

An appeal

- by -

Vivesh Kochher
(the “Appellant”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Carol L. Roberts

FILE NO.: 2019/184

DATE OF DECISION: January 28, 2020

DECISION

SUBMISSIONS

Pavan K. Grewal	counsel for Vivesh Kochher, a Director of All Star Stone & Building Materials Inc.
Arif Uraizee and Arshia Uraizee	on their own behalf
Rodney Strandberg	delegate of the Director of Employment Standards

OVERVIEW

1. Vivesh Kochher, a Director of All Star Stone & Building Materials Inc. (the “Appellant”), has filed an appeal of a Determination (the “Director Determination”) issued by a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”) on September 10, 2019.
2. The Director received complaints from two former employees (the “complainants”) of All Star Stone & Building Materials Inc. (“All Star”) alleging that All Star had contravened the *ESA* in failing to pay them wages between March 1 and March 15, 2018. The Delegate conducted a hearing into the complaints on February 12, 2019. The Appellant appeared on behalf of All Star at the hearing. On May 10, 2019, the Delegate issued a Determination in which he concluded that All Star had contravened the *ESA* in failing to pay wages. The Delegate calculated that wages and interest in the total amount of \$3,647.64 were owed to the employees (the “Corporate Determination”). The Delegate also imposed two administrative penalties on All Star for contraventions of the *ESA*, for a total amount owing of \$4,647.64.
3. The Corporate Determination, which included a notice to directors and officers explaining their personal liability under the *ESA*, was sent to All Star with copies to the registered and records office as well as to the officers and directors, including the Appellant. The last date to appeal the Corporate Determination was June 17, 2019. All Star neither appealed the Determination nor paid the amount determined owing.
4. The Delegate conducted a corporate registry search on August 27, 2018, and found that All Star was incorporated on February 7, 2014, and that the Appellant became a director of All Star on March 15, 2018. The Appellant remained a director until March 22, 2019. The Delegate determined that the Appellant was personally liable to pay \$3,694.61, representing not more than two months’ unpaid wages for the employees and interest, pursuant to section 96 of the *ESA*. The Delegate was satisfied that the Appellant was aware that the Employer had not paid the complainants and that he both authorized and permitted the Employer to fail to pay the wages. Consequently, the Director found that the Appellant was personally liable for the administrative penalties.
5. The Appellant appeals the Director Determination contending that the Director erred in law and failed to observe the principles of natural justice in making the Determination. The Appellant also argues that there is evidence that was not available to the Director at the time the Determination was issued.

6. Section 114 of the *ESA* provide that the Employment Standards Tribunal (the “Tribunal”) may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria.
7. On October 24, 2019, the Tribunal requested the section 112(5) record from the Director. The record was submitted to the Tribunal on October 30 and a revised cover letter was submitted on November 7, 2019. On November 8, 2019, the Tribunal forwarded the record and the revised cover letter to the Appellant and the complainants, notifying them that if they had any objection to the completeness of that record, they were to notify the Tribunal no later than November 25, 2019.
8. On December 5, 2019, I was notified of the Appellant’s objection to the completeness of the record. The Appellant’s counsel indicated that she had mistakenly faxed the objection to the Employment Standards Branch rather than the Tribunal and sought an extension of time in which to make the objection. Counsel contends that the record did not contain a complete copy of the share purchase agreement, which the Appellant submits is a crucial aspect of his argument.
9. I sought submissions from the Delegate solely on the issue of the completeness of the record. The Delegate asserted that the record was complete and that the Appellant had not provided the share purchase agreement prior to filing the appeal. The former employees confirmed that they submitted an extract from the share purchase agreement at the hearing of the complaint. I accept the Delegate’s assertion and find that the record is complete.
10. These reasons are based on the written submissions of the parties, the section 112(5) “record” that was before the Delegate at the time the decision was made, and the Reasons for the Determination.
11. If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1), the complainants will and the Delegate may be invited to file further submissions. If the appeal is not meritorious, it will be dismissed.

FACTS AND ARGUMENT

12. The Corporate Determination contained the following “Notice to Directors/Officers”:

If a separate Determination is made against you as a director/officer of a company, you may not argue the merits of this Determination against the company by appealing the Determination that is made against you as a director/officer.

There are only three grounds on which you may appeal a Determination made against you as a director/officer:

 - 1) That you were not a director/officer of the company at the time wages were earned or should have been paid;
 - 2) That the calculation of your personal liability as a director/officer’s is incorrect; and/or,
 - 3) That you should not be liable for the penalty, where a penalty has been imposed, on the grounds that you did not authorize, permit, or acquiesce in the company’s contravention.

13. The Appellant says that the complainants were directors of All Star at all material times prior to March 15, 2018, and that he only became a director effective March 15, 2018, after purchasing the business. He contends that the complaint for wages is “frivolous and without merit.”
14. Counsel for the Appellant submitted the purchase contract with the appeal submission. As noted above, given my finding that the record is complete, I find this to constitute new evidence.
15. The Appellant says that the complainants had “control” of All Star until March 15, 2018, and that they “were never employed in any capacity by [All Star] as soon as [the Appellant] came into control of All Star.” He further asserts that “[i]f there is money owing to the complainants, then money is owing from the directors at the time of the services provided by [the complainants] which is simply themselves.” (reproduced as written)
16. Finally, the Appellant argues that he was not the sole director of All Star, and if there is any director liability, it should be split between the directors.

ANALYSIS

17. Section 114 of the *ESA* provides that at any time after an appeal is filed and without a hearing of any kind, the Tribunal may dismiss all or part of the appeal if the Tribunal determines that any of the following apply:
 - (a) the appeal is not within the jurisdiction of the tribunal;
 - (b) the appeal was not filed within the applicable time limit;
 - (c) the appeal is frivolous, vexatious, trivial or gives rise to an abuse of process;
 - (d) the appeal was made in bad faith or filed for an improper purpose or motive;
 - (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
 - (f) there is no reasonable prospect the appeal will succeed;
 - (g) the substance of the appeal has been appropriately dealt with in another proceeding;
 - (h) one or more of the requirements of section 112(2) have not been met.
18. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:
 - the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination;
 - evidence has become available that was not available at the time the determination was being made.
19. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds. I find that the Appellant has not met that burden.

20. Although the Appellant identified three grounds of appeal, the appeal submissions, despite apparently being prepared by a lawyer, do not address any of those grounds of appeal. The appeal submissions do not indicate how the Director failed to comply with natural justice or indicate what legal error was committed. The Appellant submits that the Delegate failed to fully consider the terms of a purchase agreement which was attached to the appeal submissions. I infer that this relates to the third ground of appeal; that is, that evidence has become available that was not available at the time the determination was being made.
21. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:
- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - (b) the evidence must be relevant to a material issue arising from the complaint;
 - (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
 - (d) the evidence must have high probative value, in the sense that, if believed, it could, on its own, or when considered with other evidence, have led the Director to a different conclusion on the material issue.
22. I accept the Delegate's assertion that the Appellant did not submit the entire purchase agreement at the complaint hearing against the Corporate Employer, or at any other time prior to the Determination being issued. The Delegate submitted, and the complainants confirmed, that a portion of the share purchase agreement was submitted with the original complaint.
23. I find that the purchase agreement submitted for the first time on appeal does not meet the test for new evidence. It was certainly available to the Appellant during the adjudication of the wage complaints but was not submitted at the hearing. Had the Appellant been of the view that document was relevant to a material issue at that time, he had the obligation to submit that to the Delegate. However, even had that document been submitted at that hearing, it appears that the Appellant did not dispute that the wages were owed to the complainants. He also appeared on behalf of the Employer at that time and did not advance any argument that he was not a director of the Employer at the time the wages were owed.
24. Furthermore, I am not persuaded that the share purchase agreement would have led the Delegate to a different conclusion on the issue of director liability. The Corporate Determination was sent to the Appellant, notifying him of his personal liability for wages. Had the Appellant been of the opinion that he was not a director at the time wages were to have been paid, he ought to have submitted the entire agreement to the Director with his submissions at that time. I conclude that the entire purchase agreement does not meet the test for new evidence.
25. There is no argument, nor is there any basis in the record, for concluding that the Delegate failed to observe the principles of natural justice and I deny the appeal on this ground.

26. Section 96 of the *ESA* provides as follows:
- (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 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
 - (i) is in receivership, or
 - (ii) is subject action under section 427 of the *Bank Act* (Canada) or to a proceeding under an insolvency Act,
- ...
27. As the Corporate Determination was never appealed, it is not now open to the Appellant to make further arguments about either the quantum or the corporate liability for wages.
28. The sole issue on this appeal is whether the Appellant was a director of All Star at the time the wages were earned or should have been paid.
29. The corporate searches confirmed that the Appellant became a director of All Star on March 15, 2018, the effective date of the purchase of the company.
30. The complainants' wages were earned between March 1 and March 15, 2018. Section 17(1) of the *ESA* provides that all wages earned by an employee in a pay period must be paid within 8 days after the end of the pay period. As a result, although the Appellant was not a director of All Star when the employees' wages were earned, he was a director at the time the wages should have been paid.
31. I further note that, based on the extract of the share purchase agreement contained in the record, the purchaser assumed all liability for outstanding wages as of the date of purchase in any event.
32. I find no basis for the Appellant's assertion that the Delegate erred in law in making the Determination.
33. The Appellant seeks, in the alternative, to have the wage liability split between himself and the other director of All Star. I decline to vary the Determination, as I am not persuaded the Delegate erred in law in ordering the full amount of outstanding wages and administrative penalties to be paid by the Appellant. The Director is entitled under section 96 to recover the full amount of wages awarded from any of the company directors.
34. I dismiss the appeal.

ORDER

35. Pursuant to section 114 (1)(f) of the *ESA*, I dismiss the appeal. Accordingly, pursuant to section 115 of the *ESA*, the Determination, dated September 10, 2019, is confirmed in the amount of \$4,694.61, together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal