

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Sikandar Khan, a former director of Karakoram Restaurant Inc.
("Mr. Khan")

- 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.: 2021/019

DATE OF DECISION: April 28, 2021

DECISION

SUBMISSIONS

Sikandar Khan	on his own behalf
Saima Haider	on her own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Sikandar Khan (“Mr. Khan”), a former director of Karakoram Restaurant Inc. (“Karakoram”), has filed an appeal of a section 96 determination (corporate officer’s liability for unpaid wages) that was issued on January 18, 2021 (“the Determination”).
2. The Determination concluded that Mr. Khan was a director of Karakoram, an employer found to have contravened provisions of the *ESA*, at the time wages were earned or should have been paid to Saima Haider (“Ms. Haider”), and as such was personally liable under section 96 of the *ESA* for wages payable to her in the amount of \$8,163.76 inclusive of interest.
3. In his appeal, Mr. Khan has checked of all available grounds of appeal under section 112(1) of the *ESA*, namely: (i) the Director of Employment Standards (the “Director”) erred in law in making the Determination; (ii) the Director breached the principles of natural justice in making the Determination; and (iii) evidence has become available that was not available when the Determination was being made.
4. In correspondence dated March 1, 2021, the Tribunal notified the Director and Ms. Haider that it had received Mr. Khan’s appeal and was enclosing the same for informational purposes only. The Director and Ms. Haider were also advised that no submissions on the merits of the appeal were being sought from any of them at this time. The Tribunal also requested the Director to provide a copy of the section 112(5) record (“the record”).
5. On March 5, 2021, the Tribunal received the record from the Director and forwarded a copy of it to Mr. Khan and Ms. Haider on March 23, 2021. Both were provided an opportunity to object to its completeness, but neither did. Accordingly, the Tribunal accepts the record as complete.
6. On April 8, 2021, the Tribunal received unsolicited submissions on the merits of the appeal from Mr. Khan and Ms. Haider.
7. On April 12, 2021, the Tribunal sent correspondence to the parties advising them that a panel is assigned to decide the appeal.
8. Section 114(1) of the *ESA* permits the Tribunal to dismiss all or part of an appeal without seeking submissions from the other parties. I have decided that this appeal is appropriate to consider under section 114(1). Accordingly, I will assess the appeal solely on the basis of the Determination, the Reasons for the Determination (the “Reasons”), Mr. Khan’s submissions, Ms. Haider’s submission and my review

of the record when the Determination was being made. If I am satisfied that Mr. Khan's appeal or part of it has some presumptive merit and should not be dismissed under section 114(1) of the *ESA*, the Tribunal will invite Ms. Haider and the Director to file reply submissions on the merits of the appeal. Mr. Khan will then be given an opportunity to make a final reply to the submissions, if any.

ISSUE

9. 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*.

FACTS

10. By way of background, Karakoram operates a restaurant in Vancouver, B.C. and employed Ms. Haider in various capacities in the restaurant, including as a bookkeeper, from August 2018 until January 17, 2019.
11. On March 19, 2019, Ms. Haider filed a complaint (the "Complaint") under section 74 of the *ESA* alleging that Karakoram contravened the *ESA* by failing to pay her regular wages, overtime pay and statutory holiday pay.
12. A hearing of the of the Complaint was conducted on August 21, 2019, and the Delegate of the Director (the "Delegate") issued her determination on May 27, 2020 (the "corporate determination"), finding Karakoram to have contravened the provisions of the *ESA*.
13. The corporate determination ordered Karakoram to pay Ms. Haider wages and interest totaling \$18,901.23. The corporate determination also levied seven administrative penalties in the amount of \$500.00 each under section 29 of the *Employment Standards Regulation* against Karakoram for contravening sections 16, 17, 18, 27, 40, 45, and 46 of the *ESA*. The total amount of the corporate determination is \$22,401.23.
14. The corporate determination, which included a notice to directors and officers explaining their personal liability under the *ESA*, was sent to Karakoram, with copies to the registered and records office and to the directors and officer.
15. The statutory time period for filing an appeal of the corporate determination expired on July 6, 2020. Karakoram filed its appeal after that date and sought an extension of time to the statutory appeal date (the "corporate appeal"). The Tribunal, without ruling on Karakoram's application for an extension of time to appeal, considered the merits of Karakoram's appeal. On December 3, 2020, the Tribunal dismissed the corporate appeal under subsection 114(1)(f) of the *ESA* as having no prospect of success and confirmed the corporate determination in the amount of \$22,401.23, together with any further interest accrued under section 88 of the *ESA* (see *Karakoram*, 2020 BCEST 139).
16. Karakoram did not pay the amount determined owing to Ms. Haider in the corporate determination.
17. An online BC Registry Services Search conducted by the Delegate on March 4, 2019, with a currency date of January 11, 2019, indicates that Karakoram was incorporated in British Columbia, on April 27, 2018,

and Mr. Khan and Qasim Mehmood (“Mr. Mehmood”) were listed as the directors. There were no officers listed.

18. A BC Annual Report filed on May 22, 2019, indicates that Mr. Mehmood was added as an officer effective April 27, 2019.
19. A Notice of Change of Directors filed on May 22, 2019 indicates that Mr. Khan was removed as a director effective May 1, 2019, about three-and-a half months before the hearing of the Complaint. The Delegate notes in the Reasons that this search confirms that between August 5, 2018 and January 17, 2019, when Ms. Haider’s wages were earned or should have been paid, Mr. Khan was a director of Karakoram and is therefore personally liable for up to two months’ unpaid wages for Ms. Haider.
20. The Delegate then calculated two months’ wages for Ms. Haider totalling \$7,649.08. Since this amount is less than the amount owing to Ms. Haider in the corporate determination, the Delegate determined that Mr. Khan is personally liable to pay the said amount plus interest in the amount of \$514.68. The Delegate also determined that there was insufficient evidence that Mr. Khan authorized, permitted or acquiesced in the contraventions of the *ESA* by Karakoram and therefore, he was not personally liable for the administrative penalties levied against Karakoram.

ARGUMENTS

21. I have read Mr. Khan’s submission filed with his appeal and subsequent submission dated April 7, 2021, in support of his appeal of the Determination. While I do not find it necessary to set out his submissions in any great detail here because they do not relate to the issues that arise under section 96 of the *ESA*, I will summarize them below.
22. Mr. Khan submits:
 - (a) he was not aware he was removed as a director of Karakoram effective May 1, 2019, until he attended the Complaint hearing on August 21, 2019;
 - (b) he was “in No position” to appeal the corporate determination as he was no longer a director of Karakoram when the corporate determination was made;
 - (c) he only learned of the failed corporate appeal through the Determination;
 - (d) as a result of (a), (b) and (c) above, his natural justice rights were contravened;
 - (e) he was mistreated by his fellow director and partner in Karakoram, Mr. Mehmood, who misrepresented many things to him and failed to pay him almost \$11,000.00 in wages he earned;
 - (f) he was constructively dismissed in the workplace;
 - (g) he quit working at Karakoram on January 18, 2019 and sent Mr. Mehmood a text message that he and his hires “will [not] show up” to work until all wages owing to them are paid;
 - (h) he tried very hard, while a director of Karakoram and after, to negotiate with Mr. Mehmood with a view to having Ms. Haider paid what she was owed but Mr. Mehmood controlled the purse strings in the business and interfered with his efforts to have Ms. Haider paid;

- (i) Mr. Mehmood was not truthful in giving evidence at the hearing of the Complaint;
- (j) Mr. Mehmood's 2018, 2019 and 2020 T4s should be produced, if they are already prepared, as these documents will show his earnings or what he reported as his earnings;
- (k) Mr. Mehmood made purchase decisions for the business such as a LED sign board for Karakoram but failed to pay wages to employees and he did not agree with this decision;
- (l) if he is being held personally liable for outstanding wages of Ms. Haider then Mr. Mehmood should also be held liable for "the same amount if not more";
- (m) he acted "in good faith", "honestly" and "exercised the care, diligence and skill of a reasonably prudent trustee" and should not be held liable for \$8,000.00 for wages as it is "unjust" and an error of law; and
- (n) why should he be held liable for Ms. Haider's wages when Karakoram's business continues to thrive.

23. I have also read Ms. Haider's unsolicited submissions received by the Tribunal on April 8, 2021. These submissions are indeed unusual as it is rare to see that the awardee in the determination supporting the appellant's efforts to have the determination cancelled. While I do not find it necessary to set out Ms. Haider's submission in any great detail here, I note that most of the submissions are very critical of Mr. Mehmood's treatment of her and his testimony at the hearing of the Determination. However, she also praises Mr. Khan's efforts to have her wages paid, although to no avail because of Mr. Mehmood's resistance and interference. More particularly, she states:

I do attest that Mr. Khan acted in good faith and did everything possible during and post Karakoram, to do everything to get me paid. His submissions during our informal meetings and to the ESB has been consistent and anything but biased. [sic]

Karakoram lost its appeal and rightly so, but the liability of my unpaid wages have [sic] been shifted from the Restaurant to the Individual Directors, and even I, as a complainant, though glad to have received part of my Monies from Mr. [Mehmood] as collected and remitted by the ESB Director, after almost Two years since I filed my complaint, I do not feel it is justified to hold Mr. Khan personally liable in light [of] all the evidence here in.

...

I urge the Tribunal to consider Mr. Khan's appeal.

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
 - (i) is in receivership, or
 - (ii) is subsection 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;
 - 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 *Wilnofsky*, BC EST # D106/99, *Michalkovic*, BC EST # D056/00).
28. Mr. Khan has provided nothing in his appeal that remotely addresses any of those matters that are permitted to be raised by a director in the appeal of a determination made under section 96 of the *ESA*.
29. He does not dispute that he was recorded as being a director of Karakoram when the wages of Ms. Haider were earned or should have been paid. He 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. While I do sympathise with his plight with his fellow director and partner in Karakoram, Mr. Mehmood, and resulting fallout with the latter, however, none of what Mr. Khan has argued in his appeal of the Determination addresses any of the issues that arise under section 96 of the *ESA* (referred to in paragraph 25 above).
31. While Mr. Khan has the support of Ms. Haider in his appeal, her sympathies with Mr. Khan and her appreciation of what he did does not in any way mitigate his liability under section 96 of the *ESA*. It does not change the fact that the employer, Karakoram, has failed to pay Ms. Haider the amount determined to be owing to her under the corporate determination and Mr. Khan was a director of Karakoram between August 5, 2018 and January 17, 2019, when Ms. Haider's wages were earned or should have been paid. Therefore, the Tribunal, in this appeal, has no basis to interfere with the Determination.

32. Ms. Haider and Mr. Khan have both questioned the latter's liability in the face of Karakoram continuing its business (according to them). It is not for me to comment on what efforts, if any, have been made by the Director to enforce the corporate determination against Karakoram, but Karakoram's liability under the corporate determination is not extinguished. The appeal before me pertains to Mr. Khan's liability under section 96 and my decision here only pertains to that.
33. I have noted that Mr. Khan has checked off all three grounds of appeal in the appeal form. I can unequivocally state that Mr. Khan has not shown any basis for this Tribunal to interfere with the Determination on the error of law ground of appeal. I find that the Delegate properly interpreted section 96 of the *ESA*, did not misapply any principle of general law, did not act without any evidence, did not adopt a method of assessment which is wrong in principle or act on a view of facts which could not be reasonably entertained: *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)*, 1998 CanLII 6466 (BC CA).
34. With respect to the natural justice ground of appeal, the Tribunal, in *Imperial Limousine Service Ltd.* (BC EST # D014/05), explained the principles of natural justice as follows:
- Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; their right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party: See *BWI Business World Incorporated*, BC EST #D050/96.
35. In this case, Mr. Khan is contending that he was denied natural justice because he was "in No position" to appeal the corporate determination because he learned, at the August 21, 2019 hearing of the Complaint, that he was removed as a director of Karakoram on May 1, 2019. As a result, he was not involved in the appeal process of the corporate determination and he was also not aware that Karakoram's corporate appeal failed until he read the Determination. I am not convinced that Mr. Khan's natural justice rights, as natural justice is defined in *Imperial Limousine Services Ltd.*, were violated. He quit working for the company on January 18, 2019, and while he was removed as a director of Karakoram on May 1, 2019 (whether or not his removal as director was inconsistent with or in contravention of section 128 of the *BC Business Corporations Act*, [SBC 2002], c.57), he was aware of the Complaint of Ms. Haider and appears to have participated fully at the hearing of the Complaint on August 21, 2019, based on my review of the Reasons. At the hearing, he became aware that he was removed as a director, yet he was (and rightly so) served with the corporate determination after it was made on May 27, 2020. He does not deny receiving it. It is addressed to him at the address that appears in the BC Registry Services search by the Director conducted on March 4, 2019 with a currency date of January 11, 2019. It is also the same address he was sent the Determination under appeal. At page D3 of the corporate determination it expressly states that "[s]hould you wish to appeal this Determination, your appeal must be delivered to the Employment Standards Tribunal by 4:30 pm on July 6, 2020." At pages D4 to D6 inclusive of the corporate determination, the "**NOTICE TO DIRECTORS/OFFICERS**" explains to directors and officers their personal liability for wages under the *ESA*. It also states at page D4:

If you, as a director/officer of the company that is the subject of this Determination, dispute any of the findings contained in the Determination, you should ensure that the company files an appeal within the appeal period noted in the Determination.

... If the Employment Standards Branch has difficulty collecting against the company, proceedings will be commenced against directors and officers of the company for the amount of their personal liability as set out in the Act.

36. While Mr. Khan was sent the corporate determination, he certainly does not explain in his appeal submissions if he disputes any findings contained in the corporate determination, particularly as concerns Ms. Haider's claim for wages against Karakoram since it is a portion of those wages (2 months' worth) that he is found personally liable for in the Determination under appeal. To the contrary, he appears to have supported Ms. Haider's claim for wages against Karakoram before the Complaint was filed (when he tried to get Mr. Mehmood to pay her wages), subsequently at the hearing of the Complaint and currently in his submissions in the appeal of the Determination.
37. Further, if Mr. Khan wanted to be involved in the appeal of the corporate determination, even though he ceased being a director of Karakoram on May 1, 2019, he does not explain what efforts, if any, he made to connect with his former business partner and fellow director, Mr. Mehmood, to appeal the corporate determination he was served with. While Karakoram did not lodge its appeal in a timely fashion, it did file a late appeal through its legal counsel (without Mr. Khan's involvement) and requested an extension of time to the statutory appeal period ("extension application"). The Tribunal considered the merits of the corporate appeal and dismissed the appeal, without deciding the extension application, because the appeal had no reasonable prospect of success pursuant to section 114(1)(f) of the *ESA*. I do not see Mr. Khan as having been prejudiced in any way because he was not involved in the corporate appeal or he did not know of the dismissal of the corporate appeal until he received the Determination. I dismiss the natural justice ground of appeal.
38. As concerns the new evidence ground of appeal, the Tribunal in *Re: Merilus Technologies Inc.*, (BC EST # D171/03) delineated the following four conjunctive considerations for admitting new evidence on appeal:
- a) whether the evidence could, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or hearing;
 - b) the evidence must be relevant to a material issue in the appeal;
 - 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 a material issue.
39. In this case, Mr. Khan has not presented any evidence that would meet any of the elements of the test in *Re: Merilus Technologies Inc.*, let alone all four requirements needed to admit the evidence on appeal. I dismiss the new evidence ground of appeal.
40. In sum, Mr. Khan's appeal is without merit and has no reasonable prospect of succeeding. The purposes and objects of the *ESA*, particularly in subsections 2(b) and (d) of the *ESA*, would not be served by requiring the other parties to respond to this appeal.

41. In the circumstances, the appeal is dismissed under section 114(1)(f) of the *ESA*.

ORDER

42. Pursuant to section 115 of *ESA*, I confirm the Determination made on January 18, 2021, against Sikander Khan, a former director of Karakoram, together with any additional interest that has accrued pursuant to section 88 of the *ESA*.

Shafik Bhalloo
Member
Employment Standards Tribunal