

An appeal

- by -

Harri T. Rauma, a Director of Power Pacific Poles (2006) Inc.
(“Mr. Rauma”)

- 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: Shafik Bhalloo

FILE No.: 2009A/148

DATE OF DECISION: January 7, 2010

DECISION

SUBMISSIONS

Harri T. Rauma	on his own behalf
Andres Barker	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Harri T. Rauma (“Mr. Rauma”), a Director or Officer of Power Pacific Poles (2006) Inc. (“PPP06”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a determination of the Director of Employment Standards (the “Director”) issued on September 30, 2009 (the “Director’s Determination”). In the Director’s Determination, the Director found that Mr. Rauma was a director of the corporate employer, PPP06, at the time wages were earned by six former employees of PPP06, namely, Darren Grant (“Mr. Grant”), Brent Jarvis (“Mr. Jarvis”), Daniel Kerr (“Mr. Kerr”), Randy Marchant (“Mr. Marchant”), Peter Plathan (“Mr. Plathan”) and Daniel Waugh (“Mr. Waugh”) (collectively the “Complainants”). Consequently, the Director found Mr. Rauma personally liable for up to two months of unpaid wages (vacation pay of \$4,104.91 plus accrued interest of \$320.87 for a total of \$4,425.78) pursuant to section 96 of the *Act*.
2. In this appeal, Mr. Rauma claims that the Determination was faulty because the Director erred in law in making the Determination and there is new evidence that has become available that was not available at the time the Determination was made.
3. By way of a remedy, Mr. Rauma is seeking the Tribunal to cancel the Determination.
4. As a preliminary issue, the Tribunal in this case must consider the matter of whether to extend the deadline for filing the appeal of the Director’s Determination as Mr. Rauma filed his appeal on November 9, 2009, one day after the expiration of the time limit to file an appeal set out in sections 112(3) and 122(1) and (2) of the *Act*.
5. Pursuant to Section 36 of the *Administrative Tribunals Act* (the “*ATA*”), which is incorporated in the *Act* (s.103), and Rule 17 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, this appeal including the preliminary issue of the late filing of the appeal can be adjudicated on the basis of the Section 112(5) “record”, the written submissions of the parties and the Reasons for the Determination.

ISSUES

6. The issues in this appeal are potentially three:
 1. Should the Tribunal extend the time period for requesting an appeal in this case?

If the answer to the preliminary issue above is in the affirmative then:

2. Did the Director err in law in making the Director’s Determination?
3. Is there new evidence that has become available that was not available at the time the Director’s Determination was being made, and if so, does that evidence justify cancelling the Director’s Determination?

FACTS AND ANALYSIS

7. The history of background leading to the Director's Determination is relevant and important in this appeal both in terms of deciding the preliminary issue and, if required, in deciding the merits of the substantive grounds of appeal- "error of law" and availability of "new evidence". Accordingly, I have, in addition to the section 112(5) record and the reasons for the Director's Determination, considered the Director's and the Tribunal's decisions in the earlier proceedings involving the Complainants and the corporate employer, PPP06, which necessarily relate to the Director's Determination under consideration here.
8. The Complainants were all employees of Power Pacific Poles Ltd. ("PPP") that went bankrupt in April 2007.
9. On May 24, 2007 a receiver was appointed for PPP. Thereafter, PPP06 negotiated an agreement with the receiver to operate the manufacturing plant and offered each of the Complainants employment on the same terms and conditions they were employed with PPP with one exception, namely, their employment would be for a fixed term commencing June 1, 2007, and ending on August 31, 2007. The Complainants individually accepted the offer of employment with PPP06.
10. However, subsequently, PPP06 defaulted on the said agreement and the agreement was later replaced by another agreement with a Court appointed receiver dated August 21, 2007. This agreement allowed PPP06 to operate the manufacturing plant for an undefined period.
11. The Complainants continued working for PPP06 at the manufacturing plant until October 3, 2007, five weeks past the expiry date of the fixed term contracts they entered into with PPP06, when the doors to the manufacturing plant were locked by the Court appointed receiver.
12. In or about November 2007, Standard Pole Ltd. ("Standard") took over the assets of PPP06 and all Complainants, with the exception of Mr. Plathan, took employment with Standard as of November 1, 2007.
13. On or about November 8, 2007, the Complainants filed their complaints under Section 74 of the *Employment Standards Act* (the "*Act*") alleging that PPP06 contravened the *Act* by failing to pay them regular wages, vacation pay and compensation for length of service (the "Complaint"). A delegate of the Director investigated the Complaint and received submissions and evidence from both the Complainants and PPP06 and issued a determination on August 29, 2008 (the "Corporate Determination"), finding PPP06 to have contravened Part 7, Section 58 of the *Act* in respect of the employment of the Complainants and ordered PPP06 to pay the Complainants a total sum of \$4,289.68, an amount which included both wages and interest.
14. In addition, the Director also imposed an administrative penalty on PPP06 under Section 39(1) of the *Employment Standards Regulation* (the "*Regulation*") in the amount of \$500.00. The total amount of the Corporate Determination was \$4,789.68.
15. PPP06 appealed the Corporate Determination to the Tribunal on the ground that the Director failed to observe principles of natural justice in making the Determination and sought the Tribunal to vary or cancel the Corporate Determination.
16. The Tribunal Member, in the original decision (BC EST # D008/09) made on January 14, 2009 (the "Original Decision"), reviewed the submissions of PPP06 made by Mr. Rauma, but found no support or basis for PPP06's ground of appeal and thus dismissed the appeal.
17. Dissatisfied with the result in the Original Decision, PPP06 filed a Reconsideration application on February 16, 2009. This Tribunal considered the reconsideration application and rejected it in a decision (BC EST # RD034/09) made on April 14, 2009 (the "Reconsideration Decision") on the basis that PPP06's application was

effectively a challenge of the findings of fact of the Director in the Corporate Determination and an attempt to reweigh the evidence already tendered before the Tribunal Member in the appeal of the Corporate Determination.

18. On September 4, 2009, when the Corporate Determination remained unsatisfied, the delegate of the Director conducted a corporate search of PPP06 and found that, during the period when the Complainant's wages were earned or should have been paid, Mr. Rauma was the sole listed Director of PPP06. As a result, on September 30, 2009, the delegate issued the Director's Determination finding Mr. Rauma personally liable for up to two months' unpaid wages for each Complainant. The total amount Mr. Rauma was held personally liable for in the Corporate Determination was \$4,289.68 inclusive of accrued interest.

19. Attached to the Director's Determination was a Notice to Directors/Officers stating:

If a Determination is issued against a director/officer of a company, the director/officer may not argue the merits of the Determination against the company by appealing the director/officer Determination.

There are only three grounds on which a Determination made against a director/officer may be appealed:

- 1) That the person appealing was not a director/officer of the company at the time wages were earned or should have been paid;
- 2) That the calculation of the director/officer's personal liability is incorrect; and/or
- 3) That the director/officer should not be liable for the penalty, where the penalty has been assessed, on the grounds that he or she did not authorize, permit or acquiesce in the company's contravention.

20. As noted earlier, Mr. Rauma filed his appeal of the Director's Determination on November 9, 2009, one day after the expiry of the time limit for filing an appeal. As a result, this Tribunal needs to consider the question of whether or not to extend the time limit for filing the appeal before deciding to consider the substantive grounds of appeal raised by Mr. Rauma in the appeal. In this regard, it should be noted that the Tribunal has repeatedly stated in past decisions that the following list of factors or questions (which by no means constitute an exhaustive or exclusive list) may be considered by the Tribunal in deciding whether an extension of time to file an appeal of a determination should be granted:

1. Is there a good reason why the appellant could not meet the deadline?
2. Was there an unreasonably long delay in filing the appeal?
3. Did the appellant always intend to appeal the determination?
4. Were the respondents aware of the appellant's intent to appeal?
5. Would extending the appeal deadline harm the Respondents' case?
6. Does the appellant have a strong case that might succeed if the Tribunal grants an extension?

21. These questions, it should be noted, are not conjunctive, in that an applicant requesting an extension of the deadline to file an appeal or a respondent opposing an extension need not show that the answer to each question above supports its respective position to obtain a favourable ruling from the Tribunal on the extension question. The Tribunal's task is to review the parties' submissions on these questions (as well as any other relevant evidence) as whole and to determine whether or not, on the balance, the answers favour granting or rejecting an extension.

22. Having said this, Mr. Rauma, in his submissions on the preliminary issue, states that he was delayed in filing his appeal of the Director's Determination because he was "dealing with a family illness" which required

hospitalization of his father. In addition, he states that there was a severe storm in the Fraser Valley area (presumably where he lives or has an office) that led to a power outage and disabled the memory on his fax machine and led him to believe that the appeal he faxed in was actually sent when in fact it was “sitting in the out tray” of his fax machine.

23. With respect to the length of the delay in filing the appeal, Mr. Rauma notes that he sent the appeal at 1:19 p.m. on November 9, 2009, and according to his account, the Appeal was delayed by only five hours as the Tribunal begins its business day at 8:00 a.m. Thus, there was not an unreasonably long delay in filing the appeal, according to Mr. Rauma.

24. With respect to the question of whether he intended to appeal the Director’s Determination, Mr. Rauma produced an email dated October 23, 2009, he sent to Mr. Greg Jiyobu (“Mr. Jiyobu”) of the Employment Standards Branch. Mr. Jiyobu was purportedly in charge of collections pertaining to the award made in the Director’s Determination. In this email, Mr. Rauma, *inter alia*, expresses his intention to file his appeal.

25. With respect to whether other parties (here the Complainants and the delegate who wrote the Director’s Determination) were aware of his intention to appeal the Director’s Determination, Mr. Rauma states that he had no communication with either the Complainants or the delegate regarding his intention to appeal.

26. As concerns the question of any hardship extending the deadline to appeal would cause the Respondents’ case, Mr. Rauma states that there would not be any harm as the appeal was filed “the morning of the following business day” (which statement may be an innocent error as Mr. Rauma has previously admitted that the appeal was filed at 1:19 p.m. on November 9, 2009).

27. With respect to the final factor or question, namely, whether Mr. Rauma has a strong case that might succeed if the Tribunal grants the extension, Mr. Rauma submits first, that there has been a “miscalculation of amounts already paid to Mr. Plathan”, one of the Complainants. Here, it appears that Mr. Rauma is referring to his earlier submissions on the substantive grounds of appeal wherein he states that Mr. Plathan “was advanced payroll loans that were never repaid and is in possession of [Mr. Rauma’s] \$65,000.00 asset that he has refused or neglected to return”.

28. Mr. Rauma also submits on this last consideration on the preliminary issue:

... the factory was under the control of the Interim Receiver Price Waterhouse Cooper (PWC) who granted a license to Power-Pacific Poles (2006) Inc. to operate in the premises but only in the capacity as a landlord. Annacis Enterprises and Dean Dricos, its President, had control of the cash flow, scheduling of hours and holidays and remittance of all source deductions. Dean Dricos worked in a cloak and dagger scheme with Rick Cox in the attempt to buy the assets from the interim receiver without any of my input or knowledge. As such, I did not acquiesce to the contravention of the *act*, as a matter of fact I was precluded from participating in the daily activities by way of the agreements produced and enforced by PWC. I was not a bank signatory it is my understanding the majority of all payroll was paid directly from the accounts of Annacis Enterprises or Dean Dricos’ personal account and to Rick Cox, who converted payments from Dean Dricos or Annacis to his own benefit which only came to my attention after the fact. I am not privy to any accounting or cash payments made to themselves or others and have only provided information that was never in my care, custody or control.

The determination was arbitrarily made on the sole basis of the office I hold. I have produced hundreds of documents, agreements, cancelled cheques and supporting documents I have acquired supporting my claims which were never even reviewed in this determination. The fact that I was a director was the sole factor of that decision. [sic]

29. In response to Mr. Rauma’s submissions on the preliminary issue, the Director takes no position on the first five questions or factors relevant for the Tribunal’s consideration but submits on the final question that Mr. Rauma is

inappropriately raising the matter of miscalculation of amounts paid to one of the Complainants, Mr. Plathan, which the Director contends is an issue relating to the Corporate Determination and not the Director's Determination.

30. The Director also submits that Mr. Rauma's submissions relating to his lack of participation or knowledge of any events that resulted in the contraventions of the *Act* by PPP06 are not relevant in this case as "Mr. Rauma's liability as a Director does not flow from his knowledge of the events that resulted in the complainants not being paid outstanding vacation pay (but instead) it flows from his status as a director of PPP06." In the circumstances, the Director states that the Tribunal should not extend the time for filing the appeal, as Mr. Rauma has not shown a strong case that might succeed if an extension were granted to appeal.
31. Having reviewed both Mr. Rauma's and the Director's submissions on the preliminary issue, I am not, on the first 5 questions or factors relevant to the Tribunal's decision on the extension issue persuaded to reject an extension of the deadline to appeal but I am based on the 6th and final question, which in this case is perhaps the most substantive of the questions- i.e. does Mr. Rauma have a strong case that might succeed if the Tribunal grants an extension? On this last question, I am necessarily led to review the substantive submissions of Mr. Rauma in the appeal to get a better sense of the strength of his case and having done so, I find myself in agreement with the Director that the gist of Mr. Rauma's appeal is based on his dispute with the Corporate Determination. This is evidenced in the second paragraph of his appeal submissions where he states:
- The determination of the Director of Employment Standards is incorrect in the assignment of liability of any purported outstanding amounts owing to past employees of Power-Pacific Poles (2006) Inc. (PPP06) and the predecessor Power-Pacific Poles Ltd. (PPP) which was adjudged bankrupt May 24th 2007.
32. In the balance of his appeal submissions, Mr. Rauma reviews the employment history of the 6 former employees, the Complainants, and alleges that they worked under the direction of Mr. Dean Dricos ("Mr. Dricos") and Mr. Ricky Lane Cox ("Mr. Cox"). He further states that Mr. Dricos and Mr. Cox "transacted business without [his] authority or knowledge" and "collected receivables for their own personal use without [his] authority or knowledge" and "recorded and paid wages and took all liability of the operation of the premises" and essentially kept him from the goings on in the operation.
33. Whatever treatment Mr. Rauma was afforded by Messrs Cox and Dricos in the business and whatever issue Mr. Rauma may have with the Corporate Determination, neither is relevant in the appeal of the Director's Determination.
34. It is important to note that nowhere in his appeal submissions does Mr. Rauma address the three available grounds on which a determination made against a director may be appealed of which he had notice of in the Director's Determination under a bold heading "Notice to Directors/Officers". More specifically, in his submissions, Mr. Rauma does not dispute the Director's finding that he was a director of PPP06 at all material times when the wages were earned or should have been paid to the Complainants, although he claims that Messrs. Dricos and Cox were "*de facto* directors [sic]" (although I am not certain and it is unclear in the submissions if Mr. Rauma is alleging that they were *de facto* directors of PPP06). Even if Messrs. Dricos and Cox were *de facto* directors of PPP06, this does not reduce any responsibility of Mr. Rauma under section 96 of the *Act*, as he was still the director of PPP06 at the material time in question.
35. Further, Mr. Rauma also does not seriously dispute that the calculation of his personal liability as a director of PPP06. He does, however, revisit the matter of whether PPP06 is liable for the amounts found owing in the Corporate Determination but this is neither relevant nor an appropriate basis to appeal the Director's Determination.

36. Lastly, the penalty assessed against PPP06 pursuant to section 29 of the *Regulation* does not comprise part of the Director's Determination and therefore it is neither an issue in this appeal nor referred to by Mr. Rauma.
37. In my view, in light of Mr. Rauma's failure to address any of the limited available grounds for challenging the Director's Determination, I find that Mr. Rauma does not have a strong case that might succeed if the Tribunal grants him an extension of time to appeal. This factor or conclusion, in my view, on the balance, outweighs the other factors I have considered on the preliminary issue and is determinative in my decision to reject Mr. Rauma's request to extend the time to appeal.
38. If I were wrong in my decision on the preliminary issue, I would nevertheless dismiss Mr. Rauma's appeal for failing to provide persuasive and compelling evidence of any error of law on the part of the Director in the Director's Determination. More specifically, I find no error in the delegate's interpretation of section 96 of the *Act* which provides that a person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned and should have been paid is personally liable for up to two months' unpaid wages for each employee. I also find no error in the delegate's conclusion that Mr. Rauma was a director of PPP06 at the time the wages owed to the Complainants were earned or should have been paid or that Mr. Rauma is personally responsible for up to two months' wages, in this case totalling \$4,425.78 inclusive of accrued interest.
39. I also find that there is no basis for Mr. Rauma to invoke the "new evidence" ground of appeal in this case. I find that Mr. Rauma is simply appealing the Corporate Determination again (having been unsuccessful in two previous tries in the appeal of the Corporate Decision and subsequently his appeal of the Original Decision by way of a failed reconsideration application).
40. I also reiterate that Mr. Rauma does not address the three limited grounds on which an appeal of a determination against a director may be made. This is equally fatal to his appeal.
41. Finally, I also note that there is no evidence adduced by Mr. Rauma that would successfully extinguish his liability under section 96(1) of the *Act* by virtue of the operation of one or more of the statutory defences to director liability for unpaid wages in section 96(2) of the *Act*.

ORDER

42. I decline to exercise my discretion to extend the appeal period. Accordingly, pursuant to section 114(1)(b) of the *Act*, this appeal is dismissed.

Shafik Bhalloo
Member
Employment Standards Tribunal