

Citation: Gregory Shane Kennedy (Re)  
2020 BCEST 1

An appeal

- by -

Gregory Shane Kennedy  
(the “appellant”)

- 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.:** 2019/177

**DATE OF DECISION:** January 6, 2020

## DECISION

### SUBMISSIONS

Kimberly D. Darling

counsel for Gregory Shane Kennedy

### INTRODUCTION

1. On July 12, 2019, a delegate of the Director of Employment Standards (the “delegate”) issued a determination against First Sky Media Group Ltd. (“First Sky”) under section 79 of the *Employment Standards Act* (the “ESA”). By way of this determination (the “Corporate Determination”), First Sky was ordered to pay \$23,075.80 on account of unpaid wages and section 88 interest owed to a former First Sky employee (the “complainant”). These unpaid wages were earned during the period from May 20 to August 11, 2018.
2. Further, and also by way of the Corporate Determination, the delegate levied five separate \$500 monetary penalties against First Sky for various contraventions of the *ESA* and the *Employment Standards Regulation* (the “ESR”). Accordingly, the total amount payable under the Corporate Determination is \$25,575.80
3. The appeal period relating to the Corporate Determination (see section 112(3)) expired on August 19, 2019. First Sky never appealed the Corporate Determination within the appeal period and, so far as I am aware, never later applied to extend the appeal period. That being the case, the Corporate Determination now stands as a final order.
4. On September 5, 2019, the delegate issued the determination now before me in this appeal, namely, a determination issued against Gregory Shane Kennedy (the “appellant”) under section 96(1) of the *ESA* (the “Section 96 Determination”). The Section 96 Determination requires the appellant to pay the complainant \$23,120.75 on account of unpaid wages and interest. The delegate did not issue any section 98 monetary penalties against the appellant because he was unable to determine that the appellant authorized, permitted or acquiesced in any *ESA* or *ESR* contraventions on the part of First Sky (see section 98(2) of the *ESA*).
5. The appellant says that the Section 96 Determination should be cancelled on the basis that he was not a First Sky director when the complainant’s wages were earned or should have been paid.

### BACKGROUND FACTS

6. The Corporate Determination was issued following an investigation by the delegate and throughout the delegate’s investigation, First Sky was represented by one of its directors, James Delorme (“Delorme”). The delegate addressed several issues in his accompanying “Reasons for the Determination” including the timeliness of the complaint, whether the complainant was a “employee” or an “independent contractor”, and the “high technology professional” exclusion found in section 37.8 of the *ESR*. The delegate determined that the complaint was timely, and that the complainant was an employee, but also a high technology professional (and thus not entitled to statutory holiday pay and overtime pay).

7. The Corporate Determination (including the delegate's reasons) was sent to First Sky and to its three directors. In each case, the Corporate Determination was sent to the same mailing/delivery address as set out in the B.C. Registry's records, current as of January 11, 2019. The section 112(5) record includes a "registered mail trace sheet" and this document indicates that the envelope containing the Corporate Determination mailed to the appellant was never actually delivered to the appellant. The trace sheet states: "Recipient not located at address provided. Item being returned to sender" (the envelope was returned on July 23, 2019). Despite there being no actual delivery, the Corporate Determination was deemed to have been served on the appellant under section 122 of the *ESA*.
8. As noted above, the Section 96 Determination was issued on September 5, 2019, and it reflects the identical wages determined to be owed to the complainant under the Corporate Determination. The delegate noted in his reasons accompanying this Section 96 Determination: "Based on my review of all corporate filings with respect to the Employer [First Sky] with BC Registry Services, I am satisfied that [the appellant] was a director when the Complainant's wages were earned and should have been paid".
9. The Section 96 Determination was mailed to the appellant at the same address used to deliver a copy of the Corporate Determination to him.

## **THE APPEAL**

10. The appellant's appeal is based on the "new evidence" ground of appeal (section 112(1)(c)). The appellant maintains that he "did not receive notice that a determination was made against [First Sky]" regarding the complainant's unpaid wage claim. He also indicates in his appeal documents that he plans to take steps to appeal the Corporate Determination on the basis, among other assertions, that the complainant was an independent contractor rather than a First Sky employee. I understand, however, that to date no application to extend the appeal period relating to the Corporate Determination has been filed with the Tribunal.
11. With respect to the Section 96 Determination, the appellant says that relations between him and Mr. Delorme had deteriorated by early 2018 and "as a result of the continued failure of Mr. Delorme to provide timely information relating to the operations of First Sky Media Group Inc., the Appellant decided to resign as a director". The appellant maintains that he resigned effective March 1, 2018, and that he had no reason to believe that B.C. Registry records were not updated thereafter to indicate that he was no longer a director as of March 1, 2018.
12. The complainant's unpaid wage claim, as crystallized in the Corporate Determination, covers the period from May 20 to August 11, 2018. Thus, if the appellant resigned his directorship as of March 1, 2018, he would not be personally liable for any unpaid wages owed to the complainant.
13. There is nothing in the record to indicate what efforts, if any, the delegate made, consistent with section 77 of the *ESA*, to obtain the appellant's position regarding his potential section 96 liability prior to the issuance of the Section 96 Determination on September 5, 2019. The appellant says that he was not afforded an opportunity to provide relevant evidence to the delegate. Regardless of whether or not the delegate attempted to contact the appellant prior to issuing the Section 96 Determination, the present appeal proceedings do afford the appellant what I consider to be a full and fair opportunity to present all

relevant evidence relating to his status as a corporate director when the complainant's unpaid wages were earned or should have been paid.

14. The appellant filed a statement sworn on November 20, 2019, in which he states that he and his cousin, Duncan Kennedy – also identified as a First Sky director in the B.C. Registry's records – became dissatisfied with Mr. Delorme's failure to provide timely financial and other reports to them and that this situation, in turn, precipitated their decisions to resign as directors. The appellant's sworn statement continues:

Duncan and I advised Delorme of our resignations on or about March 1, 2018 to be effective immediately.

I was not aware that anything else needed to be done by myself or Duncan in regards to our resignations.

I believed that Delorme updated the corporate records as of March 1, 2018 to show that Duncan and I had resigned as directors. We had no reason to believe that the corporate records did not reflect that we had resigned as directors effective March 1, 2018.

In fact I only became aware of the fact that Delorme did not record our resignations when I received the [Section 96 Determination].

Once I became aware of the fact that the corporate records had not been updated, I contacted Delorme. He acknowledged that the record book should have been amended to reflect the resignations of Duncan and myself and confirmed this in an email.

15. The electronic mail communication from Mr. Delorme to both the appellant and his cousin, referred to in the appellant's sworn statement, is dated October 14, 2019 and was appended to the appellant's statement. The subject line reads "Draft letter". This e-mail is reproduced, in full, below:

Hi Shane and Duncan.

I would like to propose a draft letter for your official resignation from First Sky Media Group.

The language I propose is the following:

"I James Delorme, accept the resignation of Directors Duncan Kennedy and Shane Kennedy as directors of First Sky Media Group effective February 1st, 2018."

If you are both agreeable to this I can create individual letters to this effect. Please let me know if you have any questions.

Talk soon

James Delorme  
President  
First Sky Media Group

16. It should be noted that this communication from Mr. Delorme does not confirm that the appellant and his cousin actually tendered verbal resignations to him on or shortly before March 1, 2018 (or, for that matter, on or about February 1, 2018). At best, Mr. Delorme's October 14th communication could be taken as an offer from Mr. Delorme to prepare a letter that would confirm acceptance of resignations "backdated" to February 1, 2018.

17. Returning to the appellant's sworn statement, he says that after October 14, 2019, he "tried repeatedly to contact Delorme to get some evidence from him regarding the fact that Duncan and I tendered our resignations as of March 1, 2018" but that these many efforts (100 telephone calls, 46 text messages, and "multiple emails") were unsuccessful since Mr. Delorme "is not responding to any attempts at communication".
18. Finally, the appellant's sworn statement raised several arguments concerning the Corporate Determination, although these all stem from a common fundamental assertion, namely, that the complainant "was to be paid as a contractor not as an employee".

### FINDINGS AND ANALYSIS

19. In my view, this appeal has no reasonable prospect of succeeding and, on that basis, must be dismissed under section 114(1)(f) of the *ESA*.
20. I will first address the appellant's challenge to the Corporate Determination and, in particular, the assertion that the complainant was not entitled to the benefit of the *ESA*'s wage recovery protections because he was an independent contractor rather than an employee. This latter issue was raised by Mr. Delorme, on behalf of the First Sky, during the course of the delegate's investigation and was addressed, in detail, in the delegate's reasons accompanying the Corporate Determination. The Corporate Determination, as noted above, now stands as a final order and the question of the complainant's status has been finally adjudicated. In law, this latter question is a matter of *res judicata*, and it cannot be reopened or otherwise collaterally attacked by way of an appeal of a determination issued under section 96 of the *ESA*.
21. The only issue properly before the Tribunal in this appeal is whether the appellant was a First Sky director when, in the language of section 96(1), "wages of an employee of the corporation were earned or should have been paid". I note that the appellant does not advance any other argument regarding the correctness of the Section 96 Determination – for example, that the 2 months' unpaid wage liability has been incorrectly calculated, or that one or more of the section 96(2) defences applies.
22. The appellant says that in early 2018 he advised Mr. Delorme that he intended to resign his directorship, effective March 1, 2018. While I am prepared to accept that assertion for purposes of this appeal, it should be noted that it stands wholly uncorroborated by any other evidence. As a matter of general principle, the Tribunal will not accept uncorroborated assertions from an individual to the effect that they resigned their directorship (see *Hester*, BC EST # D287/02). Mr. Delorme's October 14th communication, reproduced above, does not confirm that he actually received a verbal resignation from the appellant on or about March 1, 2018. There is no written letter of resignation in the record before me.
23. More critically, section 128 of the *Business Corporations Act* appears to be a complete (and, for the appellant, an adverse) answer to this appeal. Section 128(1)(a) states that "a director ceases to hold office when...the director dies or resigns". Section 128(2) states:

- 128 (2) A resignation of a director takes effect on the later of
- (a) the time that the director's written resignation is provided to the company or to a lawyer for the company, and

- (b) if the written resignation specifies that the resignation is to take effect at a specified date, on a specified date and time or on the occurrence of a specified event,
  - (i) if a date is specified, the beginning of the specified date,
  - (ii) if a date and time is specified, the date and time specified, or
  - (iii) if an event is specified, the occurrence of the event.

(my underlining)

24. The appellant does not assert and, in any event, there is absolutely no evidence before me to show, that a written resignation was ever tendered and delivered in accordance with the above provisions of the *Business Corporations Act*. Thus, in law, the appellant continued as a First Sky director after March 1, 2018, and the B.C. Registry records are presumptive evidence of his status as a director when the complainant's unpaid wage claim crystallized. As noted in *Director of Employment Standards (Michalkovic)*, BC EST # RD047/01, the corporate registry's records may be relied on to establish an individual's status as a corporate director, unless rebutted by cogent evidence that the records are incorrect. In this case, there is no evidence of a lawful resignation and, that being the case, there is no reason to question the correctness of the delegate's finding (based on corporate registry records) that the appellant was a First Sky director when the complainant's unpaid wages were earned or should have been paid.
25. Section 128 of the *Business Corporations Act* was discussed in *Hunter v. The Queen*, 2018 TCC 108. Mr. Hunter claimed that he was not personally liable, as a director, for certain corporate payroll remittances because he had previously resigned as a director. The court rejected this defence because the evidence did not demonstrate that a written resignation had been delivered as required by the statute. The Tribunal has consistently taken the same approach (see, for example, *Iles*, BC EST # D265/98); namely, that legislative provisions regarding directors' resignations are mandatory requirements that cannot be waived by the Tribunal. The appellant's counsel has not referred to any statutory provision or judicial authority supporting a contrary view.
26. In her submission appended to the Appeal Form, the appellant's counsel referred to a potential application to the B.C. Supreme Court "for an order correcting the corporate records of [First Sky]", and I presume this refers to a possible application under section 129 of the *Business Corporations Act*. However, to my knowledge, no such application has ever been filed, let alone a formal rectification order issued. Further, in the absence of a valid resignation, it seems that one would be hard-pressed to successfully argue that the corporate records are inaccurate.
27. When an individual agrees to serve as a corporate director, certain obligations flow from that position including possible unpaid wage liability under the *ESA*. Individuals must inform themselves about these obligations and if they intend to resign as a director, they must comply with the statutory provisions governing resignations. In this case, while it may have been the appellant's *intention* to resign, he did not effectively carry out that intention and, accordingly, his liability under the Section 96 Determination stands as a lawful order.

28. It may be that the appellant has some sort of claim for relief as against Mr. Delorme. I pass no judgment whatsoever on that possible avenue for recourse. However, insofar as section 96(1) of the *ESA* is concerned, I am satisfied that the appellant is liable to the complainant under that provision as set out in the Section 96 Determination.

**ORDER**

29. Pursuant to section 114(1)(f) of the *ESA*, this appeal is dismissed. Pursuant to section 115(1)(a) of the *ESA*, the Section 96 Determination is confirmed in the amount of \$23,120.75 together with whatever further interest that has accrued under section 88 of the *ESA* since the date of issuance.

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