

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Gloria Sommaggio, an officer of Il Lago Family Italian Restaurant & Bar Ltd.

- of a Determination issued by -

The Director of Employment Standards

PANEL: Carol L. Roberts

FILE NO.: 2023/100

DATE OF DECISION: September 28, 2023

DECISION

SUBMISSIONS

Gloria Sommaggio on her own behalf, as an officer of Il Lago Family Italian Restaurant & Bar Ltd.

OVERVIEW

1. This is an appeal by Gloria Sommaggio (“Ms. Sommaggio”), an officer of Il Lago Family Italian Restaurant & Bar Ltd. (“Employer”), of a determination issued by a delegate of the Director of Employment Standards (“Director”), on April 27, 2023 (“Personal Determination”).
2. A former employee of the Employer (“Employee”) filed a series of complaints with the Director alleging that the Employer had contravened the *Employment Standards Act* (“ESA”) in failing to pay wages and compensation for length of service.
3. On March 17, 2023, the Director issued a determination (“Corporate Determination”) determining that the Employer had contravened the *ESA* and finding that the Employer owed the Employee wages and interest in the total amount of \$3,295.07. The Director also imposed administrative penalties in the amount of \$1,500.00 for the contraventions.
4. The Corporate Determination, which included a notice to officers and directors of their personal liability under the *ESA*, was sent to the Employer’s registered and records office, with copies to the officers and directors. The appeal period on the Corporate Determination expired on April 11, 2023, for service via e-mail and April 24, 2023, for service by ordinary mail. The Employer neither paid the amount determined to be owing nor appealed the Corporate Determination.
5. 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. Ms. Sommaggio 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.
6. In the Personal Determination, the Director found that Ms. Sommaggio was both a director and an officer of the Employer between September 21, 2019 and June 30, 2020, at the time the Employee’s wages were owed and should have been paid. The Director found that Ms. Sommaggio did not dispute her status as an officer of the Employer, despite being given notice of her potential liability.
7. The Director determined that, as an officer of the Employer, Ms. Sommaggio was personally liable for up to two month’s unpaid wages for the Employee pursuant to section 96 of the *ESA*.
8. The Director determined Ms. Sommaggio’s liability for the unpaid wages and interest to be \$3,120.00, representing the full amount owing in the Corporate Determination, plus interest of \$274.13, for a total amount of \$3,394.13. The Director determined that there was insufficient evidence that Ms. Sommaggio authorized, permitted or acquiesced in the contravention and was therefore not personally liable to pay

the administrative penalties. The deadline for filing an appeal of the Personal Determination was June 5, 2023, if served by ordinary or registered mail.

9. Ms. Sommaggio filed the appeal on the grounds that the Director erred in law. Ms. Sommaggio's appeal was filed with the Tribunal on June 29, 2023, after initially sending a letter to the Employment Standards Branch ("Branch"), following the Branch initiation of collection proceedings. In the undated letter to the Branch, Ms. Sommaggio asserted that she had not received any communications "on this matter." A June 21, 2023 email from the collections officer at the Branch provided Ms. Sommaggio with information regarding the appeal process.
10. Ms. Sommaggio did not expressly request an extension of the appeal deadline, although I infer that she wishes to do so.
11. Section 114 of the *ESA* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria. After reviewing the appeal submissions, I found it unnecessary to seek submissions from the Employee or the Director.
12. This decision is based on the section 112(5) "record" that was before the Director at the time the Personal Determination was made, Ms. Sommaggio's submissions, and the Reasons for the Determination.

ISSUE

13. Whether Ms. Sommaggio has established grounds for interfering with the Personal Determination.

ARGUMENT

14. Ms. Sommaggio's submissions are, in essence, that the Corporate Determination is wrong. She contends, among other things that the Employee unlawfully took food from the restaurant, and that he was "always" paid.
15. There is nothing in Ms. Sommaggio's appeal submission of the Personal Determination that addresses either her position as an officer of the Employer or her personal liability for unpaid wages.

ANALYSIS

16. Section 114 of the *ESA* provides that 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.

17. 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.

18. I am not persuaded that there is any reasonable prospect the appeal will succeed.

19. Ms. Sommaggio's submissions relate entirely to the Corporate Determination. The deadline for filing an appeal of the Corporate Determination was no later than April 24, 2023.

20. The leading Tribunal decision regarding an extensions of time in which to file appeals is *Niemisto* (BC EST #D099/96), which held that appellants seeking time extensions for requesting an appeal from a determination issued under the *ESA* should satisfy the Tribunal that:

- i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
- iii) the respondent party (i.e., the employer or employee), as well the Director, must have been made aware of this intention;
- iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
- v) there is a strong *prima facie* case in favour of the appellant.

21. Ms. Sommaggio provides no explanation for her failure to request an appeal of the Personal Determination within the statutory time limit. There is no evidence she had a genuine or *bona fide* intention to appeal prior to June 29, 2023, which was over two weeks after the statutory appeal deadline for filing an appeal of the Personal Determination. Ms. Sommaggio's decision to appeal appears to have been motivated by collections proceedings undertaken by the Director.

22. I am also not persuaded that Ms. Sommaggio has a strong *prima facie* case on appeal. It appears from the record that, although the Employer initially participated in the investigation of the Employee's complaint, it ceased doing so. I am satisfied that the Employer was aware of the complaint and the opportunity to respond to the Director's investigation.

23. I am also satisfied that the Employer was made aware of the Corporate Determination and did not appeal it. The record indicates the Corporate Determination was sent to Ms. Sommaggio at a mailing address

identified in the Corporate Registry, as well as to the address of the Employer's other officer/director, and to the registered and records office.

24. It is not open to a director or officer to challenge the merits of a corporate determination through the appeal of a personal determination (see *Kerry Steinemann, Director/Officer of Pacific Western Vinyl Window & Doors Ltd.*, BC EST #D180/96). As the "Notice to Directors/Officers" attached to the Corporate Determination informed Ms. Sommaggio:

There are only three grounds on which you may appeal a Determination made against you as a director/officer:

- 1) That you were not a director/officer of the company at the time wages were earned or should have been paid;
- 2) That the calculation of your personal liability as a director/officer is incorrect; and/or,
- 3) That you should not be liable for the penalty, where a penalty has been imposed, on the grounds that you did not authorize, permit or acquiesce in the company's contravention.

Error of Law

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

- (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,

...

26. There is nothing in the appeal submission that addresses Ms. Sommaggio's status as an officer of the Employer. I find no error in the Director's conclusion that she was an officer of the Employer at the time the Employee's wages were earned and that she is personally liable for up to two months of the Employee's unpaid wages.
27. I am further satisfied that the Employer was properly notified of both the complaint investigation as well as the Determination, and took no steps to appeal or satisfy it.
28. I find, pursuant to section 114(1)(f) of the *ESA*, that there is no reasonable prospect the appeal will succeed, and I deny the appeal.

ORDER

29. Pursuant to section 115(1) of the *ESA*, I confirm the Personal Determination dated April 7, 2023 in the amount of \$3,394.13 together with whatever interest may have accrued since the date of issuance, pursuant to section 88 of the *ESA*.

Carol L. Roberts
Member
Employment Standards Tribunal