

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Ebrahim Al Shihabi
("Mr. Al Shihabi")

- 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: Mona Muker

FILE No.: 2022/100

DATE OF DECISION: June 28, 2022

DECISION

SUBMISSIONS

Ebrahim Al Shihabi on his own behalf

OVERVIEW

1. Ebrahim Al Shihabi (“Mr. Al Shihabi”), a director and officer of Mid Orient Cafe Ltd., carrying on business as Magic Cut Barbers (the “Employer”), has filed an appeal under section 112 of the *Employment Standards Act* (the “*ESA*”) of a determination issued by Carrie H. Manarin, a delegate (“Delegate Manarin”) of the Director of the Employment Standards (the “Director”), under section 96 of the *ESA*, on March 16, 2022 (the “Director Determination”).
2. On March 16, 2022, Delegate Manarin found that the Employer had contravened the *ESA* in failing to pay its former employee, Michelle Bannow (the “Employee”), wages and issued a determination against the Employer (the “Corporate Determination”). The Employer appealed the Corporate Determination and that appeal was dismissed in Tribunal Decision 2022 BCEST 37.
3. On March 16, 2022, Delegate Manarin issued the Director Determination finding that Mr. Al Shihabi was the sole director and officer of Mid Orient Cafe Ltd. at the time wages were owed to the Employee and ordered Mr. Al Shihabi to pay the total amount of \$6,300.44, that accounted for unpaid wages, interest, and fines for contravening the *ESA*.
4. Mr. Al Shihabi has appealed the Director Determination alleging that the Director failed to observe the principles of natural justice in making the Director Determination.
5. Section 114(1) of the *ESA* permits the Tribunal to dismiss all or part of an appeal without a hearing or seeking submissions from the other parties or the Director.
6. I find that this appeal is appropriate to be considered under section 114(1) of the *ESA*. After reviewing the appeal submissions, I find it unnecessary to seek submissions from the Employee or the Director. Accordingly, this decision is based on the Director Determination, the Reasons for the Director Determination (the “Reasons”), Mr. Al Shihabi’s appeal submissions, and my review of the section 112(5) record (the “Record”) that was before the Director when the Director Determination was made.

ISSUE

7. The issue before the Tribunal is whether the Director failed to observe the principles of natural justice in making the Director Determination.

BACKGROUND

8. On January 21, 2020, the Employee filed a complaint (the “Complaint”) under section 74 of the *ESA*. The Employee alleged that Mid Orient Cafe Ltd. contravened the *ESA* by failing to pay her wages and tips and failing to reimburse her for a business expense.
9. Rodney J. Strandberg, a delegate (“Delegate Strandberg”) of the Director, received evidence from the Employee and Mr. Al Shihabi during the investigation of the Complaint before the Director and issued an Investigation Report dated January 25, 2022. The Investigation Report included a Notice to Directors and Officers about *ESA* section 96 and section 98 liability. Carrie Manarin, a delegate of the Director, issued the Corporate Determination finding that wages and interest were owed to the Employee in the amount of \$3,538.34, plus interest in the amount of \$262.10, for a total amount of \$3,800.44. The Director also imposed administrative penalties for contraventions of sections 16, 18, 28, 40, and 45 of the *ESA* in the total of amount of \$2,500.00. The total amount found payable in the Corporate Determination is \$6,300.44.
10. Based on a corporate BC registry search conducted on December 21, 2021, with a currency date of December 14, 2021, Mid Orient Cafe Ltd. was incorporated in British Columbia on January 16, 2017. Mr. Al Shihabi was listed as the sole director and officer for the period between September 8, 2019, and October 29, 2019, when the Employee’s wages were earned or should have been paid.
11. In the Director Determination, Mr. Al Shihabi was found personally liable for up to two months’ of unpaid wages. The Employee was employed for less than two months, thus, pursuant to section 96 of the *ESA*, the Director found Mr. Al Shihabi personally liable for all wages owed in the amount of \$3,538.34 plus interest in the amount of \$262.10. Pursuant to section 98(2) of the *ESA*, if a corporation contravenes a requirement of the *ESA* or the *Employment Standards Regulation (“ESR”)*, a director or officer of the corporation who authorizes, permits, or acquiesces in the contravention is personally liable to pay the fines. The Director found Mr. Al Shihabi personally liable for the administrative penalties found owing in the Corporate Determination in the total amount of \$2,500.00.
12. The Director found that Mr. Al Shihabi hired the Employee, set her hours of work, and supervised her. He was also responsible for paying the Employee wages. Mr. Al Shihabi participated in the complaint resolution process and was served with a copy of the Investigative Report dated January 25, 2022, which advised him of his personal liability for administrative penalties. Thus, the Director found that Mr. Al Shihabi was personally liable for the administrative penalties.

ARGUMENTS

13. Mr. Al Shihabi appeals the Director Determination alleging that the Director failed to observe the principles of natural justice in making the Director Determination.
14. Mr. Al Shihabi submits that the Director’s decision is illegal, unlawful, and uncalled for. Mr. Al Shihabi submits the same facts he already testified to during the investigation of the Complaint. I will not be reproducing those facts here, but briefly, Mr. Al Shihabi reargues facts regarding the Employee being hired as a subcontractor, there being no unpaid wages, and the scope of the Employee’s employment and remuneration.

15. Mr. Al Shihabi submits that Delegate Strandberg “pushed” him back and forth for four months and attempted to “hustle” him into paying the Employee more wages. Specifically, he was recommended to pay \$800.00 during a phone conversation, so the total amount paid would amount to \$2,000.00. Mr. Al Shihabi believed that making an additional payment would conclude the matter.
16. On appeal, Mr. Al Shihabi has submitted bank statements and copies of e-transfers, some of which can be found in the Record, and that he previously provided to Delegate Strandberg during the investigation of the Complaint. He has also submitted a wage calculator sheet that was found in the Corporate Determination.

ANALYSIS

17. Section 112(1) of the *ESA* allows a party to 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.
18. 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 any 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 that 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.
19. Section 96 of the *ESA* provides:
- (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.

20. 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).
21. Mr. Al Shihabi has provided nothing in his appeal that addresses any of the matters that are permitted to be raised by a director in the appeal of a determination made under section 96 of the *ESA*.
22. He does not dispute that he was recorded as being a director and officer of Mid Orient Cafe Ltd. when the Employee's wages 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).
23. In this case, Mr. Al Shihabi appeals the Director Determination on the basis that the Director failed to observe the principles of natural justice in making the Director Determination.
24. Natural justice is a procedural right that includes the right to know the case being made, the right to respond, the right to know about the hearing process, and the right to be heard by an unbiased decision maker (*Re 607730 B.C. Ltd. (cob English Inn & Resort)*, BC EST # D055/05; *Imperial Limousine Service Ltd.*, BC EST # D014/05). The party alleging failure to comply with natural justice must provide evidence in support of the allegation (*Dusty Investments Inc. d.b.a. Honda North*, BC EST #D043/99).
25. There is nothing in the Record showing that the Director failed to comply with the principles of natural justice in conducting the investigation. The Record shows that Delegate Strandberg communicated to Mr. Al Shihabi several times about the application of the *ESA* and the likely outcome of this case. In an email dated October 8, 2021, Delegate Strandberg stated that Mid Orient Cafe Ltd. was required to keep records which it did not. As a result, the Employee's records would likely be accepted. Furthermore, Mr. Al Shihabi's position regarding the subcontractor relationship and payment arrangement would likely not be accepted if the matter went to the Director. Delegate Strandberg also set out a tentative calculation of the wages owing, using minimum wage, and advised about the number of penalties that would likely be imposed.
26. On November 4, 2021, Delegate Strandberg emailed Mr. Al Shihabi with the Employee's proposal to resolve the matter in exchange of \$3,501.30, again, setting out the number of \$500.00 penalties that would be imposed for contravening the *ESA* if the matter went to the Director. Mr. Al Shihabi was strongly advised to seriously consider resolving the Complaint.
27. Thereafter, the Record shows several emails and phone calls were exchanged in connection with resolving the Complaint, but to no avail. On December 3, 2021, Delegate Strandberg emailed the parties about a

resolution and set out the advantages of resolving a complaint. Namely, there being no penalties imposed on Mid Orient Cafe Ltd. if contraventions of the *ESA* are found. Delegate Strandberg explained that if no voluntary resolution was reached, they would complete an investigative report, which would go to the Director. This was reiterated again in an email on January 11, 2022, along with a reminder of the imposition of penalties.

28. The Record shows that the parties were not able to resolve the matter, and in particular, Mr. Al Shihabi may have had a change of heart in early January. On January 4, 2022, Delegate Strandberg sent Mr. Al Shihabi instructions regarding the information they would need to initiate a settlement proposal; however, Mr. Al Shihabi provided a nonresponsive email in response to the information requested. On January 19, 2022, Delegate Strandberg spoke to the parties about a possible \$800.00 payment. On January 25, 2022, Delegate Strandberg emailed Mr. Al Shihabi with the Investigative Report and asked for a response by February 8th, confirming that the Investigative Report would be sent to the Director for a determination. The email also confirmed that if Mr. Al Shihabi wished to make a voluntary payment in early February, as he indicated he might, to please provide details. On February 10, 2022, Delegate Strandberg emailed the parties confirming the \$800.00 payment made by Mr. Al Shihabi and received by the Employee. They reiterated that the Investigative Report would be going to the Director on February 11th, who would make a final decision about the Complaint.
29. I find that Delegate Strandberg did their due diligence in providing Mr. Al Shihabi opportunities to respond, to resolve the Complaint, and considered Mr. Al Shihabi's testimony and evidence. I do not find that Mr. Al Shihabi was pressured in any way to resolve the Complaint or make an \$800.00 payment. Many of the initial emails sent by Delegate Strandberg had typical boiler plate information for the parties' information, which included information about resolutions, the likelihood of success, and imposition of fines. Based on the Record, I find that it would have been in the best interests of Mr. Al Shihabi to resolve the matter when he had the opportunity to do so.
30. I find that Mr. Al Shihabi should have reasonably known that the matter would be going to the Director for a determination because he did not voluntarily resolve the matter. There is nothing in the Record that shows that the \$800.00 payment was initiated to resolve the matter. The Record shows that Mr. Al Shihabi had ample notice and numerous reminders throughout the investigation of the Complaint about the terms needed to reach a settlement, about the Investigative Report going to the Director if there was no resolution, the high likelihood of his position not being accepted, and the imposition of fines. The email of January 25, 2022, made it clear that the Investigative Report would be going to the Director, even if Mr. Al Shihabi made a voluntary \$800.00 payment in early February.
31. I will not be addressing Mr. Al Shihabi's remaining submissions for they do not raise any basis for this ground of appeal or other grounds of appeal under section 112(1) nor do they address any arguments that could be raised under section 96 of the *ESA*.
32. Thus, I find that the Director did not breach the principles of natural justice.
33. Accordingly, I dismiss the appeal.

ORDER

- ^{34.} The appeal is dismissed under section 114(1)(f) of the *ESA*. Pursuant to section 115(1) of the *ESA*, the Determination dated March 16, 2022, is confirmed, together with any interest that has accrued under section 88 of the *ESA*.

Mona Muker
Member
Employment Standards Tribunal