

An appeal

- by -

Glenn Thompson

- 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: Carol L. Roberts

FILE NO.: 2019/172

DATE OF DECISION: January 28, 2020

DECISION

SUBMISSIONS

Mandi A. Deren-Dube

counsel for Glenn Thompson

Terry Hughes

delegate of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Glenn Thompson (the “Appellant”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on August 26, 2019. (the “Director Determination”)
2. The Director received complaints from two former employees of Berjak Construction Ltd. (“Berjak”) alleging that it had contravened the *ESA*. The Director investigated the complaints and on January 11, 2019, issued a determination in which he concluded that Berjak had contravened sections 18, 40, 45 and 58 of the *ESA* as well as section 46 of the *Employment Standards Regulation* in failing to pay regular and overtime wages, statutory holiday pay and vacation pay. The Director determined that wages and interest were owed to the employees in the total amount of \$88,023.35 (the “Corporate Determination”). The Director also imposed administrative penalties on Berjak for contraventions of the *ESA*.
3. The Corporate Determination, which included a notice to directors and officers explaining their personal liability under the *ESA*, was sent to Berjak with copies to the registered and records office as well as to Berjak officers and directors. The Employer unsuccessfully appealed the Corporate Determination (*Re Berjak Construction*, 2019 BCEST 46). To date, the Employer has not paid the amount of the Corporate Determination.
4. In the Director Determination, the Director’s delegate found that the Appellant was listed as an officer of Berjak between September 11, 2017 and March 14, 2018, when the complainants’ wages were earned. The delegate determined that the Appellant was personally liable to pay \$40,936.72, representing not more than two months’ unpaid wages for the employees and interest, pursuant to section 96 of the *ESA*. The delegate found insufficient evidence that the Appellant authorized, permitted or acquiesced in Berjak’s contraventions of the *ESA*, and determined that the Appellant was not personally liable for the administrative penalties. The deadline for filing an appeal of the Director Determination was 4:30 p.m. October 3, 2019. Although the appeal was dated October 3, 2019, the Tribunal did not receive it until October 4, 2019.
5. The Appellant appeals the Director Determination contending that the Director 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 Director Determination was issued. The Appellant sought an extension of time in which to file the appeal.
6. Section 114 of the *ESA* provides 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. After receiving the Appellant's written submissions, I requested the Director provide further information on how and when the Determinations (the Corporate and the Director Determination) were sent to the Appellant. Upon receipt of the Director's submission, I invited submissions from the Respondents and the Director on the merits of the appeal. The Respondents and the Director declined to make any submissions on the merits of the appeal.
8. This Decision is based on the section 112(5) "record" that was before the delegate at the time the decision was made, the submissions of the parties, and the Reasons for the Determination.

FACTS AND ARGUMENT

9. The Corporate Determination contained the following "Notice to Directors/Officers":

If a Determination is issued against a director/officer of a company, the director/officer may not argue the merits of the Determination against the company by appealing the director/officer Determination.

There are only three grounds on which a Determination made against a director/officer may be appealed:

 - 1) That the person appealing was not a director/officer of the company at the time wages were earned or should have been paid;
 - 2) That the calculation of the director/officer's personal liability is incorrect; and/or,
 - 3) That the director/officer should not be liable for the penalty, where a penalty has been assessed, on the grounds that he or she did not authorize, permit or acquiesce in the company's contravention.
10. The record confirms that the Corporate Determination, which was sent by registered mail on January 11, 2019, to the Corporate office as well as the Berjak directors, was never delivered to the Appellant. The mail was unclaimed and returned to the Branch. It was, however, successfully delivered to Berjak's corporate office as well as the two other corporate directors.
11. Berjak was incorporated in 2016 and registered in Alberta in January 2016. Alberta Corporate Registry searches conducted February 23, 2018, and November 28, 2018, confirmed that the Appellant was a director of Berjak as of those dates. The Corporate Registry indicates that the Appellant's name was removed as a director as of September 25, 2019.
12. The Appellant contends that he was not a director of the company. He says that he agreed to invest capital into the company and the other two directors/shareholders would run the day-to-day operations of the business. He contends that he did not at any time consent to acting as a director of Berjak and that he was improperly listed as a director.
13. Attached to the appeal document was a copy of correspondence consisting of a series of text messages between the Appellant and Muhammad Berjak, one of the other directors/shareholders. In those messages, an individual whom the Appellant says is Muhammad Berjak, states that he does not believe the Appellant was a director, and that he had instructed the corporate lawyer to remove the Appellant from the corporate registry.

14. The Appellant says that at all material times, he resided in Asia and played no role in Berjak’s decision making. He also says that he had no access to any of its financial dealings and that he had no knowledge of the employment of either of the former employees. He says that his involvement in the company was limited to updates from Muhammad Berjak about the status of the business and Muhammad Berjak’s intentions to repay his investment.
15. The Appellant also submitted two “statement of facts” from Muhammad Berjak and Ahmad Berjak, the two other Berjak directors, confirming that the Appellant resigned from all dealings with Berjak as of August 1, 2017, and that he had no express or implied authority as a director effective September 1, 2017.
16. The Appellant says that the only factor the Director took into account in finding him to be a director was the Alberta Corporate Registry. He argues that, had the Director taken into account the other information he would have provided, but for his inability to respond, the Director would have concluded that he was not a director of Berjak during the time the employees’ wages were earned.
17. The Appellant also contends that he does not fall within the *ESA*’s definition of director, and that he is not a director as defined by the *Business Corporations Act* (RSA 2000, c. B-9) (“*ABCA*”).
18. The Appellant submits that, despite his name appearing as a director in the corporate registry, he was not a member of the Board of directors or any other governing body of Berjak. He argues that the *ESA* does not prescribe which corporate registry may be applicable in determining an individual’s directorship nor does it establish any criteria for when an individual ceases to be a director of a corporation. Consequently, the Appellant argues, reference must be had to the *ABCA*. That legislation, he contends, governs the manner in which a director ceases to hold office. He further argues that the statutory duty to inform the Registrar of a resignation is owed by the corporation itself, not an individual.
19. The Appellant contends that, because he has resided in Asia since 2016, he did not receive notice of the proceedings against Berjak and had no opportunity to respond to the Director’s correspondence. He says that he first received notice of these matters from one of the employees via Facebook. He says he contacted Muhammad Berjak on August 31, 2019, to inquire about the proceedings and asserts that Muhammad Berjak informed him that the employee “lied”. He contends that Muhammad Berjak informed him that “they had a lawyer who was taking care of the situation.” He further asserts that Muhammad Berjak told him that the employees’ actions “would not impact him personally.” He says that he first learned of the Director Determination on September 26, 2019, when he returned to Canada whereupon he immediately retained counsel.
20. The Appellant sought a 30-day extension to further investigate the claims and provide additional evidence.

ANALYSIS

21. 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.

22. 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.

23. 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 conclude that the Appellant has met that burden.

Extension of time

24. In *Niemisto*, BC EST # D099/96, the Tribunal set out the following criteria which an appellant had to meet in seeking an extension of time in which to file an appeal:

- a) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- b) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
- c) the respondent party (*i.e.*, the employer or employee), as well as the Director, must have been aware of this intention;
- d) the respondent party will not be unduly prejudiced by the granting of an extension; and
- e) there is a strong *prima facie* case in favour of the appellant.

These criteria are not exhaustive.

25. I accept that the Appellant did not receive the Determination until September 26, 2019. While I find that there was sufficient time in which to file an appeal by the statutory deadline, I note that the appeal was filed within one day of that deadline. I find there is a reasonable explanation for the failure to file the appeal within the statutory time limits, and in the circumstances, allow the application for an extension of time in which to file the appeal.

26. The record confirms that the Corporate Determination was sent to Berjak and its directors by registered mail. The record confirms that the mail sent to the Appellant was returned to the Director, unclaimed, which is consistent with the Appellant's assertions. The Corporate Determination was appealed,

unsuccessfully, by one of the other Directors. The Director Determination was sent to the Appellant by registered mail on August 26, 2019. That was also returned to the Director as unclaimed.

27. 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,
- ...
28. Section 96 is an extraordinary exemption to the general principle that corporate directors are not personally liable for corporate debts. Therefore, the imposition of personal liability of corporate directors for unpaid wages ought to be construed narrowly (see *Re Archibald*, BC EST # D090/00, and *MIV Therapeutics Inc.*, BC EST # D096/10).
29. The Corporate records indicate that the Appellant was listed as a director of Berjak at the time the employees' wages were earned and should have been paid.
30. When an individual is recorded as a director of the Company in the records maintained by the Registrar of Companies, there is a presumption that the individual is actually a director of a company, a presumption on which the Director may rely to determine officer and director status. However, that presumption may be rebutted by credible and cogent evidence that the Registrar's records are inaccurate. The burden of providing evidence that the Registrar's records are inaccurate rests upon the individual who denies the corporate director status (see *Michalkovic*, BC EST # RD047/01).
31. The Appellant contends that while the corporate records are presumptively accurate, he should have been given the opportunity to rebut that presumption, and that the Director failed to afford him that opportunity.
32. The record confirms that the Appellant was never given the opportunity to respond to the Director's finding that he was a director of Berjak at the time the employees' wages were earned. Had he been given that opportunity, I find that the Director would have arrived at a different conclusion.
33. Although the Appellant contends that he never agreed to be a director of Berjak, he also argues that he was not a director of the Corporate Employer at the time the wages were earned. In support of this argument, he submitted a copy of his August 1, 2017 resignation, which was sent to one of the other Berjak directors. The Appellant also submitted a very similar document signed by Ahmad Berjak

acknowledging the Appellant's resignation. The resignation also appears to have been sent to Muhammad Berjak, who would have been the other remaining director.

34. The Appellant also submitted a series of text messages in support of his argument that the corporate records are incorrect. While there is no clear date attached to those messages, the Appellant, through his counsel, says that they are dated September 3, 2019. The content of those messages includes the following exchanges.

35. The text messages between the Appellant (GT) and Muhammad Berjak (MB) read, in part, as follows:

GT: Who is this and what are you not telling me? Who is the lawyer? ...

August 31

MB: This guy lied and claim we owe him 90k. We don't. We are now fighting it and dealing with the courts... We have a lawyer dealing with it. We won't get you involved we'll take care of it don't worry he's just trying to cause a fit cause he's losing...

GT: It involves me if my name is present Mo and it can impact me personally I want to know what is going on. I've had some documents sent to the house apparently. 3 or 4 documents were sent to my house.

GT: Who is he suing? What is the contact for the lawyer that set up this company so I can speak to him directly regarding this.

MB: Ahmad will send you an email explaining everything that's happened/happening with the documents we've received so far. He's dealing with it so he knows the details better than I do....

GT: Are they suing me personally or suing the company that he listed?

MB: Company

GT: I want my name off this company. I shouldn't be liable for whatever you guys are doing I'm not even a part of any decision making process and never have been....

MB: I took you off as a director already when we had to renew the company so I don't know why you're getting this shit. We'll have to talk to the lawyer to see what's up.

GT: OK

September 3

GT: Its now Tuesday when is the email coming explaining everything. Have you talked to Aleem today to take my name off this company?

MB: It was a long weekend I'll talk to him today.

September 5

GT: It's now Thursday and no one including the lawyer has responded to my email.

36. Section 101(1) of the *ABCA*, which is the governing legislation in this case, defines a director as someone who "manage(s) or supervise(s) the management of the business or affairs of the corporation." Section 108 of the *ABCA* provides that a director ceases to hold office when he resigns, and that a resignation of a director "becomes effective at the time a written resignation is sent to the corporation, or at the time

specified in the resignation, whichever is later.” According to section 113(1) of the *ABCA*, the corporation has the duty to inform the Registrar of a resignation of a director. These provisions are very similar to those in the British Columbia *Business Corporations Act* ([2002] c. 57, s. 128(2))

37. I find the evidence submitted by the Appellant to be credible and accept that he submitted his resignation as director of Berjak to one of the other directors on August 1, 2017. According to the *ABCA*, his resignation was effective on that day. It was the company’s duty to inform the Alberta corporate registry of that resignation, not the Appellant (see also *Wilinofsky*, BC EST # D106/99). That was not done, despite Muhammad Berjak’s assurances to the contrary.
38. I find that the Appellant was not a director of Berjak between September 11, 2017, and March 14, 2018, when the employees’ wages were earned.

ORDER

39. Pursuant to section 115(1)(a) of the *ESA*, the Determination, dated August 26, 2019, is cancelled.

Carol L. Roberts
Member
Employment Standards Tribunal