



An appeal

- by -

Ralph Hanneke a Director or Officer of 0888231 B.C. Ltd carrying on business as
RDH Construction
("Mr. Hanneke")

- 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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2011A/166

DATE OF DECISION: January 26, 2012

DECISION

SUBMISSIONS

Ralph Hanneke	on his own behalf
Anthony Osborne	on his own behalf
Amanda Clark Welder	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Ralph Hanneke (“Mr. Hanneke”) of a Determination that was issued on October 19, 2011, by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Mr. Hanneke was a director of 0888231 B.C. Ltd. carrying on business as RDH Construction (“0888231”), an employer found to have contravened provisions of the *Act*, at the time wages owed were earned or should have been paid and as such was personally liable under section 96 and section 98(2) of the *Act* for an amount of \$3,050.59, an amount which included wages, interest and administrative penalties.
2. In this appeal, Mr. Hanneke says the Director erred in law and failed to observe principles of natural justice in making the Determination. He seeks to have the liability imposed against him in the Determination cancelled.
3. The Tribunal has reviewed the appeal, the submissions and the material submitted by the parties, including the Section 112 (5) record filed by the Director, and has determined this appeal can be decided from the material in the file.

ISSUE

4. The issues in this appeal are whether Mr. Hanneke has shown the Director has committed a reviewable error and that the Determination should be cancelled.

THE FACTS

5. The facts relating to this appeal are brief.
6. Anthony Osborne (“Mr. Osborne”) filed a complaint with the Director, alleging 0888231 had contravened the *Act* by failing to pay all wages owed and making unauthorized deductions from his wages. The Director investigated the complaint and, on April 29, 2011, issued a Determination against 0888231 (the “corporate Determination”). The corporate Determination found 0888231 was liable for wages and interest in the amount of \$1,034.34 and administrative penalties in the amount of \$2000.00.
7. The corporate Determination specifically considered who was Mr. Osborne’s employer for the purposes of the *Act* and found that to be 0888231. The corporate Determination was sent to the registered and records office of 0888231 and to its listed director, Mrs. Intan Hanneke (“Mrs. Hanneke”), and to Mr. Hanneke. No appeal of the corporate Determination was filed.

8. A BC On-line search conducted by the Director on March 16, 2011, showed 0888231 was incorporated on August 16, 2010, and listed Mrs. Hanneke as the sole director of the company. The Director found Mrs. Hanneke was a director of 0888231 during the time Mr. Osborne's wages were earned or should have been paid and issued a Determination against her. Mrs. Hanneke has appealed that Determination and that appeal has been dismissed.
9. In the Determination under appeal here, the Director considered whether Mr. Hanneke, although not listed as a director or officer in the corporate records, should be considered a *de facto* director for the purposes of the *Act* and held personally liable for the wages owed to Mr. Osborne.
10. The Director examined the evidence of the functions, tasks and duties performed by Mr. Hanneke in the affairs and business of 0888231 and found he was the controlling mind of the affairs and business of the company. This conclusion was based on the evidence of his role in the company, his hiring of Mr. Osborne, his setting the terms of Mr. Osborne's employment, his representation to the Director that Mrs. Hanneke had "nothing to do with the business" and other facts and factors indicating he held the decision making authority for the company sufficient to influence its affairs and interests.
11. The Director also found evidence to conclude that Mr. Hanneke had permitted or acquiesced in a contravention of the *Act* and was personally liable for the administrative penalties imposed in the corporate Determination.
12. The section 112(5) Record indicates efforts were made by the Director to notify 0888231 and Mr. Hanneke of the complaint and the investigation. The corporate Determination was successfully delivered to the business address of 0888231. The address being used by Mr. Hanneke for this appeal is the same address to which the Determination under appeal was delivered.

ARGUMENT

13. Mr. Hanneke has grounded his appeal in an alleged error of law by the Director and a failure by the Director to observe principles of natural justice. He has identified the Director's conclusion that 0888231 was Mr. Osborne's employer and that he was a director or officer of the company as errors of law. In respect of the natural justice ground, he says he was never served with any registered mail from the Director concerning the matter of Mr. Osborne's claim. His appeal submission also contains the assertions that he hired Mr. Osborne "personally" as his "personal driver", that he paid Mr. Osborne "in full" for the work he did, that Mr. Osborne fabricated some of his hours and his terms of employment and that 0888231 was incorporated by Mrs. Hanneke to start a coin laundry business but the business was never developed or commenced because of injuries suffered by Mrs. Hanneke in a car accident.
14. Both Mr. Osborne and the Director have responded. In his response, Mr. Osborne suggests that Mr. Hanneke is not being truthful in his appeal submission. He has provided his view on several points raised by Mr. Hanneke in his appeal, but overall his response speaks to the merits of his claim against 0888231 rather than to the issues which need to be considered in an appeal of a director/officer Determination.
15. In the Director's response, an outline of the efforts made by the Director to communicate with 0888231 to discuss and obtain a response from the company concerning Mr. Osborne's complaint is provided. The efforts included telephone calls, e-mail communications and correspondence sent by registered and regular mail to the registered, records and business address of 0888231 and to Mr. and Mrs. Hanneke individually. The section 112(5) Record evidences the efforts made. The Director's response also notes that the

communications to another delegate of the Director described by Mr. Hanneke in his appeal submission occurred on July 4 and September 1, 2011. The first of these communications occurred nearly a month after the appeal period had expired and both were apparently triggered by different aspects of collection proceedings taken by the Director. In both discussions, Mr. Hanneke indicated he was going to appeal the corporate Determination, but no appeal was ever made.

16. The Director's response to the merits of the appeal notes that a director or officer challenging a liability imposed under section 96 of the *Act* is limited to arguing those issues which arise under that provision: whether the person was a director/officer when the wages were earned or should have been paid; whether the amount of the liability imposed is within the limit for which a director/officer may be found personally liable; and whether circumstances exist that would relieve the director/officer from personal liability under subsection 96(2). The Director submits there is nothing in the appeal that demonstrates any error in the Director finding Mr. Hanneke was a *de facto* director/officer of 0888231.
17. The Director says there were reasonable efforts made to notify Mr. Hanneke of the investigation and the corporate Determination. The Director notes the address to which correspondence from the Director was sent is the same address Mr. Hanneke is using on the appeal.
18. A final reply filed by Mr. Hanneke does no more than continue his challenge to the corporate Determination. Some new evidence is submitted with the reply. That evidence, even if it had relevance to the issues raised in this appeal, would not be accepted by the Tribunal for the reasons expressed in the Tribunal decisions *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03, *Tri-West Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97.
19. The material also contains a late flurry of accusations, counter accusations and insults that do not speak to any aspect of this appeal. An e-mail from Mr. Hanneke, which was delivered to the Tribunal on January 16, 2012, is one such piece of material. It arrived after the Tribunal had closed submissions and referred the file to me for decision. It contains nothing relevant.

ANALYSIS

20. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

112 (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of 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 made.*

21. It is well established that a person challenging a director/officer Determination is limited to arguing those issues which arise under section 96: whether the person was a director/officer when the wages were earned or should have been paid; whether the amount of the liability imposed is within the limit for which a director/officer may be found personally liable; and whether circumstances exist that would relieve the director/officer from personal liability under subsection 96(2). The director/officer is precluded from arguing the corporate liability: see *Kerry Steineman, Director/Officer of Pacific Western Vinyl Windows & Doors Ltd.*, BC EST # D180/96. Accordingly, the arguments that question the correctness of the corporate Determinations may not be raised in this appeal.

22. Specifically, Mr. Hanneke may not question the validity of the findings by the Director that 0888231 was Mr. Osborne's employer, what Mr. Osborne's wage rate was, what his hours were and whether he was owed wages by 0888231. The conclusions reached by the Director on all of these matters were based on findings of fact made in the corporate Determination that were never appealed and may not be challenged now.
23. The only argument made by Mr. Hanneke on the issues that arise under section 96 or section 98(2) is that he was not a director of 0888231, but even on that matter he has not framed his argument in the context of those facts and factors on which the Director based the finding that he was a *de facto* director of the company. A person may be found to be a director of a corporation even though not formally listed in the corporate registry if that person exercises functions, task and duties that are typical of a corporate director: see, for example, *Erwin Penner and Beverly Hauff*, BC EST # D371/96, and *Jim Kovacs*, BC EST # D076/97. The facts relied on by the Director in finding Mr. Hanneke was a director are supported in the material found in the section 112(5) Record, in the reasonable and logical conclusions that flow from that material and point strongly to Mr. Hanneke being the controlling mind of the company and a *de facto* director. Mr. Hanneke has not demonstrated there was any error made by the Director in this regard.
24. The material in the section 112(5) Record shows the Director made reasonable efforts to provide 0888231 and Mr. Hanneke with the particulars of the complaint, with an opportunity to present argument and evidence in response to the complaint¹ and with the corporate Determination. A party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99. The bald assertion made by Mr. Hanneke, in the face of the material in the section 112(5) Record, that he was not served is not sufficient to satisfy the burden of persuading the Tribunal there has been a failure to comply with principles of natural justice in making the Determination. In this context, I note the *Act* does not require personal service; delivery by registered mail to the person's last known address constitutes service for the purposes of the *Act*: see section 122 of the *Act*.
25. As a result of the above considerations, I find that Mr. Hanneke has failed to demonstrate any reviewable error in the Determination or provided any basis for cancelling it. The appeal is dismissed.

ORDER

26. Pursuant to section 115 of the *Act*, I order the Determination dated October 19, 2011, be confirmed in the amount of \$3,050.59, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal

¹ I note in this regard the correspondence from the Director dated April 7, 2011, which was sent by registered and regular mail to Mr. and Mrs. Hanneke, setting out the evidence received by the Director from Mr. Osborne, and the preliminary conclusions reached by the Director on that evidence, inviting a response from them and notifying them of the potential consequences of a Determination, including personal liability on them under section 96.