

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Pirtpal Singh Dhaliwal, a Director of Marigold Trucking Ltd.
("Mr. Dhaliwal")

- of a Determination issued by -

The Director of Employment Standards

PANEL: Shafik Bhalloo, K.C.

FILE NO.: 2023/054

DATE OF DECISION: July 11, 2023

DECISION

SUBMISSIONS

Pirtpal Singh Dhaliwal on his own behalf, as a director of Marigold Trucking Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), on April 21, 2023, Pirtpal Singh Dhaliwal (“Mr. Dhaliwal”), a director of Marigold Trucking Ltd. (“Company”), filed an appeal of a section 96 determination (corporate officer’s liability for unpaid wages) that was issued on April 6, 2023 (“Determination”) by the Director of Employment Standards (“Director”).
2. The Determination concluded that Mr. Dhaliwal was a director 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 Gurpreet Gill (“Mr. Gill”), and as such was personally liable under section 96 of the *ESA* for wages payable to him in the amount of \$3,409.48 inclusive of interest.
3. The Determination also found Mr. Dhaliwal liable for two administrative penalties of \$500 each pursuant section 98(2) of the *ESA* because he authorized, permitted or acquiesced in contraventions of section 18 of the *ESA* and section 46 of the *Employment Standards Regulation* (“*Regulation*”).
4. It should be noted that the Determination was issued in tandem with an identically worded determination pursuant to section 96 of the *ESA* against Karamjit Kaur Dhaliwal (“Ms. Dhaliwal”), a director and officer of the Company, holding the latter similarly liable as Mr. Dhaliwal for the wages earned and should have been paid to Mr. Gill including the two administrative penalties referred to above.
5. In his appeal, Mr. Dhaliwal invokes a single ground of appeal, namely, the Director breached the principles of natural justice in making the Determination.
6. While Mr. Dhaliwal has checked off “Yes” in response to the question on the Appeal Form “Is the complete appeal being filed before the expiry of the statutory appeal period?”, he is also seeking an extension of time to May 15, 2023, about two weeks after the May 1, 2023, expiry date for filing his complete appeal, to provide more documents to the Tribunal and his “reasons and arguments.”
7. In an email dated April 27, 2023, addressed to Mr. Dhaliwal and Ms. Dhaliwal, the Tribunal granted the request for an extension of time for Mr. Dhaliwal to submit his additional reasons and arguments as well as any supporting documents by no later than 4:00 p.m. on May 15, 2023.
8. On May 5, 2023, the Tribunal received 3 emails from Ms. Dhaliwal with all three containing written reasons and argument and the first two also including some supporting documents which I will refer to under the heading Arguments below.
9. In correspondence dated May 18, 2023, the Tribunal notified all the parties that it had received Mr. Dhaliwal’s appeal and was enclosing the same for informational purposes only. The Director and Mr. Gill 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 to provide a copy of the section 112 record (“the record”).

10. On June 8, 2023, the Tribunal received a submission from the delegate of the Director which included a copy of the record. On June 12, 2023, the Tribunal sent the same to Mr. Dhaliwal and to Mr. Gill. Both were provided an opportunity to object to its completeness, but neither did. Accordingly, the Tribunal accepts the record as complete.
11. On June 30, 2023, the Tribunal sent correspondence to the parties advising them that a panel is assigned to decide the appeal.
12. 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 (“Reasons”), Mr. Dhaliwal’s submissions, and my review of the record when the Determination was being made. If I am satisfied that Mr. Dhaliwal’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 Mr. Gill and the Director to file reply submissions on the merits of the appeal. Mr. Dhaliwal will then be given an opportunity to make a final reply to the submissions, if any.

ISSUE

13. 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

14. By way of background, the Company operates a trucking business in Abbotsford, British Columbia, and employed Mr. Gill as a truck driver from March 29, 2021, to May 21, 2021. More particularly, Mr. Gill drove the Company’s dump truck within the Lower Mainland and his home terminal was in Abbotsford. At the time of termination of his employment, Mr. Gill’s rate of pay was \$29.00 per hour. He filed a complaint under section 74 of the *ESA* with the Employment Standards Branch (the “Branch”) on June 9, 2021, alleging that the Company contravened the *ESA* by failing to pay him wages for hours worked (“Complaint”).
15. An investigation was conducted into Mr. Gill’s Complaint by an investigating delegate who issued his investigation report on August 5, 2022, summarizing the information collected from the investigation. Subsequently, on January 18, 2023, another delegate of the Director, the adjudicating delegate, after reviewing all of the information on the file including the investigation report, issued a determination (the “Corporate Determination”) against the Company finding wages and interest were owed to Mr. Gill. The total amount of wages owed was \$3,031.08 plus interest accrued to that date in the amount of \$162.82 for a total of \$3,193.90. It was also determined that two administrative penalties of \$500 each were owed by the Company for its contravention of section 18 of the *ESA* for failing to pay Mr. Gill within six days after he quit his employment with the Company on May 21, 2022, and for contravening section 46 of the *Regulation* for failing to produce or deliver records of Mr. Gill’s hours worked under section 85(1)(f) of the *ESA* as and when required by the Director.

16. The Corporate Determination, which included a notice to directors and officers explaining their personal liability under the *ESA*, was sent to the Company, with copies to the registered and records office and to the directors and officers which included Mr. Dhaliwal. The appeal period for the Corporate Determination expired on February 13, 2023, and no appeal was filed.
17. The Company did not pay the Corporate Determination amount.
18. A BC Online Registrar of Companies Search conducted by the adjudicating delegate on June 28, 2021, with a currency date of May 17, 2021, indicates that the Company was incorporated in British Columbia on May 2, 2019, and Mr. Dhaliwal was listed as a director.
19. A further search by the adjudicating delegate conducted on March 20, 2023, with a currency date of September 20, 2022, indicates that Mr. Dhaliwal was still listed as director of the Company. As a result of the searches, the adjudicating delegate found Mr. Dhaliwal was a director of the Company between March 29, 2021, and May 21, 2021, when Mr. Gill's wages were earned or should have been paid. As a result, the adjudicating delegate held that, as a director of the Company, Mr. Dhaliwal is personally liable for up to two months' unpaid wages for Mr. Gill.
20. As Mr. Gill was employed for less than two months, the adjudicating delegate found that Mr. Dhaliwal is personally liable for the full amount owing to Mr. Gill in the Corporate Determination.
21. The adjudicating delegate also observed that pursuant to section 98(2) of the *ESA*, if a corporation contravenes a requirement of the *ESA* or the *Regulation* a director or officer of the corporation who authorizes, permits or acquiesces in the contravention is personally liable to pay the penalty.
22. In the case at hand, the adjudicating delegate noted that Mr. Dhaliwal was responsible for overseeing the day-to-day operations of the business, including the payment of wages. During the investigation, Mr. Dhaliwal confirmed that wages were owing and that they were intentionally withholding Mr. Gill's final wages until a dispute over damage to a truck was resolved. Despite receiving education on sections 18 and 21 of the *ESA* from the investigating delegate, they continued to withhold the wages.
23. Further, the adjudicating delegate also noted that Mr. Dhaliwal acknowledged receipt of a Demand for Employer Records ("Demand"). The Demand included notice that a penalty would be incurred for non-compliance and notice that directors and officers could be held liable for the penalty. The investigating delegate also provided education on sections 28 and 98 of the *ESA* to Mr. Dhaliwal, and reminders when the deadline for the Demand was approaching. However, Mr. Dhaliwal chose not to comply with the Demand.
24. Accordingly, the adjudicating delegate concluded that there is sufficient evidence to support the conclusion that Mr. Dhaliwal authorized, permitted or acquiesced in the contraventions of the *ESA* and *Regulation* and is therefore personally liable for the administrative penalties of \$500 each for contraventions of section 18 of the *ESA* and section 46 of the *Regulation*.

ARGUMENTS

25. I note that the written submissions filed with Mr. Dhaliwal's appeal and supporting documents are similar to those filed in the appeal of the section 96 determination against Ms. Dhaliwal.

26. In a subsequent submission filed on April 25, 2023, Mr. Dhaliwal states that he authorizes his wife, Ms. Dhaliwal, to represent him in the appeal and make submissions on his behalf.
27. On May 5, 2023, in her submissions on behalf of Mr. Dhaliwal, Ms. Dhaliwal submits: (i) a “Vehicle Inspection Report / Notice and Order” created or issued by a peace officer identifying all contraventions of the *Motor Vehicle Act* and *Regulations* the peace officer discovered on May 21, 2021, when they inspected the Company’s truck driven by Mr. Gill; and (ii) an NSC report/record showing that, on May 21, 2021, Mr. Gill was found “guilty” of contravention of section 215.3 of the *Motor Vehicle Act* and was given a “24 HOUR PROHIBITION - DRUGS”.
28. Ms. Dhaliwal says that Mr. Gill used drugs as evidenced in the NSC report and he damaged the Company’s brand-new truck costing the Company \$5,000 in damages. As a result of his use of drugs, the “truck was bound for 24 hours”.
29. She also submits that she has a tracking device on the truck in question and “at that time” (presumably when the peace officer inspected the vehicle on May 21, 2021), she suspected Mr. Gill was using the truck to do work for others.
30. Ms. Dhaliwal also submits that she does not “have any records that shows (sic) that how much (sic) hours are left to pay” Mr. Gill. She says she has “1 pay stub left” that shows Mr. Gill has been unpaid for 50 hours work. She asks the Tribunal to “[please] consider the case from each and every angle before” deciding this appeal.

ANALYSIS

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

32. 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).

33. 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 Window & Doors Ltd.*, BC EST #D180/96)

34. 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 Registrar'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)

35. Mr. Dhaliwal has provided nothing in his appeal that remotely addresses any of those matters that are permitted to be raised by a director (or officer) in the appeal of a determination made under section 96 of the *ESA*.

36. He does not dispute that he was recorded as being a director of the Company when the wages of Mr. Gill 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 the amount the Company owes Mr. Gill 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 or officer 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).

37. As indicated previously, Mr. Dhaliwal 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).

38. Having closely reviewed Mr. Dhaliwal'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.

39. I also note that while Mr. Dhaliwal does not rely on the error of law ground of appeal in section 112(1)(a) of the *ESA*, I have considered this ground of appeal and find that there is no error of law on the part of the adjudicative delegate in making the Determination. More particularly, I find the adjudicative 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] B.C.J. No. 2275.

40. Mr. Dhaliwal 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.
41. It is abundantly clear from the submissions and supporting documents Ms. Dhaliwal has presented on his behalf in the appeal that Mr. Dhaliwal is arguing the merits of the Corporate Determination. The appropriate time for making submissions on the merits of the Corporate Determination is in the appeal of the Corporate Determination but the Company failed to appeal the Corporate Determination. As previously indicated, it is 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 Window & Doors Ltd.*, *supra*). Therefore, Mr. Dhaliwal may not make any submissions questioning or raising the matter of the correctness of the Corporate Determination in this appeal.
42. In the result, I find Mr. Dhaliwal’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.
43. In the circumstances, the appeal is dismissed under section 114(1)(f) of the *ESA*.

ORDER

44. Pursuant to section 115 of *ESA*, I confirm the Determination made on April 6, 2023, against Pirtpal Singh Dhaliwal, a director of Marigold Trucking Ltd., together with any additional interest that has accrued pursuant to section 88 of the *ESA*.

Shafik Bhalloo, K.C.
Member
Employment Standards Tribunal