

EMPLOYMENT STANDARDS TRIBUNAL

An application for reconsideration
pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

Gloria Sommaggio
("Applicant")

- of a Decision issued by -

The Employment Standards Tribunal

PANEL: Kenneth Wm. Thornicroft

FILE No.: 2023/167

DATE OF DECISION: November 16, 2023

DECISION

SUBMISSIONS

Gloria Sommaggio on her own behalf

INTRODUCTION AND BACKGROUND FACTS

1. Gloria Sommaggio (“Applicant”) applies for reconsideration of 2023 BCEST 77, an appeal decision issued by Tribunal Member Roberts on September 28, 2023 (“Appeal Decision”). This application is made pursuant to section 116 of the *Employment Standards Act* (“ESA”).
2. By way of the Appeal Decision, Member Roberts confirmed a determination that was issued against the applicant on April 27, 2023, under section 96 of the *ESA* (“Section 96 Determination”). Section 96 states: “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.”
3. The Section 96 Determination followed an earlier determination issued against Il Lago Family Italian Restaurant & Bar Ltd. (“employer”) on March 17, 2023 (“Corporate Determination”). The Corporate Determination ordered the employer to pay a former employee (“complainant”) \$3,295.07 on account of unpaid wages and section 88 interest. Further, the employer was also ordered to pay an additional \$1,500 on account of three separate \$500 monetary penalties (see section 98 of the *ESA*). Accordingly, the employer’s total liability under the Corporate Determination is \$4,795.07.
4. The Corporate Determination was served on the employer, Lorenzo Sommaggio (as a corporate director and officer), and on the applicant (as a corporate officer). The latter two individuals’ separate roles with the employer were recorded in the B.C. Corporate Registry’s files as of the date the Corporate Determination was issued. The Corporate Determination sets out, at pages D4-D6, a clearly worded notice to the directors and officers of the employer regarding their potential personal liability under section 96 of the *ESA*.
5. The employer never appealed the Corporate Determination, and it now stands as a final order. The employer did not pay any monies owed under the Corporate Determination, and thus the Section 96 Determination was issued against the applicant (the total amount being \$3,394.13 representing the unpaid wages owed to the complainant plus additional section 88 interest).
6. As recorded in the Appeal Decision (at para. 9), the applicant filed a late appeal of the Section 96 Determination following collection proceedings being taken against her by the Employment Standards Branch. The applicant appealed the Section 96 Determination on the ground that the Director of Employment Standards erred in law (see section 112(1)(a) of the *ESA*).
7. In the Appeal Decision, Member Roberts concluded that there was no proper basis for extending the appeal period under section 109(1)(b) of the *ESA* (see paras. 21-23). Member Roberts also concluded that the appeal had no reasonable prospect of succeeding (see paras. 24-28). That being the case the appeal

was dismissed under section 114(1)(f) of the *ESA*, and the Section 96 Determination was confirmed under section 115(1) of the *ESA*.

THE APPLICATION FOR RECONSIDERATION – FINDINGS AND ANALYSIS

8. The applicant filed her section 116 reconsideration one day after the applicable application period expired (see section 116(2.1) of the *ESA*). However, since I consider this application to be entirely without merit, I do not propose to address whether it would be appropriate to extend the application period under section 109(1)(b) of the *ESA*. Apart from its untimeliness, this application does not pass the first stage of the two-stage *Milan Holdings* test (see *Director of Employment Standards*, BC EST # D313/98).
9. There are two elements to the present application. First, the applicant once again challenges the findings in the Corporate Determination regarding the complainant's unpaid wage claim. However, as noted in the Appeal Decision (at paras. 14-15 and 23-27), a challenge to the correctness of the unpaid wage award should have been advanced by way of an appeal of the Corporate Determination. The applicant, as a corporate officer, was served with a copy of the Corporate Determination, and could have taken steps to ensure that it was appealed. As noted above, the Corporate Determination was not appealed, and it now stands as a final order.
10. In this instance, the only proper grounds for appealing the Section 96 Determination concerned the applicant's status, and the calculation of the "2-month unpaid wages" liability ceiling. Other than a bald assertion that "I'm not in the corporation", the applicant never argued either matter in her appeal of the Section 96 Determination. Rather, she focused her appeal on the correctness of the complainant's unpaid wage award.
11. As previously noted, the applicant in her submissions filed in this reconsideration application once again seeks to challenge the correctness of the complainant's unpaid wage award, asserting that the complainant was a "bad" manager, and a thief, which led to his dismissal. If the employer wishes to advance a claim against the complainant for theft, it will have to file a separate civil action against the complainant. I pass no opinion whatsoever about the merits of such a potential claim. However, insofar as this application is concerned, the matter of the complainant's unpaid wage award is now a "closed book", and cannot be re-opened by way of a section 116 application.
12. The applicant raises a second issue, namely, her status as a corporate officer. The applicant says:

I'm not in the corporation at the time off this matter. See attachment papers from the government. I'm not responsible what happenind after I left the companie. [sic].
13. The "government papers" to which the applicant refers show that she ceased to be a corporate *director* as of June 30, 2020. However, she continued to be a corporate *officer* after June 30, 2020. The complainant's employment ended on September 21, 2020, at which point wages were owed to him (section 63 compensation for length of service), but were not paid. For the purposes of section 96 of the *ESA*, the B.C. corporate registry records are presumed to be accurate. However, an individual can rebut that presumption by demonstrating, through clear and cogent evidence, that the registry's records are incorrect. The applicant has never submitted such evidence at any point in these proceedings.

14. In the “Reasons for the Determination” issued concurrently with the Section 96 Determination, the following information is recorded (at page R2):

A BC Registry Services Search conducted online on March 6, 2023, with a currency date of September 20, 2022, indicates that the Employer was incorporated in British Columbia on June 26, 2015 (Incorporation Number BC1041116). [The applicant] was listed as an officer. The Incorporation Application lists [the applicant] as a director. An annual report filed with BC Registry Services on December 10, 2018, shows that as of June 26, 2018, [the applicant] was an officer. A notice of change of directors filed with BC Registry Services on July 8, 2020, shows that as of June 30, 2020, [the applicant] was removed as a director.

The search confirms that [the applicant] was a director between September 21, 2019 and June 30, 2020 and an officer between September 21, 2019 and September 21, 2020, when the Complainant’s wages were earned or should have been paid. [The applicant] did not dispute her status as an officer of the Employer, despite being provided notice of her potential liability. There is no information which would suggest that [the applicant] ceased being an officer of the Employer.

15. The Appeal Decision, at paras. 5-6, noted the following:

A corporate registry search conducted March 6, 2023, with a currency date of September 20, 2022, indicated that the Employer was incorporated on June 26, 2015. [The applicant] was listed as both an officer and director from the date of incorporation until she was removed as a director effective June 30, 2020. She remained an officer of the Employer.

In the [Section 96] Determination, the Director [of Employment Standards] found that [the applicant] was both a director and an officer of the Employer between September 21, 2019 and June 30, 2020, at the time the [complainant’s] wages were owed and should have been paid. The Director [of Employment Standards] found that [the applicant] did not dispute her status as an officer of the Employer, despite being given notice of her potential liability.

16. In light of the above, there is no credible argument that the applicant had, as she put it, “left the company” before the complainant’s unpaid wages were earned or should have been paid. She was, according to the B.C. corporate registry records in evidence before me, an officer of the employer when the complainant’s wages – as set out in the Corporate Determination – were earned or should have been paid. The applicant never asserted, either on appeal or in her submissions filed in this application, that the 2-month unpaid wage liability ceiling was incorrectly calculated. There is simply no proper basis for cancelling or varying the Section 96 Determination.

ORDER

17. This application for reconsideration is refused. Pursuant to section 116(1) of the *ESA*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal