Employment Standards TRIBUNAL

Citation: 1050417 B.C. Ltd. and Jared Dale Penner (Re)
2024 BCEST 13

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

1050417 B.C. Ltd. and Jared Dale Penner

- of Determinations issued by -

The Director of Employment Standards

PANEL: Kenneth Wm. Thornicroft

FILE NOS.: 2023/157 and 2023/158

DATE OF DECISION: January 30, 2024

DECISION

SUBMISSIONS

Jared Dale Penner — on behalf of 1050417 B.C. Ltd. and on his own behalf

INTRODUCTION

1. Jared Dale Penner ("Penner") appeals, on his own behalf (EST File No. 2023/158), and on behalf of 1050417 B.C. Ltd. (EST File No. 2023/157), two separate determinations issued by Nikala de Balinhard, a delegate of the Director of Employment Standards (the "delegate"), on August 31, 2023. Both appeals are grounded on section 112(1)(c) of the *Employment Standards Act* ("*ESA*") – the so-called "new evidence" ground of appeal: "…a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds…(c) evidence has become available that was not available at the time the determination was being made."

2. The first of the two determinations, issued against 1050417 B.C. Ltd. (the "employer"), requires the employer to pay four former employees (the "complainants") a total sum of $17,371.05, as well as an additional $2,000 on account of four separate $500 monetary penalties (see section 98 of the *ESA*). Accordingly, the employer's total liability under this determination is $19,371.05. I shall refer to this determination as the "Corporate Determination." The delegate issued separate "Reasons for the Determination" concurrently with the Corporate Determination.

3. The second determination, issued against Mr. Penner in his personal capacity under section 96(1) of the *ESA*, requires him to pay $17,371.05 to the complainants, but does not require him to pay any monetary penalties. I shall refer to this determination as the "Section 96 Determination." Section 96(1) 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." The delegate issued separate "Reasons for the Determination" concurrently with the Section 96 Determination. At all material times, Mr. Penner was the employer's sole officer and director, and its 'directing mind.'

4. With respect to the Section 96 Determination, the delegate concluded that Mr. Penner was not personally liable for any of the monetary penalties levied against the employer because, in the wording of section 98(2), he never authorized, permitted or acquiesced in the employer's contraventions. On this point, the delegate simply observed: "There is insufficient evidence that Jared Dale Penner authorized, permitted or acquiesced in the contraventions of the Employer [and] for this reason, I find that Jared Dale Penner is not personally liable for the administrative penalties." For my part, I find this bald statement to be troubling. Mr. Penner was at all times the employer's sole operating mind, and he alone, by his actions and inactions, was responsible for the employer's failure to pay the monies to which the complainants were entitled. In my view, the section 112(5) record in this matter contains ample evidence demonstrating that Mr. Penner should also have been subject to section 98 penalties. Given the circumstances at hand, if Mr. Penner did not authorize, permit or acquiesce in the employer's *ESA* contraventions, I am hard-pressed to conceive of what additional facts might have been required in order to bring Mr. Penner within the ambit of section 98(2). However, I am of the view that I do not have the statutory authority to vary

the Section 96 Determination by ordering Mr. Penner to pay the monetary penalties that have been levied against the employer.

5. Overall, I consider these two appeals, based on identical reasons for appeal, to be untimely, and without any reasonable prospect of succeeding. Indeed, given that both appeals are so manifestly without merit, I consider that these two appeals can be fairly characterized as frivolous, vexatious or trivial, and an abuse of process. That being the case, I am dismissing both appeals under sections 114(1)(b), (c) and (f) of the *ESA*. My reasons for reaching those conclusions now follow.

THE TIMELINESS OF THE APPEALS

6. Both determinations were issued on August 31, 2023. The Corporate Determination was sent by regular mail to the employer's registered and records office. In addition, the Corporate Determination was served, by both regular and email, on Mr. Penner in his capacity as the employer's sole director and officer. Section 9 of the *Business Corporations Act* states that a corporation may be validly served in a "legal proceeding" (which includes a civil, criminal, quasi-criminal, administrative or regulatory action or proceeding) by serving a corporate director or senior officer. Thus, the employer was lawfully served on August 31, 2023. The Section 96 Determination was sent by regular mail and email to Mr. Penner.

7. Section 81(1) of the *ESA* requires the Director of Employment Standards to serve a determination on the persons named in the determination. Section 122(1) of the *ESA* states that a determination may be served by ordinary or registered mail (section 122(1)(a)) or by email (section 122(1)(b)). Section 122(3) states that if a person is served by email, "then the determination…is deemed to have been served 3 days after it is transmitted". Therefore, the deadline for filing an appeal of the Corporate Determination, calculated in accordance with section 112(3)(b) of the *ESA*, was September 25, 2023.

8. Section 81(1)(d) of the *ESA* states that a determination must include information concerning "the time limit and process for appealing the determination to the tribunal." In a text box, headed "Appeal Information," found at page D4 of the Corporate Determination, and at page D3 of the Section 96 Determination, two separate appeal deadlines were listed, namely, September 25, 2023 (where service was by email) and October 10, 2023 (where service was by ordinary or registered mail – see section 112(3)(a) of the *ESA*). The following statement also appears in the text box: "If this Determination was served to you by more than one method of service and you wish to appeal, the longest appeal period applies for delivery to the Employment Standards Tribunal" (my underlining).

9. In my view, this latter statement set out in the Corporate Determination and in the Section 96 Determination regarding the applicable appeal period is erroneous. The Director of Employment Standards has no authority under the *ESA* to extend an appeal period – that authority rests solely with the Tribunal under section 109(1)(b). As soon as the employer was lawfully served – by email delivered to its sole director and officer – section 122(3) was triggered, and the applicable appeal period was fixed by section 112(3)(b) (i.e., "21 days after the date of service of the determination"). Thus, the applicable appeal deadline in this case was September 25, 2023. This finding applies with equal force to Mr. Penner who was also served by email. That said, the fact that a party may have been misinformed about the applicable appeal deadline could certainly be taken into account in determining whether an appeal period should be extended under section 109(1)(b). For purposes of both of these appeals, I will accept that the appeal deadline was the later of the two deadlines, namely, October 10, 2023.

10. On October 6, 2023, Mr. Penner submitted separate Appeal Forms regarding both the Corporate Determination and the Section 96 Determination. Although in both Appeal Forms the stated ground of appeal was the section 112(1)(c) "new evidence" ground, no evidence of any kind was submitted to the Tribunal along with the form. The only document submitted in support of the appeals, other than the two Appeal Forms and a Contact Information Form, was a brief email in which Mr. Penner indicated that he was appealing both the Corporate Determination and the Section 96 Determination, and was seeking an extension of the appeal periods because "I've been travelling for work most of September, and haven't been able to put in time to assemble a compelling appeal based on new evidence." He sought an extension to October 31, 2023, so that he "could assemble a robust appeal with the new pertinent evidence." As neither Mr. Penner nor the employer provided the Tribunal with a copy of either determination being appealed, Mr. Penner was requested to submit those documents to the Tribunal, which he did. Subsequently, on October 12, 2023, the Tribunal advised the employer and Mr. Penner to provide their reasons and arguments supporting the appeals, as well as any relevant documents. The employer and Mr. Penner were expressly advised that this dispensation did not constitute an extension of the appeal periods.

11. In my view, the explanation offered for failing to file a complete appeal of the Corporate Determination and the Section 96 Determination by the October 10, 2023 deadline falls well short of the mark. In a subsequent email to the Tribunal delivered on October 30, 2023, Mr. Penner asked for a further extension, to November 30, 2023, to file additional documents regarding the Corporate Determination. Mr. Penner attached some additional documents to his October 30th email, none of which is admissible under section 112(1)(c) of the *ESA* because these documents all predate the issuance of the Corporate Determination, and thus were available and could have been submitted to the Employment Standards Branch during the investigation of the four complaints. No other documents were ever filed with the Tribunal in support of either appeal.

12. Mr. Penner also attached a 1-½ page memorandum to his October 30, 2023, email setting out his reasons for appealing both determinations. In this memorandum, he explained that when he was first served with both determinations, he "was not in a medical condition to refute the judgements." There is no independent medical evidence before me corroborating that assertion, let alone explaining why his medical condition actually prevented him from filing timely appeals (or instructing legal counsel to do so). As will be seen, the reasons offered in support of the appeals are entirely without merit and, apart from that, there is no evidence before me that the employer had an ongoing *bona fide* intention to appeal. Finally, the employer has ceased operations and may be contemplating insolvency proceedings (see the delegate's reasons accompanying the Corporate Determination, page R2). Any further delay in adjudicating these appeals could likely prejudice the complainants. There has already been considerable delay in adjudicating the four complaints, which were initially filed in December 2021, April 2022, and May 2022 (two complaints were filed in May 2022).

13. In light of the *Niemisto* criteria (see BC EST # D099/96), I am not satisfied that the time for filing an appeal of either the Corporate Determination or the Section 96 Determination should be extended. As noted above, I have accepted, for the purposes of these appeals, that the applicable appeal deadline was October 10, 2023. However, while the employer filed an Appeal Form on October 6, 2023, neither the employer nor Mr. Penner provided even a scintilla of evidence or argument to support its "new evidence" ground of appeal. Thus, both appeals were (and remain) deficient, since there was no rationale provided

for setting aside either the Corporate Determination or the Section 96 Determination. On the basis of the employer's and Mr. Penner's submissions, and absent an extension of the appeal period (and for which no cogent justification has been provided), the Tribunal has no choice but to dismiss the appeal under section 114(1)(f) of the *ESA*.

THE *PRIMA FACIE* MERIT OF THE APPEALS

14. There is no admissible "new evidence" in light of the strict requirements for admissibility of new evidence set out in *Davies et al.*, BC EST # D171/03. There are four complainants who were awarded wages under both the Corporate Determination and the Section 96 Determination. I shall identify them as BP (awarded $975.00 including section 88 interest), CW (awarded $4.031.17 including interest), QH (awarded $5,188.29 including interest), and NH (awarded $7,176.59 including interest).

15. Mr. Penner does not dispute BP's award: "…this money is owed and am happy to setup a repayment plan to ensure he receives those funds." As for the other three complainants, in each case Mr. Penner has not provided clear and cogent evidence calling into question the delegate's calculations. Further, and in any event, the scant "evidence" (actually, mere uncorroborated assertions) presented by Mr. Penner was available and could have been provided to the Employment Standards Branch during the investigation.

16. Mr. Penner says that the employer provided medical and dental benefits to QH, as well as a company car for his business and personal use, but failed to make payroll deductions from the latter's wages on account of those benefits. Mr. Penner asserts that QH "has most likely been over-paid." An employer is entitled to make payroll deductions to be remitted "to an insurance company for insurance or medical or dental coverage" (section 22(1)(d)), or in relation to "an outstanding balance in respect of the personal use of real and personal property of the employer by the employee" (section 22(4)(c)), but only if authorized by a written assignment from the employee. There is no evidence that either form of assignment was ever executed and, in any event, even if there were such written assignments, those documents should have been provided to the Employment Standards Branch during the complaint investigation process.

17. I believe it is also important to stress that during the investigation, as recorded in the delegate's reasons accompanying the Corporate Determination (at page R3), "Mr. Penner did not provide any records during the investigation, but he confirmed that the records the Complainants provided are generally accurate," and that when the employer ceased business operations in March 2022, "Mr. Penner confirmed the Employer did not pay the Complainants' final wages because neither the Employer nor Mr. Penner had the funds necessary to do so." The Tribunal has consistently held that, as a matter of general principle, appellants should not be permitted to advance evidence and argument on appeal in circumstances where they, essentially, refused to meaningfully participate in the complaint investigation process.

18. To summarize, I consider both appeals to be untimely, and that it would not be appropriate to extend the appeal period governing either appeal. Even if the appeal periods were extended, neither appeal has any reasonable prospect of succeeding. In my view, the employer's appeal is so wholly without merit as to be fairly characterized as frivolous and vexatious. Mr. Penner concedes that he was a director and officer of the employer when the complainants' wage claims crystallized. The amount Mr. Penner has been personally ordered to pay to the complainants falls, in each case, under the 2-month section 96(1) liability ceiling.

ORDERS

19. The applications to extend the time for appealing the Corporate Determination and the Section 96 Determination are both dismissed.

20. Pursuant to sections 114(1)(b), (c) and (f) of the *ESA*, the employer's and Mr. Penner's appeals are both dismissed.

21. Pursuant to section 115(1)(a) of the *ESA*, the Corporate Determination and the Section 96 Determination are both confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal