

An appeal

- by -

Dorina Paicu, a Director of Dermatone Body Contours Inc.

- of a Determination issued by -

The Director of Employment Standards  
(the “Director”)

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

**TRIBUNAL MEMBER:** Carol L. Roberts

**FILE No.:** 2015A/125

**DATE OF DECISION:** January 7, 2016



### Extension of Time in Which to File an Appeal

9. Sebastien Anderson (“Mr. Anderson”), counsel for Ms. Paicu, says that the appeal was submitted to the Employment Standards Branch rather than the Tribunal through an administrative error. He contends that the Tribunal should grant an extension of time in light of the fact that the appeal was filed in time, although to the improper body. Counsel for Ms. Paicu contends that there is no prejudice to the Respondent by the late filing, there is a *bona fide* intention to appeal the Determination and a credible explanation for the late filing. Finally, Mr. Anderson argued that there is a strong *prima facie* case in Ms. Paicu’s favour.
10. The Director did not object to Ms. Paicu’s application for an extension of time in which to file the appeal.
11. In *Niemisto* (BC EST # D099/96), the Tribunal set out the following criteria which an appellant had to meet in seeking an extension of time in which to file an appeal:
- a) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
  - b) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
  - c) the respondent party (*i.e.*, the employer or employee), as well as the Director, must have been aware of this intention;
  - d) the respondent party will not be unduly prejudiced by the granting of an extension; and
  - e) there is a strong *prima facie* case in favour of the appellant.
12. These criteria are not exhaustive.
13. I find there is a both a genuine and on-going *bona fide* intention to file an appeal and a reasonable explanation for the failure to file the appeal within the statutory time limits.
14. I accept Mr. Anderson’s assertion that he spoke to the Tribunal regarding the appeal process on August 19, 2015. Although the appeal was submitted on August 21, 2015, in advance of the appeal deadline of August 24, 2015, it was submitted to the Employment Standards Branch rather than the Tribunal as a result of an administrative error. When the Employment Standards Branch notified Ms. Paicu’s counsel about the error, counsel submitted the appeal to the Tribunal.
15. I also accept there is no prejudice to the Director, as the Director was aware of Ms. Paicu’s intention to appeal within the statutory time limits. Given that the appeal was in fact filed shortly after Ms. Paicu’s counsel was informed of the error, I conclude there is no undue prejudice to the employee.
16. Finally, I find there is a strong *prima facie* case in favour of the appellant.
17. I grant Ms. Paicu’s application to extend the time in which to file the appeal.

### **FACTS AND ARGUMENT**

18. Dermatone was incorporated in accordance with the *Business Corporations Act* (“BCA”) (SBC 2002, c. 57), on May 3, 2011. At the time of incorporation, Ilan Givon (“Mr. Givon”) was the sole corporate director. The October 4, 2012, and the August 1, 2014, annual reports both indicate that Mr. Givon was the only corporate director.

19. A Notice of Change of Directors was filed with the Corporate Registry on May 7, 2014, indicating that Ms. Paicu became a director of Dermatone effective April 1, 2014.
20. Ms. Paicu says that the incorporating director of Dermatone, Mr. Givon, filed a Notice of Change of Directors listing her as a corporate director without notice to her. She also says that she neither consented to the appointment nor did she have any knowledge at any material time that Dermatone had appointed her as a director. Attached to Ms. Paicu's appeal is a statutory declaration from Mr. Givon declaring that Ms. Paicu "did not and has not signed a Consent to become a Director of Dermatone."
21. Mr. Givon also declares that, according to the documents registered under the BCA, the registered office for Dermatone is 2039 62 Avenue, Vancouver but that the office is no longer located at that address. He says that Dermatone's corporate records are kept at a private residence, and that on August 18, 2015, he provided all Dermatone records to the Labour Rights Law Office to view and make copies.
22. Ms. Paicu also says that she never functioned in the capacity of a corporate director of Dermatone.
23. The Director relied on the record that was before the delegate at the time the Determination was made and made no submissions in response to the new evidence submitted on appeal.

## ANALYSIS

### The Appeal

24. Section 112(1) of the *Act* 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.
25. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I conclude that Ms. Paicu has met that burden.
26. In *Re Merilus Technologies* (BC EST # D171/03), the Tribunal established the following four-part test for admitting new evidence on appeal:
- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
  - (b) the evidence must be relevant to a material issue arising from the complaint;
  - (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
  - (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own, or when considered with other evidence, have led the Director to a different conclusion on the material issue.
27. I find that the new evidence submitted on appeal is both relevant and credible. I also find that the evidence may have led the Director to a different conclusion on Ms. Paicu's liability for unpaid wages.

28. The record indicates that Ms. Paicu received the Director's May 25, 2015, investigation letter. Included with that letter was a notice to officers and directors. Ms. Paicu does not provide any explanation about why she did not inquire into the reasons the letter was sent to her. Although I accept she was unaware that she had been listed as a director, this letter ought to have alerted Ms. Paicu about a proceeding in which she had an interest. Nevertheless, I accept that there was no basis on which she could have discovered and presented this new evidence during the investigation, as the Corporate Determination was issued at the same time as the Director Determination, depriving her of any basis to dispute the delegate's determination of her status as a director. (see also *Dustin Harrison*, BC EST # D094/15)
29. I also find that it would be unfair to Ms. Paicu not to admit the new evidence, which demonstrates that the Determination is incorrect.
30. Section 96 of the *Act* 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 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 an individual or group terminations, if the corporation is in receivership,
    - (b) any liability to an employee for wages, if the corporation is subject to an action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act,
- ...
31. Section 96 is an extraordinary exemption to the general principle that corporate directors are not personally liable for corporate debts. Therefore, the imposition of personal liability of corporate directors for unpaid wages ought to be construed narrowly. (see *Re Archibald*, BC EST # D090/00, and *MIV Therapeutics Inc.*, BC EST # D096/10)
32. When an individual is recorded as a director of the Company in the records maintained by the Registrar of Companies, there is a presumption that the individual is actually a director of a company. However, that presumption may be rebutted by credible and cogent evidence that the Registrar's records are inaccurate. The burden of providing evidence that the Registrar's records are inaccurate rests upon the individual who denies the corporate director status. (see *Michalkovic*, BC EST # RD047/01, and *Wilnofsky*, BC EST # D106/99)
33. Under the BCA, a person becomes a corporate director either by subscribing to the corporate articles and memorandum, or, following the first meeting, by providing the required consent to become a director.
34. In addition, any change to the composition of directors must be conducted in compliance with sections 122 and 123 of the BCA.
35. Section 122(1) of the BCA requires that directors, other than the first directors of a company who are in their first term of office, must be elected or appointed in accordance with the BCA and with the memorandum and articles of the company.

36. Section 122(4) of the BCA provides that no election or appointment of an individual as a director is valid unless
- (a) the individual consents in accordance with section 123 to be a director of the company, or
  - (b) the election or appointment is made at a meeting at which the individual is present and the individual does not refuse, at the meeting, to be a director.
37. Section 123(1)(a) of the BCA provides that consent may be provided in written form while section 123(1)(b) provides that consent may be obtained through the performance of functions or realization of benefits exclusively available to a director of the company.
38. Where the conditions for appointment as a corporate director under the BCA are not satisfied, the appointment is not valid. (*Stuart D. Briston, a Director or Officer of Ezebiz Software (Canada) Inc.*, BC EST # D063/02, and *Re Martens*, BC EST # D614/01)
39. I find that Ms. Paicu has established that the corporate records are inaccurate. The uncontradicted evidence is that she was listed as a director of Dermatone without her knowledge or consent. There is also no evidence that Ms. Paicu performed any functions or realized any benefits available to a director. I also note that in her complaint, the employee identified Mr. Givon as both the employer and the supervisor. There was no indication that Ms. Paicu had anything to do with the business.
40. I conclude that Ms. Paicu's appointment was not valid under the BCA. I find that Ms. Paicu has established that the corporate records are inaccurate.
41. I allow the appeal.

## **ORDER**

42. Pursuant to section 115(1) of the *Act*, I Order that the Determination, dated July 17, 2015, be cancelled.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**