

EMPLOYMENT STANDARDS TRIBUNAL

Appeal

- by -

Carmine Esposito
("Mr. Esposito")

- 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.: 2021/021

DATE OF DECISION: June 30, 2021

DECISION

SUBMISSIONS

Rob Toor

on behalf of Carmine Esposito

OVERVIEW

1. In mid 2019, seven employees (collectively, the “employees”) of Salon Montage and Day Lounge Ltd. (the “Employer”) filed complaints with the Director of Employment Standards (the “Director”) alleging that the Employer had contravened the *Employment Standards Act* (the “ESA”) in failing to pay them regular and overtime wages, commissions and, for some, compensation for length of service. The Employer provided no records to the Director during the investigation of the complaints.
2. On January 9, 2020, a delegate of the Director issued a Determination (the “Corporate Determination”) finding that the Employer had contravened the ESA and that it owed the employees wages and interest in the total amount of \$36,777.13. The Director sent the Corporate Determination, which included a notice to directors and officers explaining their personal liability under the ESA, to the Employer’s registered and record office, and to Carmine Esposito (“Mr. Esposito”), who was the Employer’s sole director as well as its President and Secretary. The last date to appeal the Corporate Determination was February 18, 2020.
3. The Employer did not appeal the Determination, nor did it pay the amount determined owing.
4. A corporate registry search conducted July 18, 2019 indicated that the Employer was incorporated on February 6, 1996 under the name ZR-1-Investments Inc. The Employer changed its name to Salon Montage and Day Lounge Ltd. on June 27, 2006. The corporate records identified the Employer’s sole director, President, and Secretary as Mr. Esposito. A September 30, 2020 corporate registry search, which displayed information effective as of February 28, 2020, showed no change to this information. The search also indicated that Mr. Esposito’s address was also the address of Employer’s registered and records office.
5. Based on this information, the Director issued a determination (the “Personal Determination”) on October 14, 2020, finding that Mr. Esposito was a director and officer of the Employer at the time the employees’ wages were owed and should have been paid, and that Mr. Esposito was personally liable for up to two month’s unpaid wages for each of the employees.
6. The Director determined that Mr. Esposito was liable to pay the amount of \$37,575.40, representing two month’s unpaid wages, plus interest, pursuant to section 96 of the ESA.
7. The statutory appeal period for the Personal Determination expired at 4:30 p.m. on November 23, 2020.
8. On February 26, 2021, Mr. Esposito appealed the Personal Determination, and sought an extension of time in which to file the appeal to March 4, 2021. The Appeal Form indicates Mr. Esposito’s representative is Rob Toor (“Mr. Toor”). In a subsequent submission, Mr. Toor identifies himself as Senior Corporate

Counsel for Northland Properties Corporation. In separate correspondence with the Tribunal, Mr. Esposito is identified as being with the Taxation Section of Northland Properties Corporation.

9. Mr. Esposito argues that the Director erred in law and failed to observe the principles of justice in making the Determination. Mr. Esposito also contends that evidence has become available that was not available at the time the Determination was being made.
10. Section 114 of the *ESA* provides that 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. After reviewing the appeal submissions, I found it unnecessary to seek submissions from the employees or the Director on the merits of the appeal.
11. This decision is based on the section 112(5) “record” that was before the delegate at the time the Determination was made, Mr. Esposito’s submissions, the Reasons for the Determination, and a submission from the Director regarding service of documents.

ISSUES

12. At issue is whether the Tribunal should grant Mr. Esposito’s application for an extension of time in which to file the appeal and whether Mr. Esposito has demonstrated a basis for interfering with the Director’s Determination.

ARGUMENT

13. Mr. Esposito contends that he was not a director/officer of the Employer at the time “of the possible Employment Standards infractions.” Mr. Esposito asserts that he resigned as a director and officer of the Employer on March 15, 2019.
14. Mr. Esposito asserts that he did not respond to any of the Director’s “notices” as he was no longer a director/officer of the Employer. He also contends that he was not personally notified of the allegations, but that if he had been, he would have been able to inform the delegate of his resignation.
15. Mr. Esposito acknowledges his “failure” to update the corporate records directory showing that he had resigned as a director/officer of the Employer. He says he was unaware of his obligations to file notices online, particularly after he submitted his resignation to the Employer.
16. Mr. Esposito contends that “[i]t would have been prudent for Employment Standards to review the Company’s minute book to confirm the officers/directors of the Company” and that such a review would have shown that he was not an officer/director after March 15, 2019.
17. Finally, Mr. Esposito says he did not become aware of the dispute and subsequent Personal Determination until “November/December 2020” as he was dealing with illnesses in his family and was in the process of a divorce. Mr. Esposito sought an extension of the appeal period “so he can provide his defense.”
18. Attached to the appeal is a document purporting to be Mr. Esposito’s letter of resignation as the Employer’s Officer/Director effective March 15, 2019.

19. Mr. Toor made a supplemental appeal submission attaching letters from two former employees who state that they wish to “rescind” their previous applications to the Employment Standards Branch. In those letters, the employees say they are not owed further compensation.

ANALYSIS

20. Section 114(1) 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.

21. 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.

22. The Tribunal will not grant extensions of time as a matter of course; it will only do so where there are “compelling reasons” (see *Re: Wright*, BC EST # D132/97). The onus is on an appellant to show that the time period should be extended (see *Moen & Sagh Contracting Ltd.* BC EST # D298/96).

23. Appellants seeking to extend the time period in which to file an appeal from determinations of the Director should satisfy the Tribunal that:

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

(see *Niemisto*, (BC EST # D099/96)

24. These criteria are not exhaustive. There may be other factors that ought to be considered and not all the above factors may be applicable in determining whether to grant an extension.
25. Mr. Esposito filed his appeal over three months after the statutory appeal period had expired. He says that he did not file his appeal in a timely manner because of illnesses in his family and because he was in the process of a divorce. Although Mr. Esposito provides no other details or evidence of these circumstances, I am prepared to accept they are both credible and reasonable.
26. There is no evidence Mr. Esposito had a genuine and ongoing *bona fide* intention to appeal the Personal Determination before the statutory appeal deadline. While I understand the circumstances Mr. Esposito was facing were challenging, it is difficult to understand why steps could not have been taken to pursue the appeal within the time period, including seeking the assistance of counsel or a representative as it appears Mr. Esposito ultimately did. There is no evidence the Director or the employees were aware of Mr. Esposito's intention to appeal before February 26, 2021.
27. I find that at least some of the employees would be prejudiced by the granting of an extension as it delays the recovery of their outstanding wages.
28. I find that Mr. Esposito has not established a strong *prima facie* case on appeal.

Error of Law

29. The Corporate Determination, which was sent to Mr. Esposito's home address by registered mail and which he confirms receiving, 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 imposed, on the grounds that he or she did not authorize, permit or acquiesce in the company's contravention.
30. Mr. Esposito did not appeal the Corporate Determination or challenge his identification as a director/officer of the Employer at any time during the delegate's investigation of the wage complaints. Even though Mr. Esposito asserts that he did not deal with any of the correspondence because he was "no longer a officer/director of the Company", the Director's correspondence was sent to his home address which was also the registered and records office.
31. The record discloses that some of the employees had e-mail and text communications with Mr. Esposito about their wages during the period leading up to the filing of the wage complaints. Additionally, Mr.

Esposito's name was on the Record of Employment issued to the employees, and as late as July 30, 2019, was issuing cheques on behalf of the Employer either on the corporate account or personal account.

32. I am not prepared to accept, without better evidence, that Mr. Esposito was unaware of the Director's investigation. Had he believed that the Director's information was incorrect, a reasonably prudent person would have taken steps to correct the record during the investigation of the employee's unpaid wage claims and informed the delegate.

33. 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,

...

34. Corporate records raise a rebuttable presumption that a person is a director of a company. (*Wilinofsky*, BC EST # D106/99) The presumption can be rebutted if a director can prove, on a balance of probabilities, that they were not a director because they were never properly appointed or because they resigned. (Director of Employment Standards (*Michalkovic*), BC EST # RD047/01)

35. BC Corporate Registry information disclosed that the registered and records office listed was the same address as Mr. Esposito's address. There is no evidence the corporate address was changed, nor was there any evidence Mr. Esposito forwarded the mail to any other address. I am not persuaded, in part for the reasons outlined above, that Mr. Esposito has rebutted the presumption that the corporate records were incorrect.

Failure to Comply with Principles of Natural Justice

36. Natural justice is a procedural right that includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker.

37. There is nothing in the appeal submission that establishes that the delegate failed to provide Mr. Esposito with an opportunity to respond. The record discloses that on January 7, 2020, the delegate sent the Corporate Determination to Mr. Esposito by registered mail at his home address. That address is the same address used by Mr. Esposito when he filed his appeal. Furthermore, Mr. Esposito acknowledged receiving documents but asserts, in essence, he ignored them because he was no longer involved in the company. Even though Mr. Esposito asserts he was not "personally served" with any documentation, not

only is there no statutory obligation that he be personally served, I am satisfied Mr. Esposito was well aware of both the investigation and the Corporate Determination.

38. I find no basis for this ground of appeal.

New Evidence

39. Mr. Esposito attached new evidence with the appeal consisting of a letter of resignation purportedly signed on March 15, 2019, and a copy of a page from the corporate minute book.

40. 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.

41. I find that neither the letter of resignation nor the corporate minute book excerpt meets the test for new evidence. Both presumably existed during the Director's investigation of the wage complaints, and ought to have been presented to the delegate. That Mr. Esposito did not open correspondence addressed to him does not meet his obligation of due diligence.

42. Further, there is no evidence to whom the letter of resignation, which was unaddressed, was delivered, nor is there any information or evidence about either the Employer's new address or its new directors.

43. I am not persuaded that the "new" evidence is sufficient to rebut the presumption arising from the corporate Records.

44. I find that the Appellant has not discharged his burden of proving that he was not a corporate director or officer of the company during the period when the Employee's wages were earned.

45. I also find that the letters from two employees regarding their outstanding wages is not relevant to the appeal of the Personal Determination. While they may have been relevant to the Corporate Determination, the Corporate Determination was not appealed. It is not now open to Mr. Esposito to challenge the merits of the Corporate Determination through the appeal of the Personal Determination. (see *Kerry Steinemann, Director/Officer of Pacific Western Vinyl Window & Doors Ltd.*, BC EST # D180/96)

46. I dismiss the appeal.

ORDER

- ^{47.} Pursuant to section 115 of the *ESA*, I confirm the Determination dated October 14, 2020, in the amount of \$37,575.40 together with whatever interest may have accrued since the date of issuance, pursuant to section 88 of the *ESA*.

Carol L. Roberts
Member
Employment Standards Tribunal