

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

H&R Productions Ltd.

- and by -

Tapinder Sidhu

- of Determinations issued by -

The Director of Employment Standards

**PANEL:** Brandon Mewhort

**FILE NOS.:** 2022/177 and 2022/178

**DATE OF DECISION:** November 3, 2022

## DECISION

### SUBMISSIONS

Anupama Nair

on behalf of H&R Productions Ltd. and Tapinder Sidhu

### OVERVIEW

1. This decision addresses two appeals. H&R Productions Ltd. (the “Employer”) appeals a determination issued by Shannon Corregan, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”), dated December 23, 2021 (the “Corporate Determination”). Tapinder Sidhu (“Mr. Sidhu” and, together with the Employer, the “Appellants”), who is a director and officer of the Employer, appeals another determination issued by the Delegate on March 11, 2022 (the “Director Determination” and, together with the Corporate Determination, the “Determinations”). The Appellants also seek orders extending the appeal periods under section 109(1)(b) of the *Employment Standards Act* (“ESA”).
2. In the Corporate Determination, the Delegate determined that a former employee (the “Employee”) was owed unpaid wages, overtime, statutory holiday pay, and annual vacation pay, as well as compensation for length of service. With the addition of interest and administrative penalties for contraventions of the *ESA*, the amount payable by the Employer to the Employee was \$40,023.98.
3. In the Director Determination, the Delegate found that Mr. Sidhu was personally liable for up to two months’ unpaid wages of the Employee pursuant to section 96 of the *ESA*. With the addition of interest and administrative penalties for contraventions of the *ESA*, the amount for which Mr. Sidhu was personally liable to the Employee was \$11,657.29.
4. Section 114(1) of the *ESA* provides that 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, among other things, the appeal was not filed within the applicable time limit or there is no reasonable prospect the appeal will succeed.
5. For the reasons discussed below, I dismiss these appeals pursuant to section 114(1) of the *ESA*, because they were not filed within the applicable time limit and, in any event, there is no reasonable prospect that either of them will succeed. I have assessed the appeals based on the Determinations, the reasons for the Determinations, the appeals, the written submissions of the Appellants, and my review of the material that was before the Director when the Determinations were being made.

### ISSUE

6. Whether these appeals should be dismissed pursuant to section 114(1) of the *ESA*.

## THE DETERMINATIONS

### *Corporate Determination*

7. The Employer operates a video production, photography and video editing business in Surrey, British Columbia. The Employee was employed by the Employer as an editor and photographer from November 15, 2015, to February 19, 2020, when he was terminated. The Employee filed a complaint with the Employment Standards Branch (the “Branch”) on December 25, 2019, shortly before he was terminated.
8. The Delegate determined that the Employee was, in fact, an employee and not an independent contractor, which means that the *ESA* applied to them. The Delegate then determined the Employee was owed unpaid regular wages, overtime wages and statutory holiday pay, as well as unpaid vacation pay.
9. The Employer argued that the Employee was terminated for just cause; however, the Delegate determined that the Employer failed to meet its burden of proving that to be the case. Accordingly, the Delegate determined that the Employee was owed four weeks’ wages in compensation for length of service, plus vacation pay for that amount of time.
10. The Employee argued that he was terminated because he filed a complaint with the Branch; however, the Delegate determined that there was insufficient evidence to find that the Employee was mistreated because of his complaint.
11. The Delegate imposed nine administrative penalties on the Employer for its various breaches of the *ESA*, totaling \$4,500.

### *Director Determination*

12. BC Registry Service searches indicated that Mr. Sidhu has been a director and officer of the Employer since its incorporation on January 26, 1987, including between December 26, 2018, and February 19, 2020, which is the period the Delegate determined that the Complainant’s wages were earned and should have been paid by the Employer. Accordingly, pursuant to section 96 of the *ESA*, the Delegate found that the Appellant was personally liable for two months’ unpaid wages of the Complainant in the amount of \$6,802.91, plus interest.
13. The Delegate also determined that Mr. Sidhu was personally liable for the administrative penalties because he authorized, permitted, or acquiesced in the Employer’s contraventions of the *ESA*.

## ARGUMENT

### *Requests to Extend the Appeal Periods*

14. The statutory deadlines for appealing the Corporate Determination and Director Determination were January 17, 2022 and April 4, 2022, respectively. In their appeal forms, which were filed with the Tribunal on August 15, 2022, the Appellants requested that the appeal periods be extended until August 26, 2022, for the Corporate Determination and until August 22, 2022, for the Director Determination.

15. In their requests to extend the appeal periods, the Appellants said their delay was due to Mr. Sidhu's health issues, as well as the recent retainer of their counsel who required additional time to prepare their submissions. The Appellants provided a two-paragraph doctor note dated July 15, 2022, which stated that Mr. Sidhu has experienced pain in his left shoulder and arm since May 2021 and that he had two steroid shots for it. The note said that, because of the ongoing pain in his shoulder and numbness in his hand, Mr. Sidhu has only been working part time since May 2021. He is unable to do any overhead work with his left shoulder and he has been unable to check his incoming mail on days when he was not working.

#### *Merits of the Appeals*

16. When asked in the appeal forms to select their grounds of appeal, the Appellants indicated that the Director failed to observe the principles of natural justice in making the Determinations. However, the Appellants did not raise any alleged failures to observe the principles of natural justice in their submissions.
17. Rather, the Appellants essentially argue that the Delegate made errors of fact, and they submit additional evidence that was not presented during the investigation of the complaint. Specifically, the Appellants included with their submissions two affidavits – one from another employee of the Employer and one from a client of the Employer. The Appellants say that this additional evidence demonstrates, for example:
- a. the terms of the Employee's employment had been changed by agreement, but it was never done in writing;
  - b. the Employee did not work as much as they claimed;
  - c. the Employee had poor performance, lacked punctuality and attempted to lure away clients of the Employer;
  - d. the Employee fell under section 65(1)(a)(i) of the *ESA*, because they were an employee who was employed under an arrangement by which the employer could have requested the employee to come to work at any time for a temporary period, and the employee had the option of accepting or rejecting one or more of the temporary periods; and
  - e. the Employee was fired for just cause, because they stole clients of the Employer, and they do not deserve compensation for length of service.
18. The Appellants did not file any specific submissions regarding alleged errors in the Director Determination.

## **ANALYSIS**

### *Requests to Extend the Appeal Periods*

19. This Tribunal has criteria to determine whether an appeal period should be extended, which are set out in the *Niemisto* decision (BC EST # D099/96). Those criteria are as follows:
- 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 ongoing *bona fide* intention to appeal the Determination;

- c. the respondent party (i.e., the employer or employee), as well 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.

20. In this case, I am not convinced that any of those criteria have been satisfied.

21. While I sympathise with Mr. Sidhu's health issues, I am not satisfied they were a reasonable or credible explanation for the Appellants' lengthy delay. The appeal of the Corporate Determination was filed approximately seven months after the statutory time limit, and the appeal of the Director Determination was filed approximately four months after the statutory time limit. Based on the doctor's note submitted by Mr. Sidhu and his submissions, I am not convinced that his shoulder pain and numbness in his hand would have reasonably led to such a significant delay. Mr. Sidhu's doctor's note says that he was working part time and he was only unable to check his incoming mail on days when he was not working.

22. The Appellants also say they retained their current counsel "quite recently". Notably, though, on February 17, 2022, the Delegate issued Mr. Sidhu her preliminary findings that he authorized, permitted, or acquiesced in the Employer's contraventions of the *ESA*. Mr. Sidhu replied on February 24, 2022, providing a written statement, and advising that his counsel would contact the Delegate directly; however, the Delegate received no further communication from the Appellants or their counsel. It is not clear whether Mr. Sidhu was referring to their current counsel in his submissions to the Delegate, but, in any event, I am not satisfied that the Appellants' retainer of counsel is a reasonable or credible explanation for their failure to request appeals within the statutory time limits, particularly given the lengthy delay.

23. I am also not satisfied there has been a genuine and ongoing *bona fide* intention on the part of the Appellants to appeal the Determinations. Prior to filing their appeals, the Appellants provided no indication that they had such an ongoing intention. Moreover, even if the Appellants did have such an ongoing intention, there is no indication that the Employee or the Director were made aware it.

24. Lastly, I am not satisfied there is a strong *prima facie* case in favour of the Appellants. To the contrary, as discussed below, I find there is no reasonable prospect that either of the appeals will succeed.

25. I therefore decline the Appellants' requests to extend the appeal periods and I dismiss the appeals pursuant to section 114(1) of the *ESA*, because they were not filed within the applicable time limit.

#### *Merits of the Appeals*

26. 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.

27. Regarding the Corporate Determination, and as discussed above, the Appellants essentially argue that the Delegate made errors of fact, and they submit additional evidence that was not presented during the investigation of the complaint.
28. As discussed by this Tribunal in *Taste of Hangzhou Catering Ltd. (Re)*, 2022 BCEST 34 (“Hangzhou Catering”) at para 62, section 112(1) of the *ESA* does not provide for an appeal based on alleged errors of fact, and “the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director’s findings raise an error of law.”
29. In *Hangzhou Catering*, this Tribunal then went on to explain how it is rare for a finding of fact to amount to an error of law (see para 63, citing *3 Sees Holdings Ltd. (Jonathan’s Restaurant) (Re)*, BC EST # D041/13 at paras 26 to 29):
- The Tribunal has, time and again, said that the test for establishing findings of fact constitute an error of law is stringent. They are only reviewable by the Tribunal as errors of law in situations where it is objectively shown that a delegate has committed a “palpable and overriding error on the facts”. In this case, to establish the Director committed an error of law on the facts, THC would be required to show the findings of fact and the conclusions and inferences reached by the adjudicating delegate on the facts were inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or inexplicable.
30. In this case, I find that the Delegate’s conclusions were supported by evidence that was before the Delegate and that the errors of fact alleged by the Appellant do not raise any errors of law.
31. Regarding the additional evidence submitted by the Appellants, this Tribunal set out the test for fresh evidence in *Davies et al.*, BC EST # D171/03, as follows (emphasis added):

We take this opportunity to provide some comments and guidance on how the Tribunal will administer the ground of appeal identified in paragraph 112(1)(c). This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions:

- a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- b) the evidence must be relevant to a material issue arising from the complaint;
- c) the evidence must be credible in the sense that it is reasonably capable of belief;  
and

- d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

32. In this case, the Appellants have not provided an adequate reason why the evidence they submitted in their appeal materials was not presented during the investigation. The only reason given was that Mr. Sidhu did not have legal counsel during the investigation and he “did not know how to defend himself”. However, there is no suggestion that the Appellants were unable to obtain counsel during the investigation if they chose to – to the contrary, as discussed above, Mr. Sidhu indicated to the Delegate on February 24, 2022, that he did, in fact, have counsel. There is also no suggestion that the Appellants were not given an opportunity during the investigation to present the evidence that was submitted with their appeal materials.
33. Accordingly, I find that the evidence that was submitted with the Appellants’ appeal materials does not meet the test for fresh evidence, because it could have been presented during the investigation of the complaint.
34. Regarding the Director Determination, section 96 of the *ESA* is clear that a person who is a director at the time wages of an employee of a corporation were earned or should have been paid is personally liable for up to two months’ unpaid wages for each employee.
35. In *Noel-Steeves*, BC EST # D007/16 at para 48, this Tribunal held:
- Absent extraordinary circumstances, in an appeal of a director/officer determination issued under subsection 96(1) of the *Act*, the only issues that may be properly raised concern the appellant’s status as a director or officer of the employer firm, whether any particular subsection 96(2) defence applies, or whether the individual’s personal liability “for up to 2 months’ unpaid wages for each employee” has been correctly calculated...
36. Mr. Sidhu has not raised any of those issues in his appeal of the Director Determination. In fact, as mentioned above, the Appellants did not file any specific submissions regarding alleged errors in the Director Determination.
37. Accordingly, even if I had exercised my discretion to extend the appeal periods as requested, the Appellants have failed to demonstrate a basis for the Tribunal to interfere with either of the Determinations and I would dismiss the appeals pursuant to section 114(1)(f) of the *ESA* as there is no reasonable prospect that either of them will succeed.

## ORDER

38. I order that both the Corporate Determination and the Director Determination be confirmed pursuant to section 115 of the *ESA*.

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**Brandon Mewhort**  
**Member**  
**Employment Standards Tribunal**