



An appeal

- by -

Goodwin Gibson, a Director or Officer of Vidwrx Inc.
(“Mr. Gibson”)

- 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: David B. Stevenson

FILE No.: 2016A/120

DATE OF DECISION: January 18, 2017

DECISION

SUBMISSIONS

Roselle P. Wu
counsel for Goodwin Gibson, a Director or Officer of Vidwrx Inc.

J. Gareth Morley
counsel for the Attorney General of British Columbia

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) Goodwin Gibson, a Director or Officer of Vidwrx Inc., (“Mr. Gibson”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on July 22, 2016.
2. The Determination found Mr. Gibson was a director of Vidwrx Inc. (“Vidwrx”), an employer found to have contravened provisions of the *Act*, at the time wages were earned or should have been paid to ten former employees of Vidwrx (“the Complainants”) and as such was personally liable under section 96 of the *Act* for wages in the amount of \$110,999.33.
3. This appeal is grounded in assertions the Director erred in law, failed to observe principles of natural justice in making the Determination and new evidence becoming available that was not available when the Determination was being made. Mr. Gibson seeks to have the Determination cancelled.
4. In correspondence dated September 1, 2016, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and, following such review, all or part of the appeal might be dismissed.
5. The appeal, among other things, raises a constitutional question relating to the applicability of section 96 of the *Act vis.* Mr. Gibson. The Tribunal has jurisdiction to decide constitutional questions arising in proceedings under the *Act* other than those relating to the *Canadian Charter of Rights and Freedoms*; see section 45(1) of the *Administrative Tribunals Act*, RSBC 2004, ch. 45 (the “*ATA*”) and section 110 of the *Act*.
6. On October 13, 2016, the Tribunal notified counsel for Mr. Gibson of the requirement to provide notice of constitutional question. On October 13, 2016, counsel for Mr. Gibson confirmed such notice had been delivered by Mr. Gibson to the Attorney Generals of Canada and British Columbia: see section 46 of the *ATA* and section 8 of the *Constitutional Question Act*, RSBC 1996, ch. 68. The Tribunal has invited submissions on the question from those parties. The Attorney General of Canada has opted not to intervene in the matter at this stage; the Attorney General of British Columbia has filed a submission on the constitutional question.
7. The section 112(5) record (the “record”) has been provided to the Tribunal by the Director and a copy has been delivered to counsel for Mr. Gibson, who has been provided with the opportunity to object to its completeness. No objection to the completeness of the record has been received and, accordingly, the Tribunal accepts it as being a complete record of the material that was before the Director when the Determination was made. Mr. Gibson seeks in this appeal to add additional evidence to the record.

8. I have decided this appeal is appropriate for consideration under section 114 of the *Act*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal, the submission of the Attorney General for British Columbia on the constitutional question, the reply submission of counsel for Mr. Gibson on the constitutional question, my review of the material that was before the Director when the Determination was being made and any other material allowed by the Tribunal to be added to the record. Under section 114(1) of the *Act*, 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.*

9. If satisfied the appeal or a part of it should not be dismissed under section 114(1) of the *Act*, the Director and the Complainants 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 there is any reasonable prospect the appeal can succeed.

ISSUE

10. The issue at this stage of the proceeding is whether the appeal should be dismissed under section 114 of the *Act*.

THE FACTS

11. The facts relating to this appeal are brief.
12. Vidwrx was a video production company with its headquarters in Vancouver, BC. Comments made in the complaints, the Determination and the appeal indicate the company ceased operations in July 2016.
13. The Complainants were employed by Vidwrx for various periods; the employment of all of the Complainants was terminated on various days through March and April 2016. The Complainants filed complaints with the Director alleging Vidwrx had contravened the *Act* by failing to pay regular wages, annual and statutory holiday pay and compensation for length of service. The Director investigated the complaints and, on July 22, 2016, issued a Determination against Vidwrx (the “corporate determination”) which found Vidwrx had contravened sections 18, 58 and 63 of the *Act* in respect of the employment of the Complainants and was liable for wages to them in the amount of \$131,784.37. The Director also imposed administrative penalties on Vidwrx in the amount of \$1,500.00.

14. The details of each Complainant's employment and the calculations of wages owed are set out in attachments to the corporate determination. The corporate determination was sent by registered mail to Vidwrx and to Mr. Gibson and the other directors of record of Vidwrx.
15. The Determination against Mr. Goodwin was issued on the same date and was sent to him by registered mail to the address recorded for him in the corporate records of Vidwrx; a copy was sent to Vidwrx at their registered and records office.
16. A BC On-line: Registrar of Companies corporate search conducted by the Director on February 9, 2016, indicated Vidwrx was registered in British Columbia as an extra-provincial company on November 9, 2007, and filed its last annual report on November 9, 2015. The corporate registry refers persons to the incorporating jurisdiction, in the case of Vidwrx, federal jurisdiction, for a list of directors. A search by the Director of Corporations Canada for Federal Corporation Information, current to July 2016, lists Mr. Gibson as one of three directors of Vidwrx.
17. The wages claimed by the Complainants were earned or should have been paid in the months immediately preceding each Complainants' termination. The searches confirmed Mr. Gibson was listed as a director of Vidwrx during the period the Complainants' wages were earned or should have been paid.
18. Based on the information acquired and the findings made, the Director concluded Mr. Gibson was liable under section 96 of the *Act* for the amount set out in the Determination. Mr. Gibson was not found liable for the administrative penalties imposed on Vidwrx in the corporate determination.
19. The corporate determination has not been appealed; the statutory time limit for filing an appeal of the corporate determination has long expired.

ARGUMENT AND ANALYSIS

20. With one addition, this appeal makes the identical arguments that were raised in an earlier appeal by Mr. Gibson, which was dismissed in BC EST # D005/17.
21. In that appeal, Mr. Gibson argued he was not personally liable under section 96 of the *Act* for the wages found owing to the employee in that case because he was never validly appointed as a director of Vidwrx, the "functional" director test is not applicable to him and, because he was a director of a company incorporated under the *Canada Business Corporations Act*, R.S. 1985, C-44, section 96 of the *Act* was inoperative against him.
22. Mr. Gibson also challenged the calculations of the wages found owing the employee in the corporate determination, as he has done in this appeal with the calculations of wages owed to the Complainants.
23. I adopt and apply all of the reasoning and the decision on those arguments in this appeal and similarly dismiss them.
24. The one additional element in this appeal that was not included in the submissions made in the earlier appeal is the contention the Director failed to observe principles of natural justice by not providing Mr. Gibson with a copy of the complaints made by two of the Complainants.
25. This argument has no merit. This argument relates directly to the process resulting in the corporate determination. It is irrelevant whether Mr. Gibson received a copy of the complaints from these two employees. It is only relevant that the corporation was aware of the claims being made by each of the

Complainants and was provided with the opportunity to respond to those claims see section 77 of the *Act*. The wage claims were investigated and the corporate determination has been issued. The statutory time period for an appeal of the corporate determination has expired without any appeal being filed. More specifically, Vidwrx has made no allegation that it was denied the opportunity to know the claims being made by each of the Complainants, including the two employees referred to in this appeal, and to respond to those claims.

26. For the same reasons Mr. Goodwin, as a director or officer of a corporation, is precluded from raising and arguing the corporate liability, he is precluded from alleging a breach of natural justice related to the process that resulted in the corporate determination. The right to raise such a claim belongs to the corporation and, as indicated, no such claim has been made by the corporation.
27. To reiterate what was stated in the earlier decision concerning a challenge by Mr. Goodwin to the calculation of the wages owed to the employee in that case, a person challenging a determination issued under section 96 of the *Act* 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 *Act*. That person is precluded from raising and arguing the corporate liability.
28. The Director does not have any obligation to provide Mr. Goodwin with the opportunity to respond to the merits of the claims made by the Complainants. That opportunity belongs to Vidwrx, which was the party under investigation for the wage claims being made: see section 77 of the *Act*. The opportunity to respond was provided to Vidwrx prior to the Determination being issued.
29. If Mr. Goodwin claims denial of natural justice, it can only be raised in the context of those matters he is allowed to raise in an appeal of a determination issued under section 96 of the *Act*. Otherwise, he is bound by the corporate determination and the failure of Vidwrx to appeal any aspect of it.
30. In respect of his challenge to the amounts found owing to each Complainant in the Determination, based on the findings made in the corporate determination, which are set out in the calculations for each of the Complainants, there is no basis for arguing the wages found owing to each of the complainants does not represent 2 months' wages.
31. I find no merit in this appeal and I find it has no reasonable prospect of succeeding. The appeal is dismissed under section 114 of the *Act*; the purposes and objects of the *Act* are not served by requiring the other parties to respond to it.

ORDER

32. Pursuant to section 115 of the *Act*, I order the Determination dated July 22, 2016, be confirmed in the amount of \$110,999.33, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal