

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

John Eneas
("Appellant")

- of a Determination issued by -

The Director of Employment Standards

PANEL: Mona Muker

FILE No.: 2023/178

DATE OF DECISION: March 18, 2024

DECISION

SUBMISSIONS

John Eneas on his own behalf.

OVERVIEW

1. This is an appeal by John Eneas (“Appellant”), a former director of Indigenous Bloom Stz’Uminus GP Ltd., carrying on business as Indigenous Bloom Stz’Uminus Limited Partnership and/or Indigenous Bloom Ladysmith (“Indigenous Bloom”), of a decision issued by a delegate (“Adjudicative Delegate”) of the Director of the Employment Standards (“Director”) dated November 14, 2023 (“Director Determination”). The appeal is filed pursuant to section 112 of *the Employment Standards Act* (“ESA”).
2. In a determination issued on September 20, 2023 (“Corporate Determination”), the Director found that Indigenous Bloom breached section 54(2) of the *ESA* by terminating its former employee, Anthony Smith (“Employee”), because he was on a leave authorized by section 52.12 of the *ESA*. The Corporate Determination ordered Indigenous Bloom to pay the Employee \$6,124.61 in wages and accrued interest. The Corporate Determination also ordered Indigenous Bloom to pay a mandatory administrative penalty of \$500.00. To date, the Corporate Determination has not been appealed.
3. In the Director Determination, the Director found that the Appellant was a director of Indigenous Bloom at the time wages were owed to the Employee. Pursuant to section 96 of the *ESA*, the Director found the Appellant personally liable for two months’ wages in the amount of \$5,191.68, plus interest amounting to \$566.30. However, the Director also found, pursuant to section 98(2) of the *ESA*, insufficient evidence that the Appellant authorized, permitted, or acquiesced in Indigenous Bloom’s contravention of the *ESA*. The Director therefore did not find the Appellant personally liable for the administrative penalty.
4. The Appellant appeals the Director Determination alleging that the Director failed to observe the principles of natural justice in making the Director Determination. The Appellant also argues he should not be liable for any penalty, on the grounds he did not authorize, permit, or acquiesce in Indigenous Bloom’s contravention.
5. Section 114(1) of the *ESA* permits the Tribunal to dismiss all or part of an appeal without a hearing or seeking submissions from the other parties or the Director.
6. I find that this appeal is appropriate to be considered under section 114(1) of the *ESA*. After reviewing the Appellant’s appeal submissions, I find it unnecessary to seek submissions from the Employee or the Director. Accordingly, this decision is based on the Director Determination, the appeal submissions, and my review of the Record that was before the Director when the Director Determination was made.

ISSUES

7. The issues before the Tribunal are whether the Director failed to observe the principles of natural justice in making the Director Determination, and whether the Director erred in law.

BACKGROUND

8. On June 28, 2021, the Employee filed a complaint (“Complaint”) under section 74 of the *ESA*. The Employee alleged that Indigenous Bloom contravened the *ESA* by terminating his employment because he was on a leave authorized by section 52.12 of the *ESA*. The Employee worked as a “Budtender” for a cannabis dispensary owned by Indigenous Bloom, from January 26, 2021, to April 22, 2021.
9. A delegate of the Director (“Investigative Delegate”) conducted an investigation into the Employee’s Complaint. Following the investigation, the Investigative Delegate issued an investigation report (“Investigation Report”) dated January 24, 2023, and sent a copy of the Investigation Report to the Appellant. The Investigation Report was accompanied by a notice to directors which informed the Appellant of his potential personal liability under the *ESA*.
10. On September 20, 2023, the Director issued the Corporate Determination ordering Indigenous Bloom to pay wages and interest to the Employee totalling \$6,124.61. The Director also ordered Indigenous Bloom to pay an administrative penalty in the amount of \$500.00.
11. The Corporate Determination, which included a notice to directors and officers explaining their personal liability under the *ESA*, was sent to Indigenous Bloom, with copies to the registered and records office, and to the directors. To date, no appeal of the Corporate Determination has been filed, and Indigenous Bloom has not paid the amount payable.
12. A corporate BC registry search conducted on July 16, 2021, with a currency date of May 14, 2021, shows that Indigenous Bloom was incorporated in British Columbia on November 5, 2020, and lists the Appellant and four other individuals as directors. Based on a Notice of Change of Directors dated July 30, 2021, the Appellant and one other individual ceased to be directors as of July 28, 2021. The search and BC Online history confirms that the Appellant was a director between January 26, 2021, and April 22, 2021, when the Employee’s wages were earned or should have been paid.
13. In the Director Determination, the Appellant, as a director, was found personally liable for up to two months of unpaid wages, pursuant to 96 of the *ESA*. The Director found that the Employee was employed for more than two months. He worked four days per week, eight hours per day, and was paid a regular wage rate of \$18.00 per hour. Thus, pursuant to section 96 of the *ESA*, the Director found the Appellant personally liable for wages owed in the amount of \$5,191.68 plus interest in the amount of \$566.30.
14. As noted above, the Corporate Determination was sent to Indigenous Bloom with copies to the registered and records office, and to the Appellant.
15. Pursuant to section 98(2) of the *ESA*, if a corporation contravenes a requirement of the *ESA* or the *Employment Standards Regulation (“ESR”)*, a director or officer of the corporation who authorizes, permits, or acquiesces in the contravention is personally liable to pay the mandatory administrative penalty.
16. The Director Determination found that there was insufficient evidence that the Appellant authorized, permitted, or acquiesced in the contravention(s) of Indigenous Bloom. Thus, the Director did not find the Appellant personally liable for the \$500 administrative penalty.

17. Accordingly, the Director found that the Appellant was personally liable to pay up to two months of unpaid wages and accrued interest, in the total amount of \$5,757.98.

ARGUMENTS

18. The Appellant appeals the Director Determination alleging that the Director failed to observe the principles of natural justice in making the Director Determination.
19. The Appellant also submits that he should not be liable for any penalty imposed because he did not authorize, permit, or acquiesce in Indigenous Bloom's contraventions of the *ESA*.
20. He further submits that he first became aware of the Employee's complaint when he was served with the Investigation Report on January 24, 2023, and the Director Determination on November 14, 2023. The Appellant submits that when he was a director, he was not involved in any discussions between Indigenous Bloom's Chief Operations Officer and its director, Ray Gauthier. He was not invited to discuss matters or informed of any matters. He submits that he was informed that all matters were being managed, including matters concerning operations, human resources, and staffing.
21. The Appellant submits that he resigned as a director sometime in June 2021.

ANALYSIS

22. Section 112(1) of the *ESA* allows a party named in a determination to appeal the 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.
23. Section 114(1) 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 any 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.

24. Section 96 of the *ESA* provides:

- (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.

25. Section 98(2) of the *ESA* provides:

- (2) If a corporation contravenes a requirement of this Act or the regulations, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the contravention is also liable to the penalty.

26. Section 122 of the *ESA* provides:

- (1) A determination ... that is required under this Act to be served on a person is deemed to have been served if it is
 - (a) sent by ordinary mail or registered mail to the person's last known address according to the records of the director,
 - (b) transmitted by email to the person's last known email address according to the records of the director,...
- (2) If service is by *ordinary mail* or registered mail, then the determination ... *is deemed to have been served 8 days after it is mailed* (emphasis added).
- (3) If service is by *email* or fax, then the determination ... *is deemed to have been served 3 days after it is transmitted* (emphasis added).

27. It is settled law that in an appeal of a determination under section 96 of the *ESA*, where the Director has found an appellant personally liable for wages owed to an employee, 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 personally liable; and

- whether circumstances exist that would relieve the director from personal liability under subsection 96(2).

28. In this case, the Appellant appeals the Director Determination on the basis that the Director failed to observe the principles of natural justice in making the Director Determination.

29. The Appellant also submits that he should not be liable for any penalty imposed because he did not authorize, permit, or acquiesce in Indigenous Bloom's contraventions. I find that the Appellant's submission pertains to whether the Director erred with respect to section 98 of the *ESA*. The Appellant argues he should not be held personally liable because he does not fall within the circumstances described in section 98(2), as set out above.

30. Accordingly, in addition to natural justice, I will also address whether the Director erred in law in making the Director Determination.

Natural justice

31. Natural justice is a procedural right that includes the right to know the case being made, the right to respond, the right to know about the hearing process, and the right to be heard by an unbiased decision maker (*Re 607730 B.C. Ltd. (cob English Inn & Resort)*, BC EST # D055/05; *Imperial Limousine Service Ltd.*, BC EST # D014/05). The party alleging failure to comply with natural justice must provide evidence in support of the allegation (*Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99).

32. There is nothing in the Record showing that the Director failed to comply with the principles of natural justice in conducting the investigation. The Record shows that the Appellant was informed about the Employee's complaint against Indigenous Bloom through the Investigation Report. The Investigation Report was accompanied by a notice to directors informing the Appellant of his potential liability. The notice to directors also contained a subsection titled "opportunity to respond," which explained how the Appellant could dispute his status as a director or provide a response regarding whether he authorized, permitted, or acquiesced in the contraventions of Indigenous Bloom. Further, the Investigation Report was accompanied by excerpts of the *ESA* explaining a corporate officer's liability for unpaid wages and monetary penalties.

33. The Record shows that the Investigation Report contained the agreed upon facts between the parties, a summary of the Employee's complaint, and a summary of the information provided by Indigenous Bloom.

34. Thereafter, the Record shows that the Appellant was served with the Corporate Determination dated September 20, 2023, by regular mail which again included a notice to directors explaining their personal liability, excerpts of the *ESA*, and information regarding an appeal.

35. The Appellant did not acknowledge receiving the Corporate Determination in his appeal submissions. However, the Record shows that it was sent by ordinary mail to his last known address. Thus, pursuant to section 122 of the *ESA*, I find that the Appellant is deemed to have been served with the Corporate Determination as of September 28, 2023, eight days after it was mailed.

36. In the appeal submissions, the Appellant acknowledges receiving the Investigation Report. Thus, I find that the Appellant should have known about the case being made against Indigenous Bloom and his personal liability. I am satisfied that the Appellant had an opportunity to respond. I also find that the Appellant should have reasonably known that the matter would go to the Director for a Director Determination if Indigenous Bloom did not pay or appeal the Corporate Determination.
37. I find that the Appellant should have known that as a former director of Indigenous Bloom, he could be held personally liable for up to two months of unpaid wages, given that he was served two notices explaining his liability, on January 24, 2023, and September 20, 2023. Furthermore, there is no evidence that the Director Determination was made by an unbiased decision maker.
38. Accordingly, I find that the Director did not breach the principles of natural justice.

Error of law

39. The Tribunal as adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
1. a misinterpretation or misapplication of a section of the *Act* [in *Gemex*, the legislation was the Assessment Act];
 2. a misapplication of an applicable principle of general law;
 3. acting without any evidence;
 4. acting on a view of the facts which could not reasonably be entertained; and
 5. adopting a method of assessment which is wrong in principle.
40. The Appellant does not explicitly reference the definition of “error of law” above, but submits that he should not be liable for any penalty imposed because he did not authorize, permit, or acquiesce in Indigenous Bloom’s contraventions of the *ESA*. As I noted above, I find this argument references section 98(2) of the *ESA*.
41. The Director Determination explains that pursuant to section 98(2), there was *insufficient evidence* that the Appellant authorized, permitted, or acquiesced in the contraventions of Indigenous Bloom. Thus, the Appellant was not found personally liable for the \$500.00 administrative penalty issued to Indigenous Bloom.
42. Section 98(2) of the *ESA* applies only to administrative penalties. It does not preclude an officer or director from being held personally liable for up to two months of unpaid wages under section 96 of the *ESA*. Thus, I find that the Appellant’s argument regarding whether he should be liable for a penalty is not applicable on appeal because the Director decided in *favour* of the Appellant on this issue and did not hold him personally liable to pay the penalty.
43. Therefore, I find that the Director did not err in law.
44. Accordingly, I dismiss the appeal.

ORDER

45. The appeal is dismissed under section 114(1)(f) of the *ESA*.
46. Pursuant to section 115(1) of the *ESA*, the Director Determination dated November 14, 2023, is confirmed, along with any interest that has accrued under section 88 of the *ESA*.

Mona Muker
Member
Employment Standards Tribunal