartial light. [*italics in original*]

17. The second instance of bias according to Mr. Wilding is contained in an email exchange he had with the delegate on March 28, 2018. He quotes the following part in the email of the delegate as exhibiting the delegate's bias:

*Look, I get that you were not happy with his performance. Next time you engage an intern (note the Act does not contemplate unpaid internships - if the duties performed by interns fall within the definition of "work", the intern falls within the definition of "employee", and the agency falls within the definition of "employer", internships will be considered "work" for the purposes of the Act), draft a contract, monitor the intern's hours to make sure they don't work overtime if you don't want to pay overtime, and if you aren't happy with their work, let them go.*

18. According to Mr. Wilding, the tone of the delegate in the email suggests he (Mr. Wilding) is a "'novice' in these matters of employee/employer, which is not the case". He states that he is "a seasoned producer" and the delegate knows it. He further adds "[b]ased on his Determination, he clearly looked into my background, and therefore, he really doesn't need to communicate with a tone that suggests that I am incompetent in such matters."

19. The last instance of bias, according to Mr. Wilding, is contained in the delegate's March 29, 2018, email where the delegate states:

*As I said when we first spoke, it's quite common for complainants not to be aware of, or to be confused about, the legal entity employing them. That's one of the issues we can sort out at mediation. You were invited to clarify the legal entity that engaged with Mr. Wiklund and participate in the mediation but instead chose to hide behind a technical irregularity in the mediation notice.*

20. Mr. Wilding argues that he is not able to speak on behalf of a company, Rampage Productions, (that Mr. Wiklund named in the complaint as his employer) that he does not represent. He states this does not amount to 'hiding behind a technical irregularity' as contended by the delegate. He goes on to add:

The mediation notice is a legal document, and therefore, should be accurate. MY reluctance to proceed on this basis should not be viewed as me being reluctant to cooperate, as Mr. Carmody interpreted it. I simply asked to have the correct documentation in place prior to doing so.

While I appreciate we are all humans, and that emotions play a role in our interactions. However, I think the tone of these emails clearly indicate that Mr. Carmody was not acting impartially to this matter.

Given Mr. Carmody's final decision, where he is imposing the maximum penalties, interest, etc., it's apparent to me, at least, and hopefully to you as well, that this was not a fair evaluation of this matter.

21. In the circumstances, Mr. Wilding is asking the Tribunal to “have a fresh look at this matter”.

### **ANALYSIS**

22. In a challenge of a determination issued under section 96 of the *ESA*, the appellant is *limited* to arguing those issues that arise under section 96, namely:

- (i) whether the person was a director when the wages were earned or should have been paid;
- (ii) whether the amount of the liability imposed is within the limit for which a director may be found personally liable; and
- (iii) whether circumstances exist that would relieve the director from personal liability under subsection 96(2).

23. The Director may issue a section 96 determination without holding a hearing based on the corporate records filed with and maintained by the Registrar of Companies. When an individual is recorded as a director of a company in the records maintained by the Registrar of Companies, a rebuttable presumption of fact arises that the individual actually is a director of the company in question. In *David Wilinofsky and Ron J. Wilinofsky* (BC EST # D106/99), the Tribunal indicated that this presumption is rebuttable by credible and cogent evidence that the Registrar’s record are inaccurate. However, the evidentiary burden of proving that one is not a corporate director lies with the individual who denies such status.

24. In this case, on April 13, 2018, the delegate conducted a BC Online: Registrar of Companies- Corporation Search of PPP. The search revealed that Mr. Wilding is the sole director of PPP. I find the delegate properly relied on this information to make the S. 96 Determination against Mr. Wilding. Furthermore, it is noteworthy that in his appeal of the S.96 Determination, Mr. Wilding does not dispute he was a director of PPP during the material time Mr. Wiklund was employed with PPP and should have been paid his wages. Mr. Wilding also does not present evidence of any circumstances that would relieve him of personal liability under subsection 96(2) of the *ESA*.

25. However, Mr. Wilding disputes the status of Mr. Wiklund as an employee of PPP which is something he also did in the investigation of the Complaint leading to the Corporate Determination. On a closer examination of his appeal submissions which I have summarized above, I find that a significant part of Mr. Wilding’s submissions reiterate his submissions in the investigation of the Complaint and also challenge the delegate’s findings of fact in the Corporate Determination. An appeal of a section 96 determination is not a proper venue for challenging findings and conclusions reached in a corporate determination. In the circumstances, I find that there is no presumptive merit in Mr. Wilding’s Appeal of the S. 96 Determination. I will address the allegations of bias which are part of Mr. Wilding’s natural justice ground of appeal separately in this decision.

26. While this is not an appeal of the Corporate Decision, I have had the benefit of looking at the Corporate Determination which the delegate sent separately to the Tribunal and which the latter disclosed to all parties. I feel compelled to note that the submissions of Mr. Wilding challenging findings of fact in the Corporate Determination would likely fail, if this were an appeal of the Corporate Determination. I note that the Tribunal has indicated, time and time again, that it does not have jurisdiction over questions of

fact (see *Re Pro-Serv Investigations Ltd.*, BC EST # D059/05; *Re Koivisto (c.o.b. Finn Custom Luminum)*, BC EST # D006/05), unless of course the matter involves errors on findings of fact which may amount to an error of law. In *Re Funk*, BC EST # D195/04, the Tribunal expounded on the latter point stating that the appellant would have to show that the fact finder made a “palpable and over-riding error” or that the finding of fact was “clearly wrong” to establish error of law. Based on my review of the Record and the reasons for the Corporate Determination, I am not persuaded that the Delegate made a palpable or overriding error or reached a clearly wrong conclusion of fact or acted without any evidence or on a view of evidence that could not reasonably be entertained. To the contrary, I find that the Delegate’s findings of fact, particularly as they relate to the determination of Mr. Wiklund’s status as an employee of PPP, rather persuasive.

27. With respect to the natural justice ground of appeal, Mr. Wilding alleges bias on the part of the delegate in making the Corporate Determination. While I am cognizant that this is an appeal of the S.96 Determination, I will address the allegation of bias because it is a very serious matter as it impugns the adjudication process and challenges the integrity of the decision-maker and it should not be made lightly without any basis.

28. In *Wewaykum Indian Band v. Canada*, 2003 SCC 45, at para. 58, in addressing the subject of the importance of impartiality of those who adjudicate in law, the Supreme Court of Canada stated:

The essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind. Conversely, bias or prejudice has been defined as a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.

(*R. v. Bertram*, [1989] O.J. No. 2123 (QL) (H.C.), quoted by Cory J. in *R. v. S. (R.D.)*, 1997 CanLII 324 (S.C.C.), [1997] 3 S.C.R. 484, at para. 106.)

29. With respect to the test or standard of proof for establishing bias, the Court referred to its earlier decision in *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369, and stated at paragraph 60:

In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, supra, at p. 394, is the reasonable apprehension of bias:

. . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is “what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”

30. In *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99 (Reconsideration of BC EST # D101/98), the Tribunal adopted the comments of Newbury, J.A. in *Finch v. The Association of Professional Engineers and Geoscientists* (1996), 18 B.C.L.R. (3d) 361 at 376 (B.C.C.A.):

The test for determining whether a reasonable apprehension of bias arises is well-known and clear: Cory, J. for the Court in *Newfoundland Telephone Co. Ltd. v. Board of Commissioners of Public Utilities* (1992) 4 Admin. L.R. (2d) 121 (S.C.C.) formulated it this way:

It is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness.

To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.

31. Based on the law delineated above, the test for determining the existence of bias on the part of the decision-maker is an objective one. Because allegations of bias are serious, they should not be found except on the clearest of evidence; and that the evidence presented should allow for objective findings of fact that demonstrate actual bias or reasonable apprehension of bias. In this case, having reviewed the alleged instances of bias delineated in Mr. Wilding’s appeal submissions – including particularly the alleged manner of the delegate and his treatment of Mr. Wilding during the mediation call and his subsequent emails to Mr. Wilding including particularly the emails of March 28 and 29, 2018, set out in the submissions – I am not persuaded that a reasonably informed bystander could reasonably perceive bias on the part of the delegate. I find that there was no bias, or reasonable apprehension of bias, arising from the delegate’s conduct in the investigation of the Complaint or his subsequent decision. I find Mr. Wilding’s perceptions of bias to be very subjective and I do not share his conclusion that the delegate was “not acting impartially to this matter”.
32. In the result, I do not find there is any presumptive merit in Mr. Wilding’s appeal of the S.96 Determination and I dismiss it under section 114(1)(f) of the *ESA*.

## **ORDER**

33. Pursuant to section 115 of *ESA*, I confirm the S. 96 Determination made on April 26, 2018, against Mr. Wilding, a Director of PPP, together with any additional interest that has accrued pursuant to section 88 of the *ESA*.

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**Shafik Bhalloo**  
**Panel**  
**Employment Standards Tribunal**