

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Paul Gill  
(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:** John Chesko

**FILE NO.:** 2021/024

**DATE OF DECISION:** June 9, 2021

## DECISION

### SUBMISSIONS

Paul Gill on his own behalf

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "ESA"), Paul Gill (the "Appellant") filed an appeal of a section 96 determination issued on February 5, 2021 (the "Section 96 Determination").
2. The Section 96 Determination held the Appellant, as a director of 1117167 B.C. Ltd. carrying on business as Ace Charters Vancouver ("Ace Charters"), personally liable for 2 months wages and interest totalling \$1,604.07.
3. In this appeal, the Appellant submits the Director of Employment Standards (the "Director") failed to observe principles of natural justice in making the Section 96 Determination and seeks to have it set aside.
4. Upon receiving the Appellant's submission, the Employment Standards Tribunal (the "Tribunal") requested the section 112(5) record (the "Record") from the Director for purposes of the appeal. On April 20, 2021, the Tribunal provided the Record to the parties and sought submissions on the completeness of the Record by May 4, 2021. The Tribunal did not receive any objections to the completeness of the Record. Accordingly, the Tribunal accepts the Record as complete.

### ISSUE

5. The issue before the Tribunal is whether this appeal should be allowed to proceed or whether it should be dismissed under section 114(1) of the *ESA*.

### BACKGROUND

#### Employee Complaint for Failure to Pay Wages

6. The Director received a complaint on March 5, 2019 from a former employee (the "Employee") of 1036923 B.C. Ltd. carrying on business as Ace Hire Car ("Ace Hire Car"). The complaint alleged the Employer had failed to pay wages for work performed between December 1, 2018, to January 24, 2019.
7. The Director's delegate (the "Delegate") held a hearing into the complaint. Following the hearing, the Delegate expanded the scope of the parties who would be included in the investigation of the complaint.
8. A preliminary findings letter dated December 3, 2019 (the "Preliminary Findings Letter") was sent by e-mail and Registered Mail to Ace Hire Car and to Ace Charters and was copied to the directors and officers of both companies, including to the Appellant. The letter included a summary of the issues to be decided, material evidence, preliminary findings of fact about the Employee's claims, status of the employer, and potential liability of directors. Ace Hire Car and Ace Charters were provided the opportunity to respond.

The Delegate advised that any responses received by December 18, 2019 would be considered prior to the issuance of a determination on the issues.

#### **The Corporate Determination dated January 17, 2020**

9. Although invited to respond to the Preliminary Findings Letter, no responses were received by the Delegate. On January 17, 2020, the Director issued a determination on the Employee's complaint (the "Corporate Determination").
10. The Corporate Determination found Ace Hire Car and Ace Charters were associated employers (collectively, the "Employer") under section 95 of the *ESA*.
11. The Corporate Determination found the Employer had contravened the *ESA* by not paying certain wages the Employee had earned and should have been paid for the period from October 22, 2018 to January 24, 2019. The Corporate Determination ordered the Employer to pay wages and interest totalling \$1,561.27 to the Employee and levied mandatory administrative penalties of \$3,000.00 for a total amount payable of \$4,561.27.
12. The Corporate Determination, which included a notice to directors and officers outlining their potential personal liability under the *ESA*, was sent by Registered Mail to Ace Hire Car and to Ace Charters with copies to their registered and records offices as well as to the officers and directors of the Employer, including the Appellant.
13. The statutory time period for filing an appeal of the Corporate Determination was February 25, 2020.
14. The Corporate Determination was not appealed by either Ace Hire Car or Ace Charters and the amount determined to be owed remains unpaid.

#### **The Section 96 Determination dated February 5, 2021**

15. The Director's delegate conducted a corporate registry search on October 29, 2019. A Notice of Change of Directors filed on May 1, 2019, indicated that the Appellant ceased to be a Director of Ace Charters on January 30, 2019.
16. In the Section 96 Determination, the Delegate concluded the Appellant was a director of Ace Charters during the time the Employee's wages were earned or should have been paid and was therefore personally liable for up to two months' unpaid wages pursuant to section 96 of the *ESA*.
17. The Section 96 Determination held the Appellant personally liable to pay \$1,604.67, representing two months' unpaid wages for the Employee and interest.
18. The Section 96 Determination also set out that there was insufficient evidence the Appellant had authorized, permitted, or acquiesced in the Employer's failure to pay wages under the *ESA* and was, therefore, not personally liable for the \$3,000.00 in administrative penalties that were levied in the Corporate Determination.

## ARGUMENT

19. The Appellant submits the Director failed to observe the principles of natural justice in making the Section 96 Determination.
20. In support of the appeal, the Appellant questions why he should be personally liable as the company is an “operating company”. The Appellant does not contradict he was a director during the time period that the Employee was working for Ace Charters. However, the Appellant notes that he resigned as director before the Employee filed the complaint. The Appellant also notes the Employee did not complain about pay while employed and the Appellant submits he would have “changed his payroll” if the Employee had “discussed the matter” with him.

## ANALYSIS

21. These reasons are based on the written submissions of the Appellant, the Section 96 Determination, and the Record.
22. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:
- (a) the director erred in law;
  - (b) the director failed to observe the principles of natural justice in making the determination;
  - (c) evidence has become available that was not available at the time the determination was being made.
23. 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 or 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.
24. The Appellant based this appeal on the ground the Director failed to comply with the principles of natural justice in making the Section 96 Determination.
25. Natural justice has been described as the right to a fair procedure. It includes specific rights such as the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision

maker (See *Re 607730 B.C. Ltd. (cob English Inn & Resort)*, BC EST # D055/05, and *Imperial Limousine Service Ltd.*, BC EST # D014/05). A party alleging failure to comply with natural justice must provide evidence in support of the allegation. There needs to be specific evidence about how the determination procedure did not meet requirements of natural justice (see *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99).

26. I have reviewed the Record and considered the Appellant's submissions carefully. I find there is no basis for the Appellant's argument on this ground nor is there any basis on the Record for concluding the Director failed to observe the principles of natural justice. The evidence is clear the Appellant was aware of the evidence and the case being made and had the right to respond and be heard. I would deny the appeal on this ground.

27. While the Appellant has not shown any breach of natural justice in making the Section 96 Determination, I have also considered the Appellant's submissions in conjunction with section 96 of the *ESA*.

28. 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 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 subject to action under section 427 of the *Bank Act (Canada)* or to a proceeding under an insolvency Act . . .

29. It is settled law in the Tribunal's decisions that in an appeal of a determination 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 personally liable; and
- Whether circumstances exist that would relieve the director from personal liability under subsection 96(2).

30. As the Corporate Determination was never appealed, it is not now open to the Appellant to make arguments about those issues. The director or 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).

31. It is also settled law in Tribunal decisions that the official corporate Registrar's records can be relied on to establish director or officer status and create a rebuttable presumption that must be overcome. A defence to section 96 liability can be raised if a director or officer can show on credible and cogent

evidence that the Registrar's records are inaccurate, either because the person was not a director at the relevant times or is not properly appointed (see *Michalkovic*, BC EST # D056/00).

32. The Appellant has not provided evidence that would overcome the section 96 liability set out in the Section 96 Determination. The Appellant's own evidence was that he "left the company long before [the Employee] filed a dispute". However, the evidence is clear the Appellant was a director of Ace Charters during the time period the Employee was working, which is also the time period the wages were earned and should have been paid. The Appellant also does not dispute the amount of liability imposed under section 96 or that he should not be held personally liable because he falls under the circumstances described in section 96(2). I find no error of law in the Section 96 Determination.
33. In sum, I find this appeal is without merit and has no reasonable prospect of succeeding.

### **ORDER**

34. The appeal is dismissed under section 114(1)(f) of the *ESA*.
35. Pursuant to section 115 of the *ESA*, I confirm the Section 96 Determination made February 5, 2021, together with any additional interest that has accrued pursuant to section 88 of the *ESA*.

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**John Chesko**  
**Member**  
**Employment Standards Tribunal**