



Citation: Nitai Chand Goswami (Re)  
2019 BCEST 58

An appeal

- by -

Nitai Chand Goswami

- 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.:** 2019/32

**DATE OF DECISION:** June 17, 2019

## DECISION

### SUBMISSIONS

Sunanda Kikla

on behalf of Nitai Chand Goswami

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Nitai Chand Goswami (“Mr. Goswami”), the sole Director of Fraser Valley Management Consultants Canada Ltd. (“FVMCC”), has filed an appeal of a section 96 determination that was issued on February 12, 2019, (the “S. 96 Determination”).
2. By way of background, on August 4, 2018, pursuant to section 74 of the *ESA*, Rajesh Selvaraj and Sakthivel Vethanayagam (collectively “the Complainants”) filed their complaints against Windsor Hotel Ltd. (“Windsor”) carrying on business as Pacific Grill Restaurant (the “Employer”) alleging that the Employer contravened the *ESA* by failing to pay them regular wages, overtime wages, statutory holiday pay, and vacation pay (the “Complaints”).
3. The delegate of the Director decided to investigate the Complaints and contacted both parties, the Complainants and the Employer, to obtain their submissions.
4. On November 19, 2018, during the investigation of the Complaints, Windsor Hotel amalgamated with several other companies or businesses operated by or associated with Mr. Goswami and his spouse, Sunanda Kikla (“Ms. Kikla”), namely, Fraser Valley Educational Consultants Inc., Fraser Valley Management Consultants Canada Ltd., Greenwood Motel Ltd., Global Training Consultants Ltd., and Pacific Hotel Ltd. As a result of the amalgamation, Windsor Hotel and other entities involved in the amalgamation ceased to exist. In their place, a new legal entity was formed. The new entity retained the name of one of the amalgamating companies and it is called Fraser Valley Management Consultants Canada Ltd. (“FVMCC”). Therefore, effectively, the “the Employer” of the Complainants is FVMCC.
5. While Mr. Goswami was a director and the sole officer of Windsor prior to its amalgamation, he continued as the sole Director of the amalgamated entity, FVMCC, as of the amalgamation date.
6. On January 11, 2019, after completing his investigation of the Complaints, the delegate issued a corporate determination (the “Corporate Determination”) finding the Employer to have contravened Part 3, sections 17 (payday) and 18 (payment of wages on employment termination); Part 4, section 40 (overtime wages); Part 5, section 45 (statutory holiday pay); Part 7, section 58 (annual vacation pay), and Part 8, section 63 (liability resulting from length of service) of the *ESA* in respect of the employment of the Complainants. The Corporate Determination ordered the Employer to pay the Complainants wages in the total amount of \$44,946.84 inclusive of accrued interest. The Corporate Determination also levied seven (7) administrative penalties against the Employer totaling \$3,500 for breaches of sections 17, 18, 28, 40, 46, 58, and 63 of the *ESA*. The total amount of the Corporate Determination is \$48,446.84.
7. The Corporate Determination, which included a notice to directors and officers explaining their personal liability under the *ESA*, was sent by registered mail to the Employer at its registered and records office

address in Greenwood, B.C., which was also the mailing address provided for Mr. Goswami in the B.C. Online Corporate Registry search of Windsor.

8. On February 19, 2019, pursuant to section 112 of the *ESA*, the Employer appealed the Corporate Determination. The Tribunal dismissed the appeal under section 114(1)(f) as having no reasonable prospect of succeeding.
9. On February 12, 2019, the Director issued the S. 96 Determination against Mr. Goswami. The S. 96 Determination held Mr. Goswami personally liable for not more than two (2) months' unpaid wages owed to the Complainants, totalling \$24,328.91, inclusive of interest. The delegate did not find sufficient evidence to conclude that Mr. Goswami authorized, permitted, or acquiesced in the contraventions of the *ESA* specified in the Corporate Determination and therefore, did not hold him responsible for any administrative penalties issued against the Employer in the Corporate Determination.
10. The S. 96 Determination was sent to Mr. Goswami by registered mail at the registered and records office address of FVMCC in Greenwood, B.C., which is the same address as its predecessor, Windsor. It is also the same address as Ms. Kikla according to the Appeal Form in the appeal of the S.96 Determination.
11. The S. 96 Determination contained "Appeal Information" setting out expressly the appeal deadline of 4:30 p.m. on March 22, 2019. Mr. Goswami filed his incomplete appeal on March 22, 2019. More particularly, Goswami's agent, Ms. Kikla sent an Appeal Form and some submissions in support of the appeal before 4:30 p.m. on March 22. The rest of the appeal submissions were sent after 4:30 p.m. on March 22, after the appeal deadline had expired. Furthermore, the submissions did not include a copy of the written reasons for the S. 96 Determination.
12. In the Appeal Form, Mr. Goswami invokes all three grounds of appeal available under section 112(1) of the *ESA*, namely, the Director breached the principles of natural justice and erred in law in making the S. 96 Determination and new evidence has become available that was not available at the time the S. 96 Determination was being made.
13. Mr. Goswami is seeking the Tribunal to cancel the S.96 Determination or to refer it back to the Director.
14. On April 8, 2019, the Tribunal requested Mr. Goswami to provide his written reasons for extension of time to the appeal period to address the matter of the late appeal submissions. The Tribunal also asked Mr. Goswami to provide the written reasons for the S. 96 Determination. The deadline for both submissions was 4:30 p.m. on April 24, 2019. However, Mr. Goswami failed to comply with either request.
15. In the same letter, the Tribunal requested the Director to provide the section 112(5) record ("the Record") that was before the Director when the S.96 Determination was made. The Director provided the Record to the Tribunal on April 25, 2019, and the latter, by correspondence dated April 29, 2019, disclosed the same to Mr. Goswami and the Complainants. Mr. Goswami and the Complainants were afforded an opportunity to make submissions on the completeness of the Record by May 13, 2019, but the parties did not make any submissions. In the circumstances, the Tribunal considers the Record as complete.
16. 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, the Reasons for the S. 96 Determination, Mr. Goswami's submissions, and my review of the Record that was before the Director when the S. 96 Determination was being made. If I am satisfied that Mr. Goswami'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 the Complainants and the Director to file reply submissions and Mr. Goswami will be afforded an opportunity to make a final reply to those submissions, if any.

## ISSUE

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

## SUBMISSIONS OF MR. GOSWAMI

18. The appeal submissions filed by Mr. Goswami and Ms. Kikla on behalf of Mr. Goswami are similar to those filed in the appeal of the Corporate Determination. The submissions and documents exceed 850 pages and also include materials pertaining to numerous complaint determinations by the Director against several corporations Mr. Goswami and Ms. Kikla have been involved in including some of those that amalgamated to form FVMCC.
19. I have carefully read the appeal submissions. While I do not find it necessary delineate them here in any great detail, the submissions are better particularized in the Corporate Determination which is published at 2019 BCEST 57. The main focus of Mr. Goswami in the submissions is his contention that the delegates of the Director involved in the processing of numerous employee complainants against various businesses he and Ms. Kikla operated were biased, fraudulent, corrupt, unfair and colluded with one another with a view to disadvantaging their businesses. This theme singularly dominates the voluminous submissions filed by Mr. Goswami in this appeal (as they did in the Corporate Appeal).
20. There are no submissions or evidence adduced by Mr. Goswami touching on those issues that arise under 96. I will elaborate on the relevant issues under S. 96 below.

## ANALYSIS

21. Section 112(3) of the *ESA* delineates appeal deadlines to ensure that appeals are dealt with promptly, as one of the stated purposes of the *ESA* is "to provide fair and efficient procedures for resolving disputes over the application and interpretation of [the]Act" (subsection 2(d)).
22. In the case of a determination served on a person by registered mail as in this case, subsection 112(3)(a) of the *ESA* provides that the appeal period is "30 days after the date of service of the determination". In this case, Mr. Goswami was sent the S. 96 Determination by registered mail. At page 2 of the S.96 Determination, it states "(s)hould you wish to appeal this Determination, your Appeal must be delivered to the Employment Standards Tribunal by 4:30 p.m. on March 22, 2019". Mr. Goswami submitted his Appeal Form and some submissions before 4:30 p.m. on March 22, 2019. He also submitted additional submissions after 4:30 p.m. on the same date. While Mr. Goswami did not apply for an extension of time to appeal, he was invited by the Tribunal to provide written reasons for an extension to the appeal period but failed to make any submissions.

23. Mr. Goswami also failed to include with his Appeal, the director's reasons for the S.96 Determination. The Tribunal requested that he submit the Reasons but he has not done so at the time of writing this decision.
24. Notwithstanding the issue of the late appeal submissions and failure to make any submissions for an extension of time to appeal the S.96 Determination, I find that Mr. Goswami's failure to include a copy of the Director's written reasons for the S.96 Determination means that Mr. Goswami's appeal has not been perfected. More particularly, by failing to submit the Director's reasons for the S.96 Determination, Mr. Goswami contravened the requirement of section 112(2)(a)(i.1) of the *ESA* which makes it a mandatory requirement for a person wishing to appeal a determination to the Tribunal to provide, *inter alia*, a copy of the director's written reasons for the determination. Pursuant to section 114(1)(h) of the *ESA* the Tribunal has discretion to dismiss an appeal where the appellant has failed to meet one or more of the requirements of section 112(2) of the *ESA*. In the circumstances, Mr. Goswami's appeal is dismissed for failing to comply with the requirements of subsection 114(1)(h) of the *ESA*.
25. Having said this, I also find, under subsection 114(1)(f) of the *ESA*, there is no reasonable prospect that Mr. Goswami's appeal will succeed.
26. In an appeal 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).
27. 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.
28. In this case, the delegate properly relied on the corporate records of Windsor filed with, and maintained by, the Registrar of Companies, to make the S. 96 Determination against Mr. Goswami. Mr. Goswami does not dispute he was a director of Windsor (an amalgamated corporation under FVMCC) during the material time the Complainants were employed by Windsor and should have been paid wages. Mr. Goswami also does not dispute the amount of the liability imposed on him, or present evidence of any circumstances that would relieve him of personal liability under subsection 96(2) of the *ESA*.
29. While Mr. Goswami has invoked the error of law, the natural justice and the new evidence grounds of appeal under subsections 112(1)(a), (b), and (c) of the *ESA*, I find that he has not established any or sufficient factual basis under these grounds of appeal. I also find that Mr. Goswami's appeal of the S.96 Determination is an attempt to challenge the Corporate Determination. An appeal of the S.96

determination is not an opportunity for a director to challenge the corporate decision. In the circumstances, I do not find there is any presumptive merit in Mr. Goswami's appeal and I would also dismiss it under section 114(1)(f) of the *ESA*.

### **ORDER**

30. Pursuant to section 115 of *ESA*, I confirm the S. 96 Determination made on February 12, 2019, against Mr. Goswami, a Director and Officer of Windsor (an amalgamated corporation under FVMCC), together with any additional interest that has accrued pursuant to section 88 of the *ESA*.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**