

An appeal

- by -

Bruno Oliveira
("Oliveira")

- 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/117

DATE OF DECISION: February 27, 2019

DECISION

SUBMISSIONS

Bruno Oliveira	on his own behalf
Tyler Siegmann	delegate of the Director of Employment Standards

INTRODUCTION & PRIOR PROCEEDINGS

1. On May 18, 2018, Alana DeGrave, a delegate of the Director of Employment Standards, issued a determination under section 79 of the *Employment Standards Act* (the “*ESA*”) against 1026019 B.C. Ltd., carrying on business as “Wings Tap & Grill” (the “Employer”) regarding five former employees’ unpaid wages. This determination included \$8,450.67 in unpaid wages and section 88 interest as well as a further \$2,000 on account of monetary penalties (see section 98). I shall refer to this determination as the “Corporate Determination”. The Corporate Determination was never appealed and now stands as a final order.
2. On October 5, 2018, Tyler Siegmann, also a delegate of the Director of Employment Standards (the “delegate”), issued a second determination relating to those same five former employees’ unpaid wages. This determination was issued against Mr. Bruno Oliveira (“Oliveira”) pursuant to subsection 96(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.” I shall refer to this determination, in the total amount of \$8,559.42 including section 88 interest, as the “Section 96 Determination”.
3. Mr. Oliveira appealed the Section 96 Determination on the ground that “evidence has become available that was not available at the time the determination was being made” (see subsection 112(1)(c) of the *ESA*), and his reasons for appeal also suggested that he was claiming that the delegate erred in law (see subsection 112(1)(a) of the *ESA*). In addition, the subsection 112(5) record before me also disclosed a possible breach of section 77 of the *ESA* which could be characterized as a failure to observe the principles of natural justice (see subsection 112(1)(c)).
4. Fundamentally, Mr. Oliveira’s position is that he never was a director of the Employer notwithstanding the fact that his name appeared in B.C. Corporate Registry records as a director during the period when the former employees’ unpaid wage claims crystallized.
5. On January 14, 2019, I issued interim reasons for decision (see *Oliveira*, 2019 BCEST 9), referring the matter of Mr. Oliveira’s unpaid wage liability back to the Director for further investigation. In particular, I was concerned about whether Mr. Oliveira had been given a reasonable opportunity, consistent with section 77 of the *ESA*, to rebut the B.C. Corporate Registry records prior to the issuance of the Section 96 Determination. While the delegate attempted to contact Mr. Oliveira using an address at which he no longer resided, the delegate did not attempt to contact him at his actual residence (and the delegate apparently was aware of this new address) prior to issuing the Section 96 Determination. I issued the following order:

Pursuant to subsection 114(2)(a) of the *ESA*, I am referring the matter of Mr. Oliveira's personal liability under subsection 96(1) back to the Director for further investigation. The Director shall afford Mr. Oliveira 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.

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. Oliveira's personal liability to the five former employees (see subsections 2(d) and 114(2)(b) of the *ESA*).

SUBSEQUENT PROCEEDINGS

6. On January 22, 2019, the delegate provided a report to the Tribunal in which he advised: "Wages found to be owing to five former employees have been paid in full by another corporate director. Accordingly, no further action is required regarding Mr. Oliveira's personal liability because the former employees have been paid."
7. On January 24, 2019, the Tribunal wrote to both the delegate and Mr. Oliveira seeking their position regarding whether they would object to the Tribunal issuing a consent dismissal order in this matter. The deadline for reply was February 7, 2019. Mr. Oliveira did not respond to the Tribunal's request. The delegate, by way of a letter dated February 1, 2019, indicated: "The Director takes no position on this matter considering the five former employees have been paid all outstanding wages and, therefore, further investigation into Mr. Oliveira's personal liability is not required."

FINDINGS

8. Mr. Oliveira's position is that the Section 96 Determination should be cancelled because it is fundamentally flawed inasmuch as he never was a director of the Employer and, that being the case, the Director had no statutory authority to issue a determination against him under subsection 96(1) of the *ESA*. The delegate's position is more nuanced – the delegate does not necessarily accept Mr. Oliveira's position regarding his status (indeed, the delegate has not taken any position with respect to that matter). Rather, the delegate says that since there is no longer an active *lis* (that is, a live dispute) between the Director of Employment Standards and Mr. Oliveira, there is no further need for an extant subsection 96(1) determination against Mr. Oliveira.
9. While it seems clear that the Director of Employment Standards will not take any steps to enforce the Section 96 Determination, it nonetheless currently stands as a valid and subsisting payment order. In my view, in light of my finding that "Mr. Oliveira was not given the opportunity, consistent with section 77 of the *ESA*, to rebut the B.C. Corporate Registry records prior to the issuance of the Section 96 Determination"¹ and the delegate's position that he does not oppose a cancellation of the Section 96 Determination, and in the absence of any prejudice to the five former employees, I believe cancellation is an appropriate order to make at this juncture.

¹ See 2019 BCEST 9 Bruno Oliveira (Re)

10. I wish to stress, however, that in issuing a cancellation order, I am not making any factual and/or legal finding with respect to Mr. Oliveira's alleged status as corporate director.

ORDER

11. Pursuant to subsection 115(1)(a) of the *ESA*, the Section 96 Determination is cancelled.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal