

EMPLOYMENT STANDARDS TRIBUNAL

Appeals

- by -

Ray Torresan
(the “Appellant”)

- of Determinations 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 NOS.: 2022/095 and 2022/096

DATE OF DECISION: June 28, 2022

DECISION

SUBMISSIONS

Paul Pulver	counsel for Ray Torresan
Jennifer Redekop	delegate of the Director of Employment Standards

OVERVIEW

1. These are appeals by Ray Torresan (the “Appellant”) of two decisions of a delegate (the “adjudicative delegate”) of the Director of Employment Standards (the “Director”) made December 31, 2020 and February 19, 2021.
2. On August 27, 2019, the Director received a complaint from a former employee (the “Employee”) of three companies, Conversion Relations Inc., ExInfluence Media Corp. and 1113622 B.C. Ltd. (the “Companies”) alleging that the Companies had contravened the *Employment Standards Act* (the “ESA”) in failing to pay wages and vacation pay.
3. Following an investigation into the complaint, the adjudicative delegate issued a determination on December 31, 2020 (the “Corporate Determination”) finding that the Employee was an employee as defined in the *ESA*, that the Companies should be considered one employer for the purposes of the *ESA*, and that the Employee was owed regular wages and vacation pay in the total amount of in the amount of \$38,671.64. The adjudicative delegate further found that the Employee was entitled to interest in the amount of \$1,450.40 under section 88 of the *ESA*, for a total amount owing of \$40,122.04.
4. The Corporate Determination, which included a notice to directors and officers explaining their personal liability under the *ESA*, was sent to the Companies, with copies to the registered and records office as well as to the officers and directors of each of the three Companies. The date for filing an appeal of the Corporate Determination was 4:30 p.m. on February 8, 2021.
5. The Companies did not appeal the Corporate Determination and did not pay the amount ordered. Following the expiration of the deadline to appeal the Corporate Determination, the adjudicative delegate issued a determination on February 19, 2021 (the “Director Determination”) finding that the Appellant was a director of Conversion Relations Inc. at the time the wages owed to the Employee were earned and should have been paid. The adjudicative delegate determined that the Appellant was personally liable to pay \$8,049.14, representing not more than two months’ unpaid wages for the Employee, plus interest, pursuant to section 96 of the *ESA*. The adjudicative delegate found insufficient evidence that the Appellant authorized, permitted or acquiesced in the Companies’ 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. on March 29, 2021.
6. On March 9, 2022, the Appellant filed an appeal of both the Corporate and the Director Determination (collectively, the “Determinations”) on the grounds that evidence has become available that was not

available at the time the Determinations were being made. The Appellant also sought a suspension of the Determinations and an extension of time in which to file the appeals.

7. The Director confirmed that it did not oppose the Appellant's suspension request and that funds seized from his account would be held in the Director's trust account pending the outcome of the appeal.
8. After reviewing the appeal submissions, I sought submissions from the Employee and the Director. Although the Director made submissions, the Employee did not.
9. This decision is based on the section 112(5) "record" that was before the adjudicative delegate at the time the Determinations were made, the submissions and the Determinations.

ISSUES

10. Whether the time period for filing an appeal should be extended, and whether the Appellant has established grounds for interfering with the Determinations.

BACKGROUND AND ARGUMENT

11. The Corporate Determination states that the Employee alleged that he was employed from June 1, 2017 until October 1, 2019.
12. The Employee provided information to the adjudicative delegate including a June 2017 document identified as a 'consulting services' agreement between the Employee and ExInfluence Media Inc. and Conversion Relations Inc. The agreement was signed on behalf of ExInfluence Media Inc. and Conversion Relations Inc. by George Fleming ("Mr. Fleming"), who identified himself as CEO of Conversion Relations Inc. The Employee also provided the delegate with email correspondence between himself and Mr. Fleming as well as invoices and e-transfers from two bank accounts – one held by Mr. Fleming and the other from 1113622 BC Ltd.
13. The adjudicative delegate informed Mr. Fleming of the Employee's complaint. Mr. Fleming took the position that the Employee was a contractor "who provided occasional services to the company over a long period of time."
14. During his investigation of the Employee's complaint, the adjudicative delegate conducted BC Registry Searches that disclosed that Conversion Relations Inc. was incorporated on April 27, 2017 with Sudeep Bala ("Mr. Bala"), Mr. Fleming and the Appellant as directors. The company was dissolved for failure to file on November 4, 2019.
15. The searches also disclosed that ExInfluence Media Corp was incorporated on June 22, 2016 with Mr. Fleming as the sole director. The company was dissolved for failure to file on December 10, 2018. 1113622 B.C. Ltd. was incorporated on March 31, 2017 with Mr. Fleming as the sole director. The company was dissolved for failure to file on September 16, 2019.
16. On July 21, 2020, the adjudicative delegate sent a registered letter to all three companies and their respective directors notifying them that he was investigating the Employee's complaint. The Employment

Standards Branch (the “Branch”) received correspondence from the current resident at the address the Branch had for Mr. Bala informing the Branch that Mr. Bala had not resided at that address since at least September 2017 and requested that no further mail be sent to that address.

17. The adjudicative delegate’s July 21, 2020 correspondence also informed the companies that he would be investigating them as associated corporations under section 95 of the *ESA*. Although the adjudicative delegate noted that Canada Post confirmed deliveries to all three companies, he did not receive any reply.
18. The adjudicative delegate determined that the three companies were separate legal entities carrying on a business, trade or undertaking, and that they were in operation at the time of the Employee’s employment.
19. The adjudicative delegate determined that the corporate searches supported a finding that:

. . . there is common control and direction of the operations of the Companies. Particularly, this is demonstrated by: Mr. Fleming’s common and simultaneous directorship of each of the named corporations; the businesses operating locations similarly intersect; and, the agreement Mr. Fleming submitted to the Branch states that Conversion Relations Inc. and ExInfluence Media Corp. are together referred to as one entity, namely ConversionIR. Additionally, [the Employee] received payment by way of e-transfers from 1113622 B.C. Ltd. As such, I find Conversion Relations Inc. and ExInfluence Media Corp. and 1113622 BC Ltd. share overlapping control and direction in their business operations.
20. The adjudicative delegate found it was appropriate to consider the three companies as one employer pursuant to section 95 of the *ESA*, that the Employee was employed by the Companies, and that the Employee was entitled to unpaid wages.
21. The Corporate Determination was sent to the three companies, their registered and records offices and their officers and directors.
22. The Corporate Determination contained the following “Notice to Directors/Officers”:

If a separate Determination is made against you as a director/officer of a company, you may not argue the merits of this Determination against the company by appealing the Determination that is made against you as a director/officer.

There are only three grounds on which you may appeal a Determination made against you as a director/officer:

 - 1) That you were not a director/officer of the company at the time wages were earned or should have been paid;
 - 2) That the calculation of your personal liability as a director/officer is incorrect; and/or,
 - 3) That you should not be liable for the penalty, where a penalty has been imposed, on the grounds that you did not authorize, permit or acquiesce in the company’s contravention.
23. When no appeals were filed of the Corporate Determination, the adjudicative delegate noted that a BC Registry Services online search conducted February 9, 2021 with a currency date of October 15, 2020

confirmed that the Appellant was a director of Conversion Relations Inc. between October 2, 2018 and October 1, 2019 when the Employee's wages were earned or should have been paid.

Argument

24. The Appellant says that the Branch sent mail to an address at which he had not resided for over six years and that he received no notice of the complaint or of either of the Determinations, either by mail, email, forwarded mail, or by telephone. He says he became aware of the Determinations only after he was notified his bank accounts "were frozen."
25. The Appellant also says that the February 19, 2021 Determination is incorrect as he was "not a director at the time wages owed" to the Employee were earned. He says that he was a director from the date of incorporation until October 11, 2018 at which time he resigned. He contends that the company owner neglected to update the corporate records after receiving and accepting his resignation. Finally, the Appellant says that he has no idea who the Employee is or any circumstances regarding his employment.
26. Attached to the Appellant's appeal is a document, which I infer is the "new evidence" referred to in the grounds of appeal. The document consists of a copy of an email dated October 11, 2018 from the Appellant to Mr. Fleming in which the Appellant informs Mr. Fleming that he is resigning as a director "effective immediately" due, in part, to concerns that employees were not being paid. Mr. Fleming's email to a person I infer is an employee at the Branch and copied to the Appellant, confirms that the Appellant resigned as a director of Conversion Relations Inc. on October 11, 2018. Mr. Fleming also states that "the records were never amended to reflect [the Appellant's] resignation."
27. The Director opposes the application for an extension of time in which to file the appeals. The Director says that the Corporate Records list the Appellant as a director of Conversion Relations Inc. up until the company was dissolved for failure to file on November 4, 2019. The Director submits that during the investigation, on July 21, 2020, the Branch sent correspondence to the Appellant at an address listed for the Appellant in the Corporate Registry. The Director further submits that the correspondence was delivered to the Appellant's address, although subsequent correspondence sent to the same address on November 30, 2020 was returned as "unclaimed."
28. The Director says that both the Corporate Determination and the Director Determination were sent to the same address and returned "unclaimed" and submits that the adjudicative delegate reasonably relied on the information contained in the BC Company summary during the investigation.
29. The Director contends that, at the time the Determinations were served, section 122 of the *ESA* provided that a determination was deemed served if it was sent by registered mail to the person's last known address. She submits that the July 21, 2020 correspondence was not returned as "moved" or "wrong address." The Director submits that, in the circumstances, the deadline to appeal should not be extended.
30. The Director notes that, should the Tribunal grant the application to extend the appeal deadline, the Appellant does not dispute the amount found owing in the Corporate Determination, only the Director Determination, which relates to the finding that he was a director of Conversion Relations Inc. The Director submits that the Director Determination was based on the information before the adjudicative delegate at the time it was issued, and after affording the Appellant an opportunity to respond.

31. The Director submits that, should the Tribunal accept the Appellant's new evidence, that is, the documents suggesting he resigned as a director of the company effective October 11, 2018, the Appellant would still be liable for wages earned or should have been paid, including vacation pay earned by the complainant until that date.
32. In reply, counsel for the Appellant submits that:
- if the BC Corporate Registry and Company Summary were incorrect in relation to the directors, that is not the fault of the Appellant;
 - the Director did not exercise due diligence in attempting to locate the Appellant, whose address was current with various government registries, social media profiles and who was registered as a director of another company on the same registry;
 - if correspondence was sent to the Appellant at the registered office address, it was never forwarded to him;
 - the Appellant never received a telephone call or email from the Director; and
 - there is no basis to doubt that the Appellant ceased to be a director on October 11, 2018, or that he had minimal involvement in the company prior to that date.

ANALYSIS

33. 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.
34. The appellant must 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 in respect of the Director Determination only.
- Extension of time*
35. In *Niemisto* (BC EST # D099/96), the Tribunal set out the following non-exhaustive criteria which an appellant has 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 made 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.

36. The record confirms that the Corporate Determination and the Director Determination were sent to the Companies and their directors by registered mail. The record confirms that the Determinations were sent to the Appellant at an address listed in the Corporate Registry and was returned to the Branch. There is nothing in the record to confirm the Director's assertion that notice of the complaint investigation was successfully delivered to the Appellant's address (and based on which the *ESA* successfully deemed service). Canada Post records indicate that the correspondence was "delivered to recipient's front door."
37. All subsequent mail sent to the Appellant was returned to the Director unclaimed, which is consistent with the Appellant's assertions.
38. Although none of the Appellant's statements are supported by affidavits or any other sworn or notarized evidence, I accept that the Appellant has not lived at the address used by the Branch since approximately 2016 and was unaware of the complaint or his ability to respond, and was unaware of either the Corporate Determination or the Director Determination, until early 2022. Confirmation that Canada Post left mail at a front door is not evidence that the Appellant received any of the Director's correspondence.
39. The appeal of the Corporate Determination was not filed within the statutory time period even though I am satisfied one of the directors of the associated corporations was aware of the opportunity to do so. Even if I were to grant the Appellant an extension of time to file an appeal of the Corporate Determination, I note that the Appellant does not take issue with the merits of the Corporate Determination and he does not dispute the amount found owing in the Corporate Determination. Rather, he only takes issue with the finding in the Corporate Determination that he was a director of Conversion Relations. In these circumstances, I dismiss the Appellant's appeal of the Corporate Determination.
40. Although the Appellant's appeal of the Director Determination was not filed within the statutory time period, I find there is a reasonable and credible explanation for the Appellant's failure to file the appeal within the prescribed time limit. I find that, since becoming aware of the Determination, the Appellant has had a genuine and *bona fide* intent to appeal it, and that the Director was made aware of this intention.
41. While I find that there may be some prejudice to the Employee by the granting of an extension, I am not persuaded that the prejudice is undue.
42. I therefore allow the Appellant's application for an extension of time in which to file the appeal of the Director Determination.
43. 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,

...

44. Section 96 is an extraordinary exemption to the general principle that corporate directors are not personally liable for corporate debts and ought to be construed narrowly. (see *Re Archibald*, BC EST # D090/00, and *MIV Therapeutics Inc.*, BC EST # D096/10)
45. Corporate records indicate that the Appellant was listed as a director of Conversion Relations Inc. at the time some of the Employee's wages were earned and should have been paid. However, given that the search confirmed that Conversion Relations Inc., of which the Appellant was listed as a director, was dissolved for failure to file on November 4, 2019, it should have been no surprise to the adjudicative delegate that the Companies did not respond to correspondence sent in July or November 2020. It also does not appear that the adjudicative delegate had any conversations with Mr. Fleming about the location or status of the other two directors of Conversion Relations Inc. when mail to the Appellant was returned unclaimed.
46. 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. The Director is under no obligation, as the Appellant's counsel seems to suggest, to conduct further searches to locate individuals who are listed as Directors in company records.
47. Nevertheless, the presumption may be rebutted by credible and cogent evidence that the Registrar's records are inaccurate and 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)
48. The Appellant argues that he was not a director of Conversion Relations Inc. at the time the wages were earned. In support of this argument, he submitted a copy of his October 11, 2018 email to Mr. Fleming, in which he resigns as a director "immediately." The email is accompanied by an acknowledgement from Mr. Fleming, copied to someone I infer is a Branch employee, confirming that he received the email and that company "records were never amended to reflect [the Appellant's] resignation."
49. The *Business Corporations Act* ([SBC 2002] c. 57) provides that a director ceases to hold office when he resigns (s. 128(1)(b)), and that a resignation of a director "takes effect on the later of the time that the director's written resignation is provided to the company" or a date specified in the resignation notice (section 128(2)(b)).
50. I find the evidence submitted by the Appellant to be credible, and accept that he submitted his resignation as a director of Conversion Relations Inc. to Mr. Fleming, one of the other directors, on October 11, 2018. His resignation was effective on that day. Mr. Fleming has acknowledged that the corporate records were never corrected to reflect the Appellant's resignation. (see *Wilnofsky*, BC EST #D106/99)

51. I am satisfied that the Appellant was not a director of any of the Companies after October 11, 2018 and thus is not personally liable for unpaid wages after that time. However, I find that he is personally liable for wages earned or unpaid until the date of his resignation. The extent of his involvement in the company up to that date is not relevant to this consideration.
52. The Director found that the Appellant was a director between October 2, 2018 and October 1, 2019, “when [the Employee’s] wages were earned or should have been paid.”
53. The Director found that the wage recovery period was from August 28, 2018 to October 1, 2019, and that some time after September 2018, the Companies paid the Employee wages “totaling \$22,000.00, in which a portion of that amount, \$12,440.00, was used to settle the outstanding wage debt as of September 2018.” Additionally, the Director determined that the Complainant was entitled to vacation pay for the period August 28, 2018 to October 1, 2019.
54. Given that I am unable to determine the Appellant’s liability from the Determinations, I refer the issue of the amount of wages unpaid up to the date of the Appellant’s resignation on October 11, 2018, back to the Director for reconsideration.

ORDER

55. Pursuant to section 115(1)(a) of the *ESA*, I confirm the Corporate Determination dated December 31, 2020.
56. Pursuant to section 115(1)(b) of the *ESA*, the Director Determination, dated February 19, 2021, is referred back to the Director of Employment Standards for reconsideration.

Carol L. Roberts
Member
Employment Standards Tribunal