

Citation: Patrick William Brauckmann (Re)
2022 BCEST 7

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Patrick William Brauckmann, a director of BC Craft Supply Co. Ltd., Pasha
Brands Holdings Ltd. and 1198937 B.C. Ltd.
("Brauckmann")

- 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: David B. Stevenson

FILE NO.: 2021/097

DATE OF DECISION: January 20, 2022

DECISION

SUBMISSIONS

Shelby Boehm	counsel for Patrick William Brauckmann
Megan Roberts	delegate of the Director of Employment Standards

OVERVIEW

1. Patrick William Brauckmann (“Brauckmann”) has filed an appeal under section 112 of the *Employment Standards Act* (the “*ESA*”) of a determination issued by Megan Roberts, a delegate of the Director of Employment Standards (the “Director”) on October 8, 2021 (the “Determination”).
2. The Determination found Brauckmann was a director of BC Craft Supply Co. Ltd., Pasha Brands Holdings Ltd. and 1198937 B.C. Ltd. (the “associated employer”), an employer found to have contravened provisions of the *ESA*, at the time wages were earned or should have been paid to Cristiano Anderson Felipe Alves (“Mr. Felipe Alves”), and as such was personally liable under section 96 of the *ESA* for wages in the amount of \$24,002.10.
3. This appeal is grounded in an assertion that the Director erred in law in making the Determination, failed to observe principles of natural justice, and that evidence has become available that was not available when the Determination was being made. The appeal seeks to have the Determination cancelled.
4. Brauckmann has also filed an application under section 113 of the *ESA* to suspend the effect of the Determination pending the outcome of this appeal. The Director does not object to suspending the effect of the Determination issued against Brauckmann.
5. In correspondence dated November 22, 2021, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party on the merits of the appeal pending a review of the appeal by the Tribunal. In correspondence dated January 6, 2022, the Tribunal notified the parties that a panel had been assigned to decide the appeal and that the panel may determine that all or part of the appeal might be dismissed.
6. The section 112(5) record (the “record”) has been provided to the Tribunal by the Director and a copy has been delivered to the parties, who have been provided with the opportunity to object to its completeness. No objection to the completeness of the record has been received and, accordingly, the Tribunal accepts it as being complete.
7. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal and my review of the material that was before the Director when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

- 114 (1) *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 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.*

8. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), the Director and Mr. Felipe Alves will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal can succeed.

ISSUE

9. The issue in this appeal is whether it should be allowed to proceed or be dismissed under section 114(1) of the *ESA*. The request for a suspension of the effect of the Determination will be addressed following a decision on this appeal.

THE FACTS

10. The facts relating to this appeal, as set out in the Determination, are relatively brief.
11. Mr. Felipe Alves filed a complaint alleging BC Craft Supply Co. Ltd. had contravened the *ESA* by failing to pay him all wages owed under the *ESA*. The Director investigated the complaint and, on October 8, 2021, issued a Determination (the “corporate determination”), finding BC Craft Supply Co. Ltd., Pasha Brands Holdings Ltd. and 1198937 B.C. Ltd. were one employer under section 95 of the *ESA* and collectively were liable to Mr. Felipe Alves for wages, including interest, in the amount of \$29,727.37. The Director also imposed administrative penalties on the employer in the amount of \$1,000.00.
12. The corporate determination, which included a notice to directors and officers explaining their personal liability under the *ESA*, was delivered to the address for the associated employer, with copies to the registered and records office of each of the associated entities and to the directors of each of the associated entities – which for each associated entity included Brauckmann – by registered mail.
13. As an aside, no appeal of the corporate determination has been filed with the Tribunal.

14. The Determination under appeal here was also issued October 8, 2021, and was also delivered to the address for the associated employer, with copies to the registered and records office of each of the associated entities and to the home address for Brauckmann, by registered mail.
15. The record shows the Director conducted BC Online Registrar of Companies searches on September 22, 2021 and October 7, 2021. These searches showed:
- BC Craft Supply Co. Ltd was incorporated on March 07, 2012. It was formerly known as Pasha Brands Ltd. and Broome Capital Inc., with name changes registered May 14, 2020 and May 29, 2019. Brauckmann was listed as the sole director from November 15, 2019 to March 26, 2020, when he ceased to be a director. No officer information for BC Craft Supply Co. Ltd. was filed.
 - Pasha Brands Holdings Ltd. was registered on May 29, 2019, as an amalgamation of 1171298 B.C. Ltd and Pasha Brands Ltd. Brauckmann was listed as the sole director for Pasha Brands Holdings Ltd. between March 29, 2019 to March 31, 2020, when he ceased to be a director. No officer information for this entity was filed.
 - 1198937 B.C. Ltd. was incorporated February 26, 2019. Brauckmann was listed as the sole director for 1198937 B.C. Ltd. between March 28, 2019 to March 31, 2020, when he ceased to be a director. No officer information for this entity was filed.
16. Based on the information acquired and the findings made, the Director concluded Brauckmann was a director of the associated employer between February 15, 2020 and March 18, 2020 – a period during which Mr. Felipe Alves’ wages were earned or should have been paid – and was liable under section 96 of the *ESA* for the amount set out in the Determination. Brauckmann was not found liable for the administrative penalties imposed on the associated employer in the corporate determination.
17. On September 22, 2021, the Director spoke with Brauckmann concerning the complaint filed by Mr. Felipe Alves. Brauckmann was advised by the Director of their potential personal liability, indicated they understood, stated they were involved in litigation with the employer and would not participate in the investigation or provide updated contact information. Brauckmann was advised the investigation would continue and the personal liability provisions could apply even without their participation; they again indicated they understood.

ARGUMENTS

18. Counsel for Brauckmann submits the Director erred under each of the grounds of appeal listed in section 112 of the *ESA*. The appeal submission contains a narrative providing a “background” for the appeal. The immediate difficulty for Brauckmann and their counsel with this narrative is that none of the information set out in the background was provided to the Director during the investigation because Brauckmann said they would not participate.
19. I will, however, for the purpose of addressing the appeal, most specifically the ground of appeal seeking to provide evidence that was not given to the Director before the Determination was made, summarize aspects of the background provided.

20. Brauckmann submits that in December 2019, they were asked to step away from their role with Pasha Brands Ltd. (the “Company”) by a group of large shareholders. Brauckmann says they did so, but agreed to remain as the sole director of the Company while the group “were preparing their Personal Information Forms for the Canadian Securities Exchange (“CSE”) and the British Columbia Securities Commission (“BCSC”), and making plans for corporate restructuring and refinancing”. Brauckmann also says the Company stood to lose its cannabis licence from Health Canada if Brauckmann was no longer listed as a director of the Company without being replaced by a person with the mandatory security clearance from Health Canada, which was required to retain the licence, which would have triggered a suspension of its listing on the CSE.
21. In sum, Brauckmann says they remained as a director of the Company only for the purpose of ensuring continued regulatory compliance. Brauckmann submits they were no longer part of the day-to-day operations of the company. Brauckmann says that, from December 2019 until they resigned, their role “was keeping the Company in compliance with Health Canada and the regulatory bodies, communicating with creditors, lawyers, key employees and New Management to ensure that the refinancing and restructuring plan of New Management would materialize.”
22. Much of the background provides information suggesting the persons who took over and assumed control of the Company made decisions that resulted in, at least, Mr. Felipe Alves not being paid, even though assurances were made to Brauckmann that all outstanding wages would be paid.
23. Brauckmann has provided an explanation for failing to cooperate with the Director or participate in the investigation.

Error of Law

24. Essentially, the argument made on behalf of Brauckmann is that, even though they are recorded as a director – in fact the sole director – of each of the corporate entities associated under section 95 of the *ESA*, this is one of those “rare and exceptional” cases where it would be inappropriate to find Brauckmann personally liable under section 96 because they only agreed to continue to act as a director in order to meet the requirement for continuing the Health Canada cannabis licence and to maintain the Company’s public listing on the CSE.
25. According to the submission made on behalf of Brauckmann, “Mr. Brauckmann’s duties consisted of signing any official documents required by law with the CSE and submission of financial statements with SEDAR” (“System for Electronic Document Analysis and Retrieval”); they had no involvement or influence in Company decisions and no control over the business or affairs of the Company from late December 2019 onwards.
26. The argument also alludes to an assurance made by the persons taking over the Company to ensure all employees’ wages were paid and Brauckmann’s inability to compel compliance with that assurance once he resigned.

Natural Justice

27. Brauckmann submits it was reasonable for them to refuse to participate in the investigation and to refuse to provide the Director with personal information during the September 22, 2021 call because they had no way of identifying the caller.
28. Brauckmann says they were not given information by the Director that would have allowed them to independently verify the identity of the caller and, “was consequently not able to make submissions with respect to his role or liability as a Director [*sic*] for wages owed to Mr. Alves [*sic*]”.

New Evidence

29. Based on Brauckmann’s position that they were not given a meaningful opportunity to respond to Mr. Felipe Alves’ complaint, it is submitted they should now be allowed to present evidence relating to their potential liability under section 96 of the *ESA*.
30. Counsel for Brauckmann says the material provided, when tested against the conditions for allowing such evidence, should be allowed and considered in the appeal. The argument made on behalf of Brauckmann infers the Determination was not made in an administratively fair manner.

ANALYSIS

31. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:
- 112 (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of 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.*
32. An appeal is an error correction process, with the burden in an appeal being on an appellant to persuade the Tribunal there is an error in the determination under one of the statutory grounds. In this case the burden is on Brauckmann to satisfy the Tribunal the Director erred in finding he was a director of the associated employer under section 96 of the *ESA*. The nature of that burden will be identified later in this decision.
33. I shall first address the natural justice and new evidence grounds of appeal, as conclusions on these grounds of appeal will impact arguments made in support of the error of law ground of appeal.

Natural Justice

34. A party alleging a failure by the Director to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST #D043/99.

35. I am able to address Brauckmann’s natural justice ground without the need for extensive analysis. The Tribunal has briefly summarized the natural justice principles that typically operate in the complaint process, including this complaint, in *Imperial Limousine Service Ltd.*, BC EST # D014/05:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the 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.

36. Provided the process exhibits the elements of the above statement, it is unlikely the Director will be found to have failed to observe principles of natural justice in making the Determination. On the face of the material in the record and in the information submitted to the Tribunal in this appeal, Brauckmann was provided with the opportunity required by principles of natural justice to present their position to the Director on the application of section 96 of the *ESA* to them. Brauckmann declined that opportunity, saying they would not participate in the investigation and refusing to provide contact information. Brauckmann has provided no objectively acceptable evidence showing otherwise and I reject the notion that in the circumstances it was “reasonable” for them to refuse the opportunity provided by the Director and the request for contact information. It is apparent from the Determination and the record that Brauckmann took no steps seek to confirm what they had been told by the Director, even though they said they “understood” the consequences of a failure to participate.

37. The situation Brauckmann complains about is entirely of his own making and I reject their argument. This ground of appeal is without merit and is dismissed.

New Evidence

38. The Tribunal has discretion to accept or refuse new evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. New evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality, and efficiency: see section 2(b) and (d) of the *ESA*.

39. Brauckmann seeks to have the documents provided added to the record and considered in the appeal. I do not find any of the documents provided satisfy the conditions for allowing for allowing them as “new evidence”. I make this finding for the following reasons.

40. First, the material is not “new”; it comprises material that existed when the investigation was being conducted and, if relevant, could – and should – have been provided to the Director during the complaint process. As suggested above, even if I accept it is relevant and probative, I find there is no satisfactory reason for Brauckmann’s failure to provide this information to the Director.
41. Second, none of the material submitted is probative to the finding by the Director that Brauckmann was a director of the associated employer at the relevant time. If the material is considered at all, it says nothing more than Brauckmann *may* not have been involved in certain operational and decision-making aspects of the Company, which at the time operated under the name Pasha Brands Ltd. The material does not say they were not involved in other matters concerning the Company; the submissions made on behalf of Brauckmann bear this out. The Tribunal has made several decisions considering section 96 of the *ESA* that confirm the personal liability of a director or officer of a corporate employer listed in the corporate records even though that person does not actually perform the duties, functions or tasks of a director or officer: see *The Director of Employment Standards (Re Michalkovic)*, BC EST #RD047/01 (Reconsideration of BC EST # D056/00). The test for liability under section 96 of the *ESA* is not a functional one where the person is listed as a director or officer in the corporate records: see, among other decisions, *Lucille M. Pacey, a Director or Officer of Mosaic Technologies Corporation*, BC EST # D121/04 and *Dyan Judith Van Dam, a Director or Officer of Van Four Enterprises Ltd. operating as De Dutch Pannekoek House*, BC EST # D088/04.
42. See also the thoughtful discussion and analysis on section 96 liability under the *ESA* in *Guiying Jiang, a Director or Officer of Grand East Supermarket Inc. and Di Liu, a Director or Officer of Grand East Supermarket Inc.*, BC EST #D074/06 at paras. 62 – 86.
43. Third, the principle expressed in *Tri-West Tractor Ltd.*, BC EST # D268/96 and *Kaiser Stables Ltd.*, BC EST # D058/97 is clearly applicable here. That principle says a party is not permitted to refuse or fail to participate in the complaint process and, subsequent to a determination being issued, seek to advance a case to the Tribunal on appeal on facts and arguments not provided to the Director during the complaint process, when the facts and arguments advanced in the appeal should have been presented in the complaint process. The circumstances of this case present a classic application of the principle extracted from those cases. I reject the suggestion in the argument of counsel for Brauckmann that there was a “legitimate reason” for what was a clear refusal to participate or cooperate in the Director’s investigation.
44. Based on my decision to refuse to accept the documents provided as “new evidence”, this ground of appeal is dismissed and the appeal will be addressed and decided on the facts found in the Determination unless those findings raise an error of law.

Error of Law

45. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
1. a misinterpretation or misapplication of a section of the *Act* [in *Gemex*, the legislation was the *Assessment Act*];
 2. a misapplication of an applicable principle of general law;

3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

46. Brauckmann is recorded in the BC Corporate Registry as being the sole director of each of the associated entities when the wages of Mr. Felipe Alves were earned or should have been paid.

47. Whether a person is a director under section 96 of the *ESA* is a question of fact and law.

48. As indicated above, the Tribunal, in *The Director of Employment Standards (Re Michalkovic)*, *supra*, summarized the law under the *ESA* for deciding whether a person may be found to be a director of officer and personally liable under section 96, stating:

. . . the case law reviewed here and in *Wilnofsky* stands for the following propositions:

1. The corporate records, primarily those available through the Registrar of Companies or available at a corporation's registered and records office, raise a rebuttable presumption that a person is a director or officer. In other words, the Director of Employment Standards may presumptively rely on those corporate records to establish director or officer status.
2. It is then open to the person, who, according to the corporate records, is a director or officer, to prove on the balance of probabilities that the company records are inaccurate, for example, because the person resigned and the documents were not properly processed, a person is not properly appointed etc.
3. There may well be circumstances where it would be inappropriate to find that a person is a director or officer despite being recorded as such. However, it will be the rare and exceptional case to be decided on all the circumstances of the particular case and not simply by showing that he or she did not actually perform the functions, duties or tasks or a director or officer.
4. The determination of director-officer status should be narrowly construed, at least with respect to Section 96.

49. In *David Wilnofsky and another*, BC EST # D106/99, the Tribunal commented on the burden imposed on an individual recorded in the corporate records as a director or officer of a company to show the corporate information is wrong:

. . . where an individual is recorded as an officer or director of a company in the records maintained by the Registrar, a rebuttable presumption arises that the individual actually is a director or officer ... of the company This presumption, however, may be rebutted by credible and cogent evidence that the Registrar's records are inaccurate—the burden of proving that one is not a corporate director or officer lies with the individual who denies such status.

50. There is no argument by Brauckmann that the corporate records are inaccurate. Rather it is argued there are circumstances which would make it inappropriate to find they are a director or officer for the purposes of the *ESA*; it is argued that a determination on director/officer status under section 96 should be narrowly construed.

51. I find Brauckmann has not met the burden resting on them to show it would be inappropriate to find them to be a director of the associated employer under section 96 of the *ESA*.
52. I reach this finding in two ways.
53. First, there is no evidence supporting this argument. The burden requires some “credible and cogent evidence”. In this case, there is no evidence.
54. Absent any evidence showing it would be inappropriate to find Brauckmann to be a director under section 96 of the *ESA*, it cannot be shown the circumstances here are a “rare and exceptional case” that should allow them to be relieved of their personal liability under section 96.
55. Second, even if I accepted the central assertion being made – that the Company was in transition and Brauckmann’s role in that transition was limited to ensuring continued compliance with regulatory bodies (which in essence was necessary for its continued operational existence) and “signing any official documents required by law with the CSE and submission of financial statements with SEDAR” – I find that does not satisfy the burden of establishing it would be inappropriate to find Brauckmann fell within the terms of section 96 of the *ESA*.
56. As well, Brauckmann does not appear to be a neophyte to the possibilities in this case and their steps to ensure financial obligations, including wage obligations, were met by the Company, demonstrates they clearly did understand the implications of agreeing to remain on the record as a director of the Company during the transition.
57. The situation is also complicated by the fact that Brauckmann is shown in the record as the sole director of each of the associated entities. There may be no fewer than one director and, while there is a “Consent to Act as Director” signed by Kevin Taylor in February 2020 in the material submitted as new evidence (which might suggest to the Director there are other persons with a personal liability under section 96), the corporate record does not show any corporate filing recording a change in directors until after the relevant claim period for Mr. Felipe Alves.
58. I recognize that Brauckmann feels somewhat “punished” by their decision to stay on as the sole director of record of the associated employer and by the consequences of that decision. I recognize their concern as to why enforcement efforts were directed toward them rather than against others with what might be referred to as having greater “moral” culpability. Our obligation, however, is to apply the law as we find it, and in this case we find ourselves unable to ignore the legal reality – a reality with consequences extending beyond the facts of this case - that they fall within the terms of section 96 of the *ESA*.
59. I find no merit in this ground of appeal and it is dismissed.
60. In sum, I find there is no apparent merit to this appeal and no reasonable prospect it will succeed. The purposes and objects of the *ESA* would not be served by requiring the other parties to respond to it and it is, accordingly, dismissed.
61. Based on the result of this appeal, it is no longer necessary to consider the application under section 113 for a suspension of the effect of the Determination.

ORDER

62. Pursuant to section 115 of the *ESA*, I order the Determination dated October 8, 2021, be confirmed in the amount of \$24,002.10, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal