

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Hossein Lotfi
(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.: 2021/044

DATE OF DECISION: August 24, 2021

DECISION

SUBMISSIONS

Hossein Lotfi on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "ESA"), Hossein Lotfi (the "Appellant") filed an appeal of a section 96 determination issued on April 7, 2021 (the "Section 96 Determination").
2. The Section 96 Determination held the Appellant, as a corporate director of Vrossis Cosmetics Inc. ("Vrossis"), personally liable for unpaid wages, interest, and penalties totalling \$4,306.72.
3. The Appellant submits the Director of Employment Standards (the "Director") made an error of law in the Section 96 Determination and seeks to have it set aside.
4. The Appellant was also late filing the appeal and requests the Tribunal extend the statutory appeal period pursuant to section 109(1)(b) of the *ESA*.
5. For reasons set out below, I find the appeal should be dismissed.

ISSUE

6. The issue before the Employment Standards Tribunal (the "Tribunal") is whether to extend the statutory appeal period pursuant to section 109(1)(b) of the *ESA*.

BACKGROUND

Employee Complaint for Failure to Pay Wages

7. The Director received a complaint from Konstantinos Liatsikos (the "Complainant"). The Complainant alleged he was an employee of Vrossis and had not been paid wages for work performed.
8. The Director's delegate (the "Delegate") carried out an investigation of the complaint. As part of the investigation the Delegate requested records and spoke with various witnesses including the Complainant and the Appellant.
9. A preliminary findings letter dated October 28, 2020 (the "Preliminary Findings Letter") was sent by Registered Mail and email to the Appellant. The Preliminary Findings Letter included a summary of the issues to be decided, material evidence, preliminary findings of fact about the Complainant's claims, status of the employer, and the potential liability of directors.
10. The Preliminary Findings Letter addressed evidence about the directors and officers of Vrossis and made preliminary findings the Appellant alone was the corporate director of Vrossis. Whether the Complainant was acting as a de facto director was specifically addressed. The Preliminary Findings Letter also noted

corporate directors could be personally liable for wages and penalties where a director is found to have authorized, permitted or otherwise acquiesced to contraventions of the *ESA*.

11. The Preliminary Findings Letter invited further submissions and advised that any responses received by November 12, 2020, would be considered prior to the issuance of a determination on the issues. The record shows the Appellant was very involved in the investigation and submitted further evidence including evidence about the role of the Complainant and submissions on the status of the Complainant as a director or de factor director of the Employer.

The Corporate Determination dated January 15, 2021

12. On January 15, 2021, the Director issued a determination on the Complainant's unpaid wages complaint (the "Corporate Determination").
13. The Corporate Determination found Vrossis had contravened the *ESA* by not paying certain wages the Complainant had earned and should have been paid for the period from January 14 to February 10, 2020. The Corporate Determination ordered Vrossis to pay wages, interest and administrative penalties totalling \$4,289.07 as follows: Unpaid wages - \$3,206.52; Administrative penalties - \$1,000.00; and accrued interest - \$82.55.
14. 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 the Appellant.
15. The Corporate Determination set out clearly there was a statutory time limit for filing an appeal of the Corporate Determination by February 22, 2021.
16. On February 8, 2021, the Appellant notified the Delegate that the Complainant had died on December 30, 2020.
17. The Delegate confirmed the information was credible and issued a Varied Determination to change the style of cause for the Complainant from Konstantinos Liatsikos to the Estate of Konstantinos Liatsikos.
18. While not raised as an issue, I note the definition of 'employee' in the *ESA* includes a 'deceased person' (see *ESA*, section 1).

Corporate Determination not appealed

19. The Corporate Determination was not appealed by February 22, 2021, and the amount determined to be owed remains unpaid.

The Section 96 Determination dated April 7, 2021

20. A Corporate Registry search conducted on February 27, 2020, with a currency date of February 6, 2020, showed that Vrossis Cosmetics Inc. was incorporated on June 5, 2018. The Appellant was listed as the only corporate director. A second Corporate Registry search done on March 22, 2021, with a currency date of October 15, 2020, also listed the Appellant as the sole corporate director. The Notice of Articles

and the Incorporation Application for Vrossis Cosmetics Inc. lists the Appellant as the sole corporate director also.

21. The Director issued a Section 96 Determination to the Appellant dated April 7, 2021 (the "Section 96 Determination"). In the Section 96 Determination, the Delegate held the Appellant was the corporate director of Vrossis Cosmetics Inc. during the time the Complainant's wages were earned or should have been paid and was personally liable to pay unpaid wages, interest and administrative penalties totalling \$4,306.72. The Section 96 Determination assessed personal liability for unpaid wages of \$3,206.52 plus interest of \$100.20 pursuant to section 96 of the *ESA*. The Section 96 Determination also held the Appellant personally liable to pay administrative penalties of \$1,000.00 assessed in the Corporate Determination. The Delegate held the Appellant was aware and in control during the relevant times and had authorized, permitted, or acquiesced in the failure to pay wages. The Delegate also held the Appellant personally liable for the administrative penalty for failure to keep employment records required under the *ESA*. The Delegate again noted the evidence supported the conclusion the Appellant was in charge, aware and controlled payroll during the relevant times.
22. The Section 96 Determination stated that any appeal must be filed by May 18, 2021.

Appeal filed by Appellant

23. On May 18, 2021, the Tribunal received a submission from the Appellant which included a copy of the Section 96 Determination and a copy of the written reasons for the Corporate Determination. The appeal submission by the Appellant referenced both the Corporate Determination and the Section 96 Determination. The Tribunal requested clarification from the Appellant regarding which determination the Appellant intended to appeal.
24. On May 28, 2021, the Tribunal received additional documents from the Appellant which again referenced both the Section 96 Determination and the Corporate Determination. The Tribunal again contacted the Appellant to confirm whether they were filing an appeal of both the Section 96 Determination and the Corporate Determination. The Appellant advised he no longer wanted to appeal the Corporate Determination but intended to appeal the Section 96 Determination.
25. On May 28, 2021, the Tribunal received a request for an extension of time to provide a submission to the Tribunal.
26. On May 31, 2021, the Tribunal granted the Appellant an administrative extension to provide the Tribunal with the requested documents required for the appeal by 4:30 pm on June 7, 2021.
27. On June 1, 2021, the Tribunal provided the Appellant with contact information to request written Reasons for the Section 96 Determination. On June 2, 2021, the Tribunal received the requested documents from the Appellant.
28. Upon receiving the Appellant's submission, the Tribunal requested the section 112(5) record (the "Record") from the Director for purposes of the appeal. On July 7, 2021, the Tribunal provided the Record to the Appellant and sought submissions on the completeness of the Record by July 21, 2021. A copy of the record was not disclosed to the Estate of the Complainant as the Tribunal did not have current contact

information of the executor on file. The Tribunal did not receive any objections to the completeness of the Record. Accordingly, the Tribunal accepts the Record as complete.

ARGUMENTS

Request to Extend the Statutory Appeal Period

29. The Appellant requests the Tribunal extend the statutory appeal period pursuant to section 109(1)(b) of the *ESA*. In support of the request to extend the statutory appeal period, the Appellant provided the following submission:

I have been food poised [sic] this week and suffered from severe stomach pain that caused me to call 911- emergency and an ambulance came to my resident so I didn't get enough change [sic] to gather the information you have a request, Alos [sic] had a Dental surgery last week

Appeal of Section 96 Determination

30. The Appellant appeals the Section 96 Determination and submits the Director made an error in law.
31. In support of the appeal, the Appellant submits the Director erred in finding that the Complainant [emphasis added] was not a de facto director of Vrossis. The Appellant's submission to the Tribunal sets out portions of the Corporate Determination dated January 15, 2021, about the status of the Complainant and the finding that the Complainant was not either a director or de facto director of Vrossis Cosmetics. The Appellant submits evidence concerning the Complainant and the Complainant's role in the company. Significantly, the Appellant's submission does not challenge the salient issues of the Section 96 Determination that the Appellant was a corporate director of Vrossis and personally liable for the unpaid wages, interest and penalties owing.
32. The Appellant does not contradict that he was a corporate director during the time period that the Complainant was working and should have been paid. Nor does the Appellant contradict the findings in the Section 96 Determination that the Appellant had authorized, permitted, or acquiesced in the employer's failure to pay wages or keep employment records required under the *ESA*.

ANALYSIS

33. These reasons are based on the written submissions of the Appellant, the Section 96 Determination, and the Record.

Request to extend the statutory appeal period

34. The *ESA* establishes a limit on the time period to appeal a determination. The relevant time periods are set out in section 112(3) of the *ESA*.
35. The Tribunal's authority to extend the time period for an appeal is set out in section 109(1)(b) of the *ESA*. Decisions of the Tribunal make it clear extensions are not granted as a matter of course but should only be granted for compelling reasons. The burden is on the appellant to demonstrate that the appeal period

should be extended. In determining whether to extend the appeal period, the Tribunal will consider the following main factors:

- whether there is a reasonable or credible explanation for the failure to file the completed appeal on time;
- whether there has been a genuine and ongoing *bona fide* intention to appeal the determination;
- whether the respondent party and the Director have been made aware of the intention to appeal;
- whether the respondent party will be unduly prejudiced by granting the extension; and,
- whether there is a strong *prima facie* case in favour of the appellant.

(see *Niemisto*, BCEST # D099/96)

36. This is not an exhaustive checklist of factors. In determining whether to extend the statutory time limit, the Tribunal considers and weighs the salient factors and evidence together in the circumstances (see *Re Patara Holdings Ltd. (cob Best Western Canadian Lodge)* BC EST # D010/08; reconsideration dismissed BC EST # RD053/08).
37. The Appellant made efforts to file the appeal on the last day of the statutory appeal period, May 18, 2021.
38. The Tribunal received further materials from the Appellant on May 28, 2021, and also received verbal confirmation from the Appellant that he intended to appeal the Section 96 Determination only. On June 1, 2021, the Appellant was requested to provide the Tribunal with additional documents which were received by the Tribunal on June 2, 2021. The appeal was perfected a number of days after the appeal period had expired.
39. I have reviewed the record and considered the Appellant's submissions carefully. I find the Appellant had, what I would describe as, a 'general intention to appeal' and I note the amount of time requested to extend the appeal period is not long, but only a matter of days. However, there is nothing in the materials before me that shows that the Director or the Complainant's Estate were aware of the Appellant's intention to file the appeal. The record suggests it was only after the Section 96 Determination was issued that the Appellant took any steps to appeal. The incomplete filing of this appeal by the Appellant at the 'last minute' is not strong evidence of a genuine and ongoing intention to appeal.
40. I also find the Appellant's explanation for not meeting the time requirements is weak. The health and dental issues listed by the Appellant in support of the request for the extension, while concerning, are not compelling in themselves and do not explain why the Appellant was unable to complete the appeal in a timely manner by May 18, 2021 (see *Globe-Time Travel*, BC EST # D140/11, and *Sharpe Wysman Inc.*, BC EST # D140/11, where a four day extension request was denied). The Appellant's argument reads more as a list of excuses after the fact than a reasoned and compelling explanation of why he was unable to file the appeal on time.

41. Although there is some prejudice in further delay of payment to the Complainant's Estate, in the current circumstances of this appeal where the Tribunal has been unable to contact the Complainant's Estate, I have not given this factor much weight.
42. However, even if I were to give the benefit of doubt to the Appellant and find the listed health and dental issues prevented him from filing the appeal on time, which I do not, the evidence is clear that the Appellant does not have a strong *prima facie* case to appeal the Section 96 Determination. The absence of a strong *prima facie* case has been held to be an important factor as it is considered contrary to the purposes of the *ESA* towards efficient and timely resolution to prolong appeal cases with little merit (see *0388025 BC Ltd. (cob Edgewater Inn)*, BC EST # D019/12, and *U.C. Glass*, BC EST # D107/08).
43. As set out above, the Appellant's argument in the appeal focuses on the Complainant's status and does not contradict the subject matter of the Section 96 Determination concerning the Appellant's status as corporate director of Vrossis and the section 96 personal liability. The Appellant's argument in this appeal appears more an argument about the findings of fact made in the Corporate Determination and an attempt to re-argue those findings of fact. The appeal jurisdiction of this Tribunal is circumscribed by the *ESA* and it is not supposed to be a 're-trial' to rehear arguments and make new findings of fact. I find that the Appellant does not have a strong *prima facie* case for this appeal.
44. I find, in all of the circumstances, the Appellant has not met the burden to show that the statutory appeal period should be extended, and the appeal should be dismissed.

Appeal of Section 96 Determination

45. Although I have found the appeal should be dismissed on the ground it was not filed within the statutory time period, I have also considered the Appellant's submission that the Director erred in law in finding the Appellant personally liable for unpaid wages, interest and penalties as set out in the Section 96 Determination.
46. 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.
47. The Appellant based this appeal on the ground the Director erred in law in making the Section 96 Determination.
48. To show there has been an error of law, an Appellant has the burden to show that there has been a significant legal error in the decision. An error of law is not just a finding of fact the Appellant disagrees with. It is something more. An error of law has sometimes been described as applying the wrong law or applying the wrong legal test. Examples of errors of law may include the following: i) a misinterpretation of misapplication of a section of the *ESA*; ii) a misapplication of an applicable principle of general law; iii) acting without any evidence at all; iv) acting on a view of the facts which could not be reasonably

entertained; and v) exercising discretion in a fashion that is inconsistent with established principle. (see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)* 1998 CanLII 6466)

49. Findings of fact may in rare cases amount to an error of law where the delegate 'acted without any evidence or on a view of the evidence that could not be reasonably entertained' or arrived at a 'clearly wrong conclusion of fact'. In cases where there is some evidence, the Tribunal will generally not re-evaluate the evidence or substitute its own view of the same evidence.
50. 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 . . .
51. 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).
52. As the Corporate Determination was never appealed, it is not now open to the Appellant to argue against 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).
53. It is also settled law in Tribunal decisions that the official Corporate Registry'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 Corporate Registry'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). It is not an error of law to rely on corporate records indicating that the Appellant was a director at the relevant time in order to issue a section 96 Determination (see *Re Wright*, BC EST # D010/14)
54. The Appellant has not provided evidence that would overcome the section 96 liability set out in the Section 96 Determination. As noted above, the Appellant's submission in this appeal is focused on the Complainant and the findings made in the Corporate Determination that the Complainant was not the

director nor acting in a de facto director role. The Appellant is re-arguing the Director's finding of fact that the Complainant was not a director, or a de facto director, and this Tribunal is not a forum to re-hear cases from the start for dissatisfied parties (see *Sharpe Wysman Inc., supra*).

55. Further, as set out above, the Appellant does not contradict the findings of the Section 96 Determination that the Appellant was a corporate director of Vrossis. Nor does the Appellant provide evidence to contradict the findings that he was liable for unpaid wages, interest and the penalties as set out in the Section 96 Determination. Indeed, the evidence is clear the Appellant was a director of Vrossis during the time period the Complainant 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.
56. In sum, I find this appeal is without merit and has no reasonable prospect of succeeding.

Section 114 of the ESA

57. 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.
58. As set out above, the appeal was not filed within the applicable time period and the Appellant has not met the burden to show the statutory appeal period should be extended.
59. As well, I have found there is no *prima facie* case; therefore, there is no reasonable prospect the appeal will succeed.

ORDER

60. The Appellant's application to extend the statutory appeal period for the Section 96 Determination is refused.
61. Pursuant to sections 114(1)(b) and (f) of the *ESA*, the appeal is dismissed.
62. Pursuant to section 115 of the *ESA*, I confirm the Section 96 Determination, together with any additional interest that has accrued pursuant to section 88 of the *ESA*.

John Chesko
Member
Employment Standards Tribunal