

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Brian Charles Witherspoon
("Mr. Witherspoon")

- 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.: 2020/082

DATE OF DECISION: August 13, 2020

ISSUE

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

THE FACTS

9. By way of background, CPM operated a machining business.
10. The Employee was employed as a mechanic with CPM. While his date of hire is in dispute, the parties agree that the Employee worked for more than eight (8) continuous years for CPM until sometime in August 2019 when his employment was terminated by CPM.
11. On November 25, 2019, the Employee filed a complaint against CPM under section 74 of the *ESA*, alleging that CPM contravened the *ESA* by failing to pay him compensation for length of service (the “Complaint”).
12. A hearing of the of the Complaint was conducted on January 22, 2020, and the Director issued a determination against CPM on January 31, 2020, (the “corporate determination”), finding CPM to have contravened the provisions of the *ESA*.
13. The corporate determination ordered CPM to pay the Employee wages and interest totaling \$8,276.62. The corporate determination also levied an administrative penalty in the amount of \$500 under section 29 of the *Employment Standards Regulation* against CPM for contravening section 63 of the *ESA*. The total amount of the corporate determination is \$8,776.62.
14. The corporate determination, which included a notice to directors and officers explaining their personal liability under the *ESA*, was sent to CPM, with copies to the registered and records office and to Mr. Witherspoon.
15. The statutory time period for filing an appeal of the corporate determination expired on March 9, 2020, and no appeal was received by the Tribunal.
16. A BC Online Registrar of Companies search conducted by the Director on November 26, 2019, indicates that CPM was incorporated in British Columbia on January 28, 2008, and Mr. Witherspoon is listed as the sole director and officer.
17. On April 10, 2020, the Director conducted a further Registrar of Companies search of CPM that indicates Mr. Witherspoon continued to be CPM’s sole director and officer.
18. At the hearing of the Complaint, Mr. Witherspoon confirmed he was CPM’s sole director and officer during the entire time CPM was operating its business. Accordingly, the Director concluded that between February 1, 2006, and June 13, 2019, when the Employee’s wages were earned or should have been paid, Mr. Witherspoon was a director and officer of CPM, and therefore, liable under section 96 of the *ESA* for the amount set out in the Determination.

SUBMISSIONS OF MR. WITHERSPOON

19. The arguments and submissions made by Mr. Witherspoon in this appeal, on the merits, are similar to those he made at the hearing which led to the corporate determination.
20. Mr. Witherspoon submits that CPM was a small automotive repair shop consisting of three (3) workers, including the Employee. When the Employee injured himself at work on June 12, 2019, and was off indefinitely, he could not find a replacement for him. He states he was unable to carry on with the workload at work without the Employee.
21. He states that after his repeated calls to the Employee to determine the latter's "prospects for return[ing] to work" failed, he decided, at the end of July 2019, to shutter the business at the end of August. He "communicated" to the Employee the news and, at some point, asked him to come and pickup his tools from the shop. The Employee attended the shop to pickup his tools on the last day of business and even then, he states, the Employee did not know when he would be able to work. This uncertainty carried on at the time of the hearing of the Complaint, according to Mr. Witherspoon.
22. Mr. Witherspoon also submits that some "mutual acquaintances" told him that the Employee "had no plans to come back to work as he didn't want to go through another tire season". This suggested to him that the Employee "was [not] worried about his future employment".
23. He concludes his submissions by contending that he should not have "to keep a failing business open in the hopes an injured employee who showed no interest in the well being of the business returning to work".

ANALYSIS

24. Section 96 of the *ESA* provides as follows:

Corporate officer's liability for unpaid wages

- 96** (1) 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.
- (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,
- (i) is in receivership, or
- (ii) is subject to action under section 427 of the *Bank Act* (Canada) or to a proceeding under an insolvency Act,

25. It is settled law in the Tribunal's decisions that in an appeal of a determination made under section 96 of the *ESA*, the appellant is limited to arguing only those issues that arise under section 96 of the *ESA*, namely:

- Whether the person was a director when the wages were earned or should have been paid;
 - Whether the amount of liability imposed is within the limit for which a director may be found personally liable; and
 - Whether circumstances exist that would relieve the director from personal liability under subsection 96(2).
26. The director/officer is precluded from arguing the corporate liability in an appeal of a section 96 determination (see *Kerry Steinemann Director/Officer of Pacific Western Vinyl Windows & Doors Ltd.*, BC EST # D180/96).
27. It is also settled law in the Tribunal's decisions that corporate records, which the Director can rely on to establish director and officer status, raise a rebuttable presumption that a person is a director/officer. A defence to section 96 liability can be successfully raised if a director/officer can show, on credible and cogent evidence, that the Registrar's records are inaccurate, either because the person resigned or is not properly appointed (see *Wilinofsky*, BC EST # D106/99, *Michalkovic*, BC EST # D056/00).
28. Mr. Witherspoon has provided nothing in his appeal that remotely addresses any of those matters that are permitted to be raised by him relating to his liability under section 96 of the *ESA*.
29. He does not dispute that he was recorded as being a director and officer of CPM when the wages of the Employee were earned or should have been paid. He has also does not dispute the amount of liability imposed under section 96 or that he should not be held personally liable because he falls within the circumstances described in section 96(2).
30. In sum, Mr. Witherspoon's appeal is without merit and has no reasonable prospect of succeeding. The purposes and objects of the *ESA*, particularly in section 2(b) and (d) of the *ESA*, would not be served by requiring the other parties to respond to this appeal.
31. In the circumstances, the appeal is dismissed under section 114(1)(f) of the *ESA*.

ORDER

32. Pursuant to section 115 of *ESA*, I confirm the Determination made on April 20, 2020, against Mr. Witherspoon, a director and officer of CPM, together with any additional interest that has accrued pursuant to section 88 of the *ESA*.

Shafik Bhalloo
Member
Employment Standards Tribunal