

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:** January 14, 2019

## DECISION

### SUBMISSIONS

Bruno Oliveira on his own behalf

### INTRODUCTION

1. Bruno Oliveira (“Oliveira”) appeals a determination issued against him on October 5, 2018, pursuant to which he was held liable for \$8,559.42 on account of unpaid wages and interest owed to five former employees of 1026019 B.C. Ltd. carrying on business as “Wings Tap & Grill” (the “Employer”). This latter determination was issued against Mr. Oliveira pursuant to subsection 96(1) of the *Employment Standards Act* (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 as the “Section 96 Determination”.
2. Mr. Oliveira appeals 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*). However, having reviewed Mr. Oliveira’s appeal documents, it would appear that he is also asserting that the Section 96 Determination should be set aside on the basis of an error of law (see subsection 112(1)(a)) of the *ESA*). Consistent with the Tribunal’s decision in *Triple S Transmission Inc.*, BC EST # D141/03, I will proceed on the basis that both grounds of appeal have been raised by this appeal.
3. Further, the subsection 112(5) record before me also discloses 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)(b)).
4. In my view, and at this juncture, it would not be appropriate to issue a final decision with respect to the merits of this appeal. Accordingly, I propose to refer the matter back to the Director for further investigation. My reasons for proceeding in that fashion now follow.

### FACTUAL BACKGROUND

5. On May 18, 2018, Alana DeGrave, a delegate of the Director of Employment Standards, issued a determination against 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”.
6. The Employer operated a restaurant in Kelowna. The five employees who were awarded wages under both the Corporate Determination and the Section 96 Determination worked in that restaurant. As detailed in the “Reasons for the Determination” issued concurrently with the Corporate Determination (at page R2):

[The Employer] ceased operating in early September, was closed for a couple of days around September 4 or 5, 2017, and a new company with different directors began operating the restaurant in or around September or October 2017...one of the new directors...said that [the

Employer] owed employees about a week and half of payroll when the new company took over. The new company paid outstanding wages to employees who continued to work for Wings. The Complainants involved in this investigation did not continue employment with the new company and therefore were not paid outstanding wages.

7. The Corporate Determination was never appealed and now stands as a final order. I am not aware of any determination having been issued against the “new company” that took over the Employer’s restaurant business (see section 97 of the *ESA*). Presumably, this new company acquired the Employer’s assets since the Employer was subsequently dissolved for failing to file annual reports (which I rather doubt would have been allowed to occur had there been a share sale), but I have no information before me regarding the so-called “new company”.
8. The Corporate Determination was sent, by registered mail, to the Employer’s registered and records office and to three individuals, including Mr. Oliveira, who were identified as directors of the Employer. The subsection 112(5) record before me indicates that the Corporate Determination was sent by registered mail to Mr. Oliveira on May 21, 2018, but that he could not be located at the address indicated and on May 25, 2018, the envelope containing the Corporate Determination was returned to the Employment Standards Branch. The Corporate Determination was mailed to Mr. Oliveira at an address listed in the B.C. Corporate Registry as being both his “mailing” and “delivery” address.
9. As previously mentioned, according to B.C. Corporate Registry documents, the Employer was dissolved for failing to file annual reports; this dissolution was effective as of July 9, 2018. This latter date is about seven weeks after the Corporate Determination was issued. It would appear that prior to issuing the Corporate Determination, the delegate who issued the determination, despite her best efforts, was unable to speak with any of the Employer’s directors or its president, all of whom either failed or refused to participate in her investigation or were perhaps entirely unaware that an investigation was ongoing.
10. As noted above, the Corporate Determination was sent by registered mail to Mr. Oliveira, but the envelope was returned to the Employment Standards Branch. The Section 96 Determination was issued on October 5, 2018, and there is nothing in the record to indicate that the delegate who issued this determination, Tyler Siegmann (the “delegate”; not the same delegate who issued the Corporate Determination), attempted to contact Mr. Oliveira prior to issuing it.
11. The Section 96 Determination was initially sent to Mr. Oliveira at his “mailing” and “delivery” address set out in the B.C. Corporate Registry, but this letter was returned to the Employment Standards Branch with a notation that the addressee had “moved”. The Section 96 Determination was sent to Mr. Oliveira at a second address (the same address Mr. Oliveira provided on his Appeal Form) and this letter was successfully delivered on October 12, 2018. The record does not indicate how or when the delegate became aware of this other address for Mr. Oliveira.

## **REASONS FOR APPEAL**

12. Mr. Oliveira filed his appeal with the Tribunal on November 13, 2018 – the last day of the statutory appeal period. Mr. Oliveira says that the Section 96 Determination should be cancelled and his “new evidence” in support of his appeal consists of a T-4 “Statement of Remuneration Paid” issued by the Employer for the 2017 taxation year. This document would not ordinarily qualify as new evidence under subsection

112(1)(c) of the *ESA* because it was obviously “available” when the Section 96 Determination “was being made”. Mr. Oliveira’s position is as follows: “I am not, or have ever acted and or been a board member of [the Employer]”. He says that he never attended an annual general meeting nor has he ever “given any indication or information authorizing any loans and had anything to do with money handling, had anything to do with employees, and or transactions pertaining to the [Employer]”. He further says that he never invested any money in the Employer and “the only association I have is that I provided janitorial services for Wings restaurant as it is indicated on my 2017 T4”. Finally, Mr. Oliveira states:

The only thing I was asked to do was to help qualify for a building lease application for a restaurant in order to strengthen the application. And once I received the first notice I repeatedly asked to be removed from lease and was not removed until the restaurant was sold to which I still have no knowledge of date or specifics and no follow up has ever been provided.

## FINDINGS AND ANALYSIS

13. The delegate’s *sole* basis for issuing the Section 96 Determination against Mr. Oliveira was his B.C. Corporate Registry listing as a director of the Employer during the period from April 14 and September 2, 2017, when the five former employees’ unpaid wage claims crystallized.
14. The record before me includes several documents from the B.C. Corporate Registry. The Employer was incorporated on January 27, 2015, and Mr. Oliveira was one of three incorporators. However, an “incorporator” does not automatically become a corporate director on incorporation – the individual must also consent in writing to serve as a director under section 123 of the *Business Corporations Act*. There is nothing in the record before me indicating that Mr. Oliveira ever provided such written consent.
15. Nevertheless, Mr. Oliveira was listed as one of three first directors and he continued to be listed as a director in a September 22, 2017, search (effective as of August 3, 2017). He continued to be listed as a director when the Employer was dissolved. This latter circumstance was verified by a registry search conducted on September 20, 2018 (effective September 15, 2018).
16. The Director of Employment Standards and his delegates may rely on B.C. Corporate Registry records to establish that a particular individual is a corporate director or officer as of a particular date. However, these records only raise a rebuttable presumption regarding the individual’s status (see *Director of Employment Standards and Michalkovic*, B.C. EST # RD047/01). In this case, 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. While it is true that 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 prior to issuing the Section 96 Determination. The delegate obviously had Mr. Oliveira’s new address in hand since the Section 97 Determination was mailed to Mr. Oliveira at both addresses.
17. In these circumstances, I am of the view that the most efficient way to proceed would be to refer this matter back to the delegate under subsection 114(2) of the *ESA* so that Mr. Oliveira is given a formal opportunity to explain why his name appears in the B.C. Corporate Registry if he was not, in fact, a corporate director. It may also be the case that Mr. Oliveira functioned as a corporate director or officer

and his apparent consent to guarantee a lease relating to the restaurant premises may be evidence of him so functioning. In any event, I will leave these matters for the delegate to consider and investigate.

## **ORDER**

18. 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.
19. 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*).

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**Kenneth Wm. Thornicroft**  
**Member**  
**Employment Standards Tribunal**