

EMPLOYMENT STANDARDS TRIBUNAL

An appeal
pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

Eli Rosenberg, a Director and Officer of Dr. Eli Rosenberg Inc. carrying on
business as Pulse Cardiac Centre

- of a Determination issued by -

The Director of Employment Standards

PANEL: Shafik Bhalloo

FILE NO.: 2022/181

DATE OF DECISION: October 28, 2022

DECISION

SUBMISSIONS

Eli Rosenberg on his own behalf as a Director and Officer of Dr. Eli Rosenberg Inc. carrying on business as Pulse Cardiac Centre

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Eli Rosenberg (“Dr. Rosenberg”), a Director and Officer of Dr. Eli Rosenberg Inc. carrying on business as Pulse Cardiac Centre (“the Company”), has filed an appeal of a section 96 determination (corporate officer’s liability for unpaid wages) that was issued on August 5, 2022 (“the Determination”) by a delegate (the “adjudicating delegate”) of the Director of Employment Standards (the “Director”).
2. The Determination concluded that Dr. Rosenberg was a director and officer of the Company, an employer found to have contravened provisions of the *ESA* at the time wages were earned or should have been paid to Frances (Debra) Rice (“Ms. Rice”), and as such was personally liable under section 96 of the *ESA* for wages payable to her in the amount of \$1,142.92 plus interest.
3. In his appeal, Dr. Rosenberg invokes a single ground of appeal, namely, the Director breached the principles of natural justice in making the Determination.
4. In correspondence dated August 30, 2022, the Tribunal notified the Director and Ms. Rice that it had received Dr. Rosenberg’s appeal and was enclosing the same for informational purposes only. The Director and Ms. Rice were also advised that no submissions on the merits of the appeal were being sought from any of them at this time. The Tribunal also requested the Director provide a copy of the *ESA* section 112 record (“the record”) to the Tribunal.
5. On September 20, 2022, the Tribunal received a submission from a delegate of the Director which included a copy of the record. On September 22, 2022, the Tribunal contacted the delegate via email to request that a revised record and record cover letter be submitted to the Tribunal. The delegate obliged on the same date with a revised record and record cover letter. The Tribunal sent the same to Dr. Rosenberg and to Ms. Rice. Both were provided an opportunity to object to its completeness, but neither did. Accordingly, the Tribunal accepts the record as complete.
6. On October 5, 2022, the Tribunal received an unsolicited submission on the merits of the appeal from Dr. Rosenberg.
7. On October 11, 2022, the Tribunal sent correspondence to the parties advising them that a panel is assigned to decide the appeal.
8. Section 114(1) of the *ESA* permits the Tribunal to dismiss all or part of an appeal without seeking submissions from the other parties. I have decided that this appeal is appropriate to consider under section 114(1). Accordingly, I will assess the appeal solely on the basis of the Determination, the Reasons

for the Determination (the “Reasons”), Dr. Rosenberg’s submissions, and my review of the record when the Determination was being made. If I am satisfied that Dr. Rosenberg’s appeal or part of it has some presumptive merit and should not be dismissed under section 114(1) of the *ESA*, the Tribunal will invite Ms. Rice and the Director to file reply submissions on the merits of the appeal. Dr. Rosenberg will then be given an opportunity to make a final reply to the submissions, if any.

ISSUE

9. The issue at this stage of the proceeding is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

FACTS

10. By way of background, the Company operates a cardiology practice in Vancouver. Ms. Rice was employed as a medical office assistant with the Company from March 9, 2020, to December 10, 2020, when she was fired. Ms. Rice was paid an annual salary of \$49,920.00 per year from her hire to November 30, 2020, and \$24.00 per hour from December 1 to 9, 2020.
11. On December 14, 2020, Ms. Rice filed a complaint under section 74 of the *ESA* alleging that the Company failed to pay her regular wages, overtime wages, vacation pay, and compensation for length of service (the “Complaint”). During the investigation of the Complaint, Ms. Rice withdrew her claims for overtime wages and compensation for length of service.
12. An investigation was conducted into Ms. Rice’s Complaint and the Director issued a determination (the “Corporate Determination”) against the Company finding wages and interest were owed to Ms. Rice. The total amount of wages owed was \$1,142.92 plus interest accrued to that date in the amount of \$41.99 for a total of \$1,184.91. It was also determined that administrative penalties were owed for contravention of section 18 of the *ESA* for failure of the Company to pay Ms. Rice within 48 hours of her termination on December 10, 2020 and for section 46 of the *Employment Standards Regulation* for failure to produce a record of the hours Ms. Rice worked each day of her employment.
13. The Corporate Determination, which included a notice to directors and officers explaining their personal liability under the *ESA*, was sent to the Company, with a copy to Dr. Rosenberg. The appeal period for the Corporate Determination expired on June 27, 2022, and no appeal was filed with the Tribunal.
14. The Company did not pay the Corporate Determination amount.
15. A BC Online Registrar of Companies Search conducted by a delegate of the Director on January 5, 2021, with a currency date of October 15, 2020, indicates that the Company was incorporated on September 23, 2014, and Dr. Rosenberg was listed as a director and officer.
16. A further search by a delegate of the Director conducted on November 29, 2021, with a currency date of October 6, 2021, indicates that Dr. Rosenberg was still listed as a director and officer of the Company. As a result of the searches, the adjudicating delegate found Dr. Rosenberg was a director and officer of the Company between December 1 and December 11, 2020, when Ms. Rice’s wages were earned or should have been paid and therefore, personally liable for up to two months’ unpaid wages for Ms. Rice.

17. Based on Ms. Rice's annual salary \$49,920.00, the adjudicating delegate calculated that two months of wages total \$8,320.00 which exceeds the full amount of the Corporate Determination of \$1,142.92 plus interest. Accordingly, the adjudicating delegate concluded that Dr. Rosenberg is personally liable for the full amount owing to Ms. Rice in the Corporate Determination.
18. However, the adjudicating delegate did not find there was sufficient evidence that Dr. Rosenberg authorized, permitted, or acquiesced in the contravention of the Company and therefore found Dr. Rosenberg was not personally liable for any administrative penalties levied against the Company in the Corporate Determination.

ARGUMENTS

19. I have read Dr. Rosenberg's written submissions and documents filed with his appeal on August 29, 2022, and his subsequent unsolicited submissions dated October 5, 2022, and supporting documents. While I do not find it necessary to set out his submissions in any great detail here because they do not relate to the issues that arise under section 96 of the *ESA*, I will broadly summarize them below.
20. Dr. Rosenberg contends that Ms. Rice took four days of vacation on August 5 to 7, 2020, inclusive. He says that while this is recorded in the clinic's schedule in the electronic medical records, the Director failed to consider this in the Determination.
21. He further submits that the IT administrator for the clinic's electronic medical system confirmed that Ms. Rice did not log into medical records system on the days she was vacationing.
22. Finally, he submits that Ms. Rice was paid \$208.00 in vacation pay for each of August 4th, 5th, 6th, and 7th for a total of \$832.00. He says this amount was included in her final pay for the period August 1, 2020 to August 15, 2020 and, therefore, Ms. Rice is not owed any further amounts. He also argues that since Ms. Rice was fully paid "within the required time frame" the administrative penalty of \$500.00 should be cancelled.

ANALYSIS

23. Section 96 of the *ESA* provides as follows:

Corporate officer's liability for unpaid wages

- 96 (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,

(ii) is subject to an action under section 427 of the *Bank Act* (Canada) or to a proceeding under an insolvency Act,

(b) [Repealed 2019-27-30] ...

24. It is settled law in the Tribunal's decisions that in an appeal of a determination made 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 found personally liable;
 - Whether circumstances exist that would relieve the director from personal liability under subsection 96(2).
25. The director/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).
26. It is also settled law in the Tribunal's decisions that corporate records, which the Director can rely on to establish director and officer status, raise a rebuttable presumption that a person is a director/officer. A defence to section 96 liability can be successfully raised if a director/officer can show, on credible and cogent evidence, that the Corporate Registry's records are inaccurate, either because the person resigned or is not properly appointed (see *Wilinofsky*, BC EST #D106/99, *Michalkovic*, BC EST # D056/00).
27. Dr. Rosenberg has provided nothing in his appeal that remotely addresses any of those matters that are permitted to be raised by a director in the appeal of a determination made under section 96 of the *ESA*.
28. He does not dispute that he was recorded as being a director of the Company when the wages of Ms. Rice were earned or should have been paid. He also does not dispute the amount of liability imposed under section 96. To be clear, he disputes that the Company owes any wages to Ms. Rice but not whether the amount of liability imposed on him as a director and officer of the Company is within the limit for which a director may be found personally liable. He also does not argue that he should not be held personally liable because he falls within the circumstances described in section 96(2).
29. As indicated previously, Dr. Rosenberg has checked off the "natural justice" ground of appeal in the appeal form. In *Imperial Limousine Service Ltd.* (BC EST # D014/05), the Tribunal explained the principles of natural justice as follows:
- Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; their right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (See *BWI Business World Incorporated* BC EST #D050/96).

30. Having closely reviewed Dr. Rosenberg’s written submissions, I find he has not advanced any evidentiary basis for this Tribunal to interfere with the Determination on the natural justice ground of appeal.
31. While Dr. Rosenberg does not rely on the error of law ground of appeal in section 112(1)(a) of the *ESA*, I have also considered this ground of appeal and find that there is no error of law on the part of the adjudicating delegate in making the Determination. More particularly, I find the adjudicating delegate properly interpreted section 96 of the *ESA*; did not misapply any principle of general law; did not act without any evidence; did not adopt a method of assessment which is wrong in principle or act on a view of facts which could not be reasonably entertained: *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1988] BCJ No 2275 (QL).
32. Dr. Rosenberg also does not rely on the “new evidence” ground of appeal, and he has not adduced any “new evidence” within the meaning of section 112(1)(c) of the *ESA* or that which would qualify for admission on appeal under the four conjunctive criteria delineated in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.* (BC EST # D171/03).
33. It is abundantly clear from the submissions of Dr. Rosenberg that he questions the correctness of the Corporate Determination when he argues that Ms. Rice had taken several days of vacation in August 2020 and was fully paid. The appropriate time for making submissions on the merits of the Corporate Determination is in an appeal of the Corporate Determination but the Company failed to appeal the Corporate Determination. As previously indicated, it settled law that the director/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., supra*). Therefore, Dr. Rosenberg may not make any submissions questioning or raising the matter of the correctness of the Corporate Determination in this appeal.
34. In the result, Dr. Rosenberg’s appeal is without merit and has no reasonable prospect of succeeding. The purposes and objects of the *ESA*, particularly in section 2(b) and (d) of the *ESA*, would not be served by requiring the other parties to respond to this appeal.
35. In the circumstances, the appeal is dismissed under section 114(1)(f) of the *ESA*.

ORDER

36. Pursuant to section 115 of *ESA*, I confirm the Determination made on August 5, 2022, against Eli Rosenberg, a Director and Officer of Dr. Eli Rosenberg Inc. carrying on business as Pulse Cardiac Centre, together with any additional interest that has accrued pursuant to section 88 of the *ESA*.

Shafik Bhalloo
Member
Employment Standards Tribunal