

An appeal

- by -

Duncan 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.: 2019/178

DATE OF DECISION: January 6, 2020

DECISION

SUBMISSIONS

Kimberly D. Darling

counsel for Duncan Kennedy

INTRODUCTION

1. This appeal is virtually identical to, and concerns the same facts, that underlie an appeal filed by Gregory Shane Kennedy of a determination issued against him on September 5, 2019, under section 96(1) of the *Employment Standards Act* (the “*ESA*”) – see EST File No. 2019/177.
2. Section 96(1) states: “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.”
3. The present appellant, Duncan Kennedy, and Gregory Shane Kennedy are cousins who were directors, along with a third individual, James Delorme, of a corporation known as First Sky Media Group Inc. (“First Sky”).
4. These reasons for decision are being issued concurrently with my reasons in the appeal filed by Gregory Shane Kennedy (EST File No. 2019/177). Those reasons (see **2020 BCEST 1**) set out, in detail, the basis for my dismissal of Gregory Shane Kennedy’s appeal pursuant to section 114(1)(f) of the *ESA*. Those reasons apply with equal force to the present appeal and set out the basis for my decision to similarly dismiss Duncan Kennedy’s appeal under section 114(1)(f).

BACKGROUND FACTS

5. Very briefly, the relevant facts are as follows. On July 12, 2019, a delegate of the Director of Employment Standards (the “delegate”) issued a determination against First Sky under section 79 of 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. 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* (“*ESR*”). Accordingly, the total amount payable under the Corporate Determination is \$25,575.80
6. The appeal period relating to the Corporate Determination (see section 112(3)) expired on August 19, 2019 and First Sky never appealed the Corporate Determination nor, so far as I am aware, has it ever applied to extend the appeal period. The Corporate Determination now stands as a final order.
7. On September 5, 2019, the delegate issued the determination now before me in this appeal, (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)).

8. The Corporate Determination (including the delegate's reasons) was sent to First Sky and to its three directors as listed in the B.C. Registry. 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 him. 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*.
9. The Section 96 Determination was sent to the appellant at the same address where the Corporate Determination was mailed and I presume was never actually received by the appellant (although, as with the Corporate Determination, it was deemed to have been served on him under section 122).

REASONS FOR APPEAL

10. The appellant says that the Section 96 Determination should be cancelled because he was not a First Sky director when the complainant's wages were earned or should have been paid. His appeal submissions are identical to those advanced by his cousin in EST File No. 2019/177.
11. 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 although, to date, no application to extend the appeal period relating to the Corporate Determination has been filed with the Tribunal.
12. The appellant and his cousin both maintain that they 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 says he resigned his directorship 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 First Sky director. 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 effective March 1, 2018, he would not be personally liable for any unpaid wages owed to the complainant.
13. The appellant says that he was not given an opportunity to provide relevant evidence to the delegate prior to the issuance of the Section 96 Determination. However, even if that is so, 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.

FINDINGS AND ANALYSIS

14. 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*. My reasons for reaching this conclusion are identical to those set out in my decision relating to the appellant's cousin's appeal and those reasons should be read in conjunction with this decision.
15. The appellant's appeal documents raise arguments relating to the correctness of the Corporate Determination. For the reasons given in my decision in the appellant's cousin's appeal, those arguments are not properly before me in this appeal. 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". The appellant has not raised 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.
16. There is no independent evidence before me to corroborate the appellant's assertion that he verbally resigned his directorship on or about March 1, 2018 (this is a critical evidentiary failing – see *Hester*, BC EST # D287/02). In any event, section 128 of the *Business Corporations Act* requires a director's resignation to be given *in writing* and there is no written letter of resignation in the record before me (see also *Hunter v. The Queen*, 2018 TCC 108, and *Iles*, BC EST # D265/98).
17. The appellant does not assert, and there is absolutely no evidence before me to show, that a written resignation was ever tendered and delivered in accordance with the relevant provisions of the *Business Corporations Act*. 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. 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.
18. 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.
19. 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

- ²⁰. 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.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal