

An appeal

- by -

Darryl Colley
("Mr. Colley")

- 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: David B. Stevenson

FILE NO.: 2018A/56

DATE OF DECISION: August 7, 2018

DECISION

SUBMISSIONS

Veronica Johnson

on behalf of Darryl Colley, a Director of 555924 B.C. Ltd. carrying on business as Kelly O’Bryan’s Restaurant and The Celt Family Restaurant

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Darryl Colley (“Mr. Colley”) has filed an appeal of a Determination issued by Jo-Ann Spencer, a delegate (the “delegate”) of the Director of Employment Standards (the “Director”), on April 18, 2018 (the “Determination”).
2. The Determination found Mr. Colley was a director of 555924 B.C. Ltd. carrying on business as Kelly O’Bryan’s Restaurant and the Celt Family Restaurant (“555924”), an employer found to have had contravened provisions of the *ESA*, at the time wages were earned or should have been paid to seven former employees (the “Complainants”) of the business of 555924 and as such was personally liable under section 96 of the *ESA* for wages in the amount of \$7,329.77, an amount representing not more than two months’ unpaid wages for each of the Complainants.
3. This appeal is grounded in all of the available grounds of appeal set out in section 112 of the *ESA*: error of law, failure to observe principles of natural justice in making the Determination, and evidence coming available that was not available when the Determination was being made. Mr. Colley seeks to have the Determination cancelled.
4. In correspondence dated May 31, 2018, the Tribunal acknowledged having received the appeal, requested the section 112(5) record (the “record”) from the Director, and notified the parties that no submissions were being sought from any other party pending a review of the appeal by the Tribunal.
5. The record has been provided to the Tribunal by the Director, a copy has been delivered to the representative for Mr. Colley and to the individual Complainants (two of the complainants did not have current contact information on file and therefore did not receive the record), and an opportunity has been provided to object to its completeness. There has been no such objection and, accordingly, the Tribunal accepts the record as being complete.
6. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal, my review of the material that was before the Director when the Determination was being made, and any additional evidence allowed to be included in the appeal. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any 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 or 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.*

7. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and the Complainants will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal will succeed.

ISSUE

8. The issue here is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE FACTS

9. The relevant facts are brief.
10. The Director investigated a complaint filed by a former employee of 555924 and, on April 18, 2018, after expanding the investigation under section 76(2) of the *ESA* to include seven former employees, issued a Determination against 555924 (the “corporate determination”) finding it liable for wages to the Complainants in the amount of \$7,329.77. The Director also imposed an administrative penalty on 555924 in the amount of \$500.00.
11. A BC Online Registrar of Companies search conducted by the Director on March 2, 2018, indicated 555924 was incorporated on December 12, 1997, and Mr. Colley was listed as a director. The search showed Mr. Colley was listed as a director of 555924 during the period, January 15, 2018, to January 29, 2018, when the Complainants’ unpaid wages were earned or should have been paid.
12. Based on the information acquired and the findings made, the Director concluded Mr. Colley was liable under section 96 of the *ESA* for the amount set out in the Determination. Mr. Colley was not found liable for the administrative penalty imposed on 555924 in the corporate determination.

ARGUMENT

13. The argument made in this appeal is that Mr. Colley cannot be held liable under the *ESA* for compensation for length of service because 555924 was insolvent as of January 27, 2018. A substantial number of documents are attached to the appeal and appeal submission as evidence in support of the contention that 55924 was insolvent. None of these documents are included in the record.

ANALYSIS

14. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:

112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

- (a) the director erred in law;*
- (b) the director failed to observe the principles of natural justice in making the determination;*
- (c) evidence has become available that was not available at the time the determination was being made.*

15. I shall respond first to the contention that the Director erred in law in finding Mr. Colley personally liable under section 96 of the *ESA*.

16. A person challenging a determination issued under section 96 is limited to arguing those issues which arise under that provision: whether the person was a director or officer when the wages were earned or should have been paid, whether the amount of the liability imposed is within the limits for which a director or officer may be found personally liable; and whether circumstances exist that would relieve the director or officer from personal liability under section 96(2) of the *ESA*, which reads:

(2) Despite subsection (1), a person who was a director or an officer of a corporation is not personally liable for

- (a) any liability to an employee under section 63, termination pay or money payable in respect of individual or group terminations, if the corporation is in receivership,*
- (b) any liability to an employee for wages, if the corporation is subject to action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act,*
- (c) vacation pay that becomes payable after the director or officer ceases to hold office, or*
- (d) money that remains in an employee's time bank after the director or officer ceases to hold office.*

17. The representative for Mr. Colley argues Mr. Colley should not have been found to be a director of 555924 because as at January 27, 2018, he was not listed as a director on the bank account for the business, had no authority or right to access any financial information relating to the business and, generally, was not medically capable of functioning as a director.

18. In *Director of Employment Standards (Re Michalkovic)*, BC EST # RD047/01 (Reconsideration of BC EST # D056/00), the Tribunal summarized the law under the *ESA* for deciding whether a person may be found to be a director or officer and personally liable under section 96, stating:

. . . the case law reviewed here and in *Wilinofsky* stands for the following propositions:

1. The corporate records, primarily those available through the Registrar of Companies or available at a corporation's registered and records office, raise a rebuttable presumption that a person is a director or officer. In other words, the Director of Employment Standards may presumptively rely on those corporate records to establish director or officer status.
2. It is then open to the person, who, according to the corporate records, is a director or officer, to prove on the balance of probabilities that the company records are *inaccurate*, for example, because the person resigned and the documents were not properly processed, a person is not properly appointed etc.
3. There may well be circumstances where it would be inappropriate to find that a person is a director or officer despite being recorded as such. However, it will be the rare and exceptional case to be decided on all the circumstances of the particular case and not simply by showing that he or she did not actually perform the functions, duties or tasks of a director or officer.
4. The determination of director-officer status should be narrowly construed, at least with respect to Section 96.

19. In *David Wilinofsky and another*, BC EST # D106/99, the Tribunal commented on the burden imposed on an individual recorded in the corporate records as a director or officer of a company to show the corporate information is wrong:

. . . where an individual is recorded as an officer or director of a company in the records maintained by the Registrar, a rebuttable presumption arises that the individual actually is a director or officer ... of the company This presumption, however, may be rebutted by credible and cogent evidence that the Registrar's records are inaccurate--the burden of proving that one is not a corporate director or officer lies with the individual who denies such status.

20. There is no evidence the corporate records are wrong and no credible and cogent evidence that would persuade me the Director made an error of law in finding Mr. Colley was a director of 555924. I find it was not inappropriate in the circumstances to find Mr. Colley was a director of 555924. The material presented as "evidence" that Mr. Colley was medically incapable of functioning as a director is underwhelming and not at all significant relative to the entitlement of the Complainants to length of service compensation, which is after all a statutory benefit earned through years of service and payable to an employee when their employment is terminated without notice.

21. In respect of the argument that Mr. Colley has no personal liability under section 96 because 555924 was insolvent at the time the wage liability arose, on the facts that argument is not supported by the provisions of the *ESA* upon which it relies and I am unable to accept it.

22. The argument references section 96(2)(a) and (b); those provisions allow a director to avoid personal liability for unpaid wages if the corporation of which the person is a director is either “*in receivership*” or “*subject to an action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act*”. There is no evidence either of those circumstances apply to 555924. The representative for Mr. Colley submits 555924 was insolvent as at January 27, 2018. While that may be so, it is not relevant to Mr. Colley’s personal liability under section 96 where the “fact” of insolvency did not manifest in 555924 being placed into receivership or result in a section 427 initiative or in a bankruptcy or insolvency proceeding based on that “fact”. In other words, it is not the mere fact of insolvency of a corporation that allows a director of that corporation to avoid personal liability under section 96, but the commencement of legal proceedings under the described legislation related to a receivership, bankruptcy or insolvency.
23. The Director did not err by not finding that Mr. Colley had no personal liability under section 96 of the *ESA*. While I have sympathy for Mr. Colley’s situation, my personal feelings do not allow me to ignore or alter the clear words and expression of the *ESA* to allow Mr. Colley to avoid personal liability.
24. The error of law ground of appeal is dismissed.
25. Mr. Colley has provided nothing in the appeal that would indicate he was denied the procedural protections accorded by section 77 of the *ESA* or principles of natural justice. Mr. Colley was accorded the procedural rights required by section 77 of the *ESA* and principles of natural justice.
26. The second ground of appeal is dismissed.
27. Mr. Colley has submitted a considerable amount of material under the ground of appeal set out in section 112(1)(c). This ground is commonly referred to as the “new, or additional, evidence” ground of appeal and is intended to address evidence that may bear on the merits of an appeal but was not presented to the Director during the complaint process, was not considered by the Director and is not included in the record.
28. The Tribunal has a discretion to accept new or additional material presented with an appeal as evidence. Material presented with an appeal under section 112(1)(c) as “additional evidence” is tested against several considerations before the Tribunal will accept it: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03.
29. The proposed “evidence” included with the appeal does not meet the necessary considerations for admission under section 112(1)(c) in three respects: first, it is not “new” – all of the material appears to have been reasonably available at the time the Determination was being made and could have been provided during the complaint process; second, based on my findings on the other two grounds of appeal, the evidence is not relevant to any material issue arising from the Complainants’ entitlement under the *ESA*; and third, specifically relating to the “medical” evidence presented to support the submission that Mr. Colley was medically incapable of acting as a director of 555924, it is not particularly cogent and not determinative of the submission for which it is submitted.
30. I find Mr. Colley has not demonstrated the material provided with the appeal should be accepted.

31. In sum, there is nothing in the appeal that shows the Director made any error in the Determination. The material in the record confirms Mr. Colley was a director of 555924 at the time wages were earned or should have been paid, that the liability imposed on him is within the limits for which a director may be found personally liable under section 96 and there are no circumstances that would relieve Mr. Colley personal liability under the *ESA*.
32. Based on all of the above, I find this appeal has no reasonable prospect of succeeding. The purposes and objects of the *ESA* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1)(f) of the *ESA*.

ORDER

33. Pursuant to section 115 of the *ESA*, I order the Determination dated April 18, 2018, be confirmed in the amount of \$7,329.77, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Panel
Employment Standards Tribunal