



Citation: Rose Ester Roja Pino (Re)
2023 BCEST 83

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Rose Ester Roja Pino
("Ms. Roja Pino")

- of a Determination issued by -

The Director of Employment Standards

PANEL: David B. Stevenson

FILE No.: 2023/085

DATE OF DECISION: October 4, 2023

DECISION

SUBMISSIONS

Andres Figueroa

on behalf of Rose Ester Roja Pino, a director of 1140668 B.C. Ltd.

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (“ESA”) by Rose Ester Roja Pino (“Ms. Roja Pino”) of a determination issued by Mathew Osborn, a delegate (“deciding Delegate”) of the Director of Employment Standards (“Director”), on December 16, 2022 (“Determination”).
2. The Determination found Ms. Roja Pino was a director of 1140668 B.C. Ltd., formerly known as Penticton Horizon Development Ltd. (“1140668”), an employer found to have contravened provisions of the *ESA*, at the time wages were earned by or should have been paid to Timothy Cole (“Mr. Cole”), and as such was personally liable under section 96 of the *ESA* for wages in the amount of \$8,201.07.
3. On May 19 and 29 and June 6, 2023, the Tribunal received correspondence from Andres Figueroa (“Mr. Figueroa”), who in subsequent communications identified himself as a director and officer of 1140668. The correspondence did not comply with the requirements of the *ESA* for filing an appeal and on June 23, 2023, the Tribunal communicated with Mr. Figueroa advising him the Tribunal was unable to accept the correspondence he had provided for the reasons set out in that correspondence. The Tribunal also noted there appeared to be two determinations which Mr. Figueroa sought to appeal. The Tribunal instructed Mr. Figueroa he needed to identify the determinations being appealed, identify the entities and/or persons who were seeking to appeal those determinations, and meet the requirements for filing an appeal – which were set out in the correspondence.
4. Mr. Figueroa was given a deadline for requesting an appeal of the determinations.
5. It has transpired that Mr. Figueroa has filed two (2) appeals on different determinations. This decision addresses the appeal filed naming the Appellant as “Rosa E. Rojas” and Mr. Figueroa as the Appellant’s representative.
6. On July 10, 2023, the Tribunal received nine (9) separate submissions from Mr. Figueroa by email in a format that is not accepted by the Tribunal. On July 12, 2023, the Tribunal requested Mr. Figueroa resubmit the documentation in an accepted format. On July 19, 2023, Mr. Figueroa contacted the Tribunal to request an extension of time to provide the requested documentation for each appeal.
7. On July 24, 2023, the Tribunal received documentation from Mr. Figueroa, seeking to appeal the Determination. The material indicated Mr. Figueroa, on behalf of Ms. Roja Pino, sought to appeal the Determination on the grounds set out in sections 112(1) (a) and (b) of the *ESA*: that the Director erred in law and failed to observe principles of natural justice in making the Determination.

8. The statutory appeal period for filing an appeal of the Determination expired on January 23, 2023. The Appeal Form and supporting submissions and documents were received by the Tribunal more than six (6) months after expiry of the appeal period.
9. In its June 23, 2023 correspondence, the Tribunal requested 1140668 to provide a “request to extend the appeal period and reasons why the appeal could not be filed before the expiry of the appeal period.” The Appeal Form submitted on July 24, 2023 indicated an extension of the appeal period was being sought and that the reasons for the extension would be provided as a separate submission.
10. The material submitted with the appeal contained three emails, one dated December 11, 2022, one dated December 15 or 16, 2022 (the date is unclear), and one dated January 9, 2023, to the Employment Standards Branch, not the Tribunal, asking for an extension of time to appeal the determination made against 1140668 B.C. Ltd., giving as the reason for the extension that the mailed copy of that determination had been misplaced. The Tribunal has not received any submission relating to the reasons for requesting an extension of the appeal period for the Determination that is being addressed in this appeal decision.
11. In correspondence dated August 2, 2023, the Tribunal, among other things, acknowledged having received an appeal, requested the section 112(5) record (“record”) from the Director and notified the other parties that submissions on the merits of the appeal were not being sought at that time.
12. The record has been provided to the Tribunal by the Director and a copy has been delivered to the parties. They have been provided with the opportunity to object to the completeness of the record.
13. None of the parties has raised any objections to the completeness of the record and the Tribunal accepts the record as being complete.
14. 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 submissions filed on 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.*

15. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and Mr. Cole 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 the appeal should be dismissed for the failure to file the appeal in the time allowed in section 112 of the *ESA* and whether, in any event, there is any reasonable prospect the appeal will succeed.

ISSUE

16. The issue here is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE DETERMINATION

17. Mr. Cole filed a complaint in March 2020 alleging 1140668, operating under its previous name, had contravened the *ESA* by failing to pay wages owed and by taking unauthorized deductions from wages. A delegate of the Director (“investigating Delegate”) investigated the complaint and, on November 7, 2022, the deciding Delegate issued a determination (“corporate determination”), finding 1149668 was liable to Mr. Cole for wages, including interest, in the amount of \$8,156.92. The Director also imposed administrative penalties on 1140668 in the amount of \$1,500.00.
18. The corporate determination, which included a notice to directors and officers explaining their personal liability under the *ESA*, was delivered to address for 1140668, with a copy to Ms. Roja Pino.
19. An appeal of the corporate determination has been filed and dismissed: see *Andres Figueroa and 1140668 B.C. Ltd.*, 2023 BCEST 82.
20. The record shows a search was conducted of the BC Online Registrar of Companies on December 7, 2022, which showed:
- Penticton Horizon Developments Ltd. was incorporated on November 8, 2017 and operated under that name until June 8, 2020, when it was dissolved for failure to file documents;
 - The company was restored as an active company on December 17, 2021 under the name 1140668 B.C. Ltd.; and
 - Ms. Roja Pino was listed as a director during the period – September 16, 2019 and February 14, 2020 – Mr. Cole’s wages were earned or should have been paid.
21. Based on the information acquired and the findings made, the deciding Delegate concluded Ms. Roja Pino was liable under section 96 of the *ESA* for the amount set out in the Determination. Ms. Roja Pino was not found liable for the administrative penalties imposed on 1140668.

ARGUMENTS

Error of Law

22. The submission made by Ms. Roja Pino in her appeal is, with some necessary modifications to indicate the appeal is from her, identical to that made by 1140668 in the appeal of the corporate determination.

Natural Justice

23. No submission has been made that identifies or addresses any natural justice issue.
24. The submission of Ms. Roja Pino does not address the delay in filing this appeal or the request for an extension of the statutory appeal period.

ANALYSIS

25. 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.*

26. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the determination under one of the statutory grounds.

The request to extend the statutory appeal period

27. I shall first address the request to extend the appeal period, as a refusal of that request is sufficient to dispose of this appeal.
28. The *ESA* imposes a deadline on appeals to ensure they are dealt promptly: see section 2(d). The *ESA* allows an appeal period to be extended on application to the Tribunal. In *Metty M. Tang*, BC EST # D211/96, the Tribunal expressed the approach it has consistently followed in considering requests to extend the time limit for filing an appeal:

Section 109(1)(b) of the *Act* provides the Tribunal with discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.

29. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re Niemisto*, BC EST # D099/96. The following criteria must be satisfied to grant an extension:
- 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 ongoing *bona fide* intention to appeal the Determination;
 - iii) the respondent party (*i.e.* the employer or employee) as well as the Director 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.
30. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can be considered. The burden of demonstrating the existence of such criteria is on the party requesting an extension of time. No additional criteria have been advanced in this appeal.
31. The Tribunal has required “compelling reasons” for granting of an extension of time: *Re Wright*, BC EST # D132/97.
32. I find, on the material before me, Ms. Roja Pino has satisfied none of the criteria that would operate in favour of granting an extension of the appeal period.
33. The appeal submission provides no explanation for a delay of more than six months to file an appeal.
34. The facts do not allow for a conclusion that Ms. Roja Pino had an ongoing and *bona fide* intention to appeal the Determination. From her submission, it appears the impetus for this appeal was the action of the Director against her bank account.
35. No party was made aware that Ms. Roja Pino had any intention to seek an appeal of the Determination.
36. There is always a prejudice to the beneficiary of a determination where the Tribunal grants an extension. The longer the delay, the greater the prejudice. The delay here is excessive.
37. As I will explain below, there is no *prima facie* case in favour of Ms. Roja Pino in this appeal.
38. As none of the criteria that would operate in favour of granting the request are found in the facts of this case, it is not appropriate to allow an extension of the appeal period and it is refused. The appeal is dismissed under section 114(1)(b) of the *ESA*.
39. Even if the statutory time period were ignored and the merits of the appeal were considered, it would still fail and would be dismissed under section 114(1)(f) of the *ESA*.
40. The appeal has no merit whatsoever; the submissions supporting it have entirely missed what is required to be addressed when considering an appeal of a determination under section 96 of the *ESA*.

41. It is a well-established principle that a person challenging a determination issued under section 96 is limited to arguing those issues which arise under that provision: whether the person was a director or officer when the wages were earned or should have been paid; whether the amount of the liability imposed is within the limits for which a director or officer may be found personally liable; and whether circumstances exist that would relieve the director or officer from personal liability under section 96(2) of the *ESA*, which reads:
- (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,*
 - ...
 - (c) *vacation pay that becomes payable after the director or officer ceases to hold office, or*
 - (d) *money that remains in an employee's time bank after the director or officer ceases to hold office.*
42. The appeal by Ms. Roja Pino does not argue any of those issues. The focus of her appeal is the corporate determination. Ms. Roja Pino, as a director of a corporation, is precluded from raising and arguing the corporate liability in an appeal of a section 96 determination. The right to appeal and raise arguments against the corporate determination belongs to the corporation and, as indicated above, an appeal by the corporation has been filed and dismissed.
43. For a more complete discussion and analysis on the section 96 liability under the *ESA*, see *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.
44. In this appeal, Ms. Roja Pino has presented nothing that relates to the matters that can be raised and considered in respect of a challenge to a determination issued under section 96 of the *ESA*.
45. The material in the record quite clearly shows: that Ms. Roja Pino was a director of 1140668 during the time wages were earned by or should have been paid to Mr. Cole; that the liability imposed on her is within the limits for which a director may be found personally liable under section 96; that there is no indication of any circumstances that would relieve Ms. Roja Pino of personal liability under that provision.
46. Based on all of the above, I confirm there is neither a *prima facie* case to this appeal nor any merit to it; I find it has no reasonable prospect of succeeding. The purposes and objects of the *ESA* are not served by requiring the other parties to respond to it.
47. For all of the above reasons, this appeal is dismissed.

ORDER

48. Pursuant to section 115(1) of the *ESA*, I order the Determination dated December 16, 2022 be confirmed in the amount of \$8,201.07, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal