

An appeal

- by -

Randolph Wright, a Director of
Wright Powerline Services Inc.
("Mr. Wright")

- 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.: 2013A/88

DATE OF DECISION: February 14, 2014

DECISION

SUBMISSIONS

Nicholas Ellegood

counsel for Randolph Wright, a Director of Wright Powerline Services Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Randolph Wright (“Mr. Wright”), a Director of Wright Powerline Services Inc. (“WPS”), has filed an appeal of a section 96 determination that was issued on November 19, 2013 (the “S. 96 Determination”).
2. By way of background, on December 12, 2012, Lindsay Nagle (“Mr. Nagle”) filed a complaint under Section 74 of the *Act*, alleging that WPS, a company specializing in the service and maintenance of high-voltage power lines, contravened the *Act* by failing to pay him regular wages, compensation for length of service, vacation pay and business costs (the “Complaint”).
3. On August 20, 2013, a delegate of the Director of Employment Standards (the “Director”) conducted a hearing of the Complaint (the “Hearing”). At the Hearing, WPS was represented by counsel, as well as by Mr. Wright. After the Hearing, on August 30, 2013, the delegate issued a determination against WPS (the “Corporate Determination”) finding wages and interest were owed to Mr. Nagle totalling \$32,033.31 and also levied administrative penalties against WPS totalling \$1,500.00.
4. The Corporate Determination included a notice to Directors and Officers of WPS, explaining their potential personal liability under the *Act*. The Corporate Determination was sent to WPS by registered mail, with copies to its legal counsel, to its registered and records office, and to Mr. Wright.
5. WPS did not pay the amounts ordered in the Corporate Determination, nor appeal the Corporate Determination within the appeal period which expired on October 7, 2013.
6. On November 19, 2013, the delegate, based on a BC Online Corporate Registry search of WPS made on December 28, 2012, which indicated WPS was active and Mr. Wright was its sole Director, issued the S. 96 Determination against Mr. Wright. The S. 96 Determination held Mr. Wright personally liable for up to two months’ unpaid wages for Mr. Nagle totalling \$17,518.98, inclusive of accrued interest. However, the delegate did not find Mr. Wright personally liable for the administrative penalties as there was insufficient evidence before her to determine Mr. Wright authorized, permitted or acquiesced in the contraventions of WPS.
7. Mr. Wright, through counsel, appeals the S. 96 Determination, alleging that the delegate erred in law and failed to observe the principles of natural justice in making the S. 96 Determination and, furthermore, new evidence has become available that was not available at the time the S. 96 Determination was being made (subsections 112(1)(a)(b) and (c) of the *Act*).
8. Mr. Wright seeks to have the liability imposed on him under the S. 96 Determination cancelled.
9. Section 114(1) of the *Act* and Rule 22 of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”) permit the Tribunal to dismiss all or part of an appeal without seeking submissions from the other parties. I have

decided that this appeal is an appropriate case for consideration under section 114(1) of the *Act* and, accordingly, I will assess the appeal based solely on the S. 96 Determination, Mr. Wright's counsel's submissions, and my review of the section 112(5) "record" that was before the Director when both the Corporate Determination and the S. 96 Determination were being made.

10. If the Tribunal is satisfied that Mr. Wright's appeal, or a part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Tribunal will invite Mr. Nagle and may invite the Director to file Reply submissions on the appeal, and Mr. Wright would be afforded an opportunity to make a final Reply to those submissions, if any.

ISSUE

11. The issue in this appeal is whether Mr. Wright has shown that the S. 96 Determination should be cancelled based on any of the grounds in section 112 of the *Act* his counsel has advanced in the appeal.

THE S. 96 DETERMINATION AND THE "RECORD"

12. In the "record" provided by the Director in this appeal, I note there are two (2) corporate searches of WPS the delegate conducted and apparently relied upon in making the S. 96 Determination. The first search was conducted by the delegate on December 28, 2012. This search shows that WPS was incorporated on October 11, 2011, and its sole Director was Mr. Wright. The second search was conducted after the Hearing but before the issuance of the Corporate Determination on August 26, 2013, and it, too, showed Mr. Wright as the sole Director of WPS. Based on the submissions of the delegate in Mr. Wright's suspension application (which I have dealt with in a separate decision), the Director appears to have commenced collection efforts against WPS using West Coast Court Bailiffs, but to no avail. The Director's submissions also assert that WPS is no longer operating. The delegate, on November 19, 2013, issued the S. 96 Determination, based on the corporate searches of WPS holding that Mr. Wright was a Director of WPS at the time the wages owed to Mr. Nagle were earned or should have been paid, and ordered Mr. Wright to pay \$17,518.98 to Mr. Nagle.

SUBMISSIONS OF MR. WRIGHT

13. Counsel for Mr. Wright appeals the S. 96 Determination, alleging that the delegate breached the principles of natural justice and erred in law in making the S. 96 Determination and, furthermore, that new evidence has become available that was not available at the time the S. 96 Determination was made.
14. With respect to the natural justice ground of appeal, counsel argues that at the Hearing of the Complaint against WPS no evidence was led "for the purpose of disputing Mr. Wright's personal liability" and that Mr. Wright only attended the Hearing to give evidence as a representative of WPS and not in his personal capacity. Counsel contends that the S. 96 Determination "was made without any oral or written submissions from any party on the issue of whether or not Mr. Wright should be personally liable". According to counsel, Mr. Wright was denied the opportunity to hear the case against him and present evidence and make arguments "regarding whether or not he should be personally liable", and this is "a serious breach of natural justice".
15. Counsel further argues that the delegate erred in law in reaching her decision. Counsel contends that the delegate relied upon a company search which was conducted on December 28, 2012, and that search had "nothing to do with Mr. Nagle's original complaint against WPSI, or with whether or not Mr. Wright should be personally liable for the unpaid wages found to be owing". According to counsel, the delegate made no

finding that Mr. Wright was a Director of WPS at the time the unpaid wages were earned by Mr. Nagle and, as such, the S. 96 Determination is “wrong in law”.

16. With respect to the new evidence ground of appeal, I note that counsel argues that “the parties did not lead evidence on Mr. Wright’s status with the company, for the purpose of arguing about his personal liability”. Therefore, according to counsel, the delegate “did not hear all the evidence that could be relevant to whether or not Mr. Wright should be personally liable”. Counsel admits that, while this evidence may not be “new” as it is evidence that could have been discovered or presented at or before the Hearing, it nevertheless is evidence that is relevant, reliable and could have an effect on the delegate’s decision.

ANALYSIS

17. A person challenging a Director determination is limited to arguing those issues that arise under section 96 of the *Act*, namely:
- (i) Whether the person was a Director when the wages were earned or should have been paid;
 - (ii) Whether the amount of the liability imposed is within the limit for which a Director may be found personally liable; and
 - (iii) Whether circumstances exist that would relieve the Director from personal liability under subsection 96(2).
18. Having said this, I note that the Director may issue a section 96 determination without holding a hearing, based on the corporate records filed with, and maintained by, the Registrar of Companies. However, when an individual is recorded as a Director of a company in the records maintained by the Registrar of Companies a rebuttable presumption of fact arises that the individual actually is a Director of the company in question. As indicated by the Tribunal in *David Wilinofsky and Ron J. Wilinofsky*, (BC EST # D106/99), this presumption, however, is rebuttable by credible and cogent evidence that the Registrar’s records are inaccurate. However, the evidentiary burden of proving that one is not a corporate Director lies with the individual who denies such status.
19. In the case at hand, as indicated, counsel contends that there was a violation of Mr. Wright’s natural justice rights because no hearing was held to afford Mr. Wright an opportunity to give evidence disputing his personal liability under section 96 of the *Act*. I do not find there to have been a breach of natural justice rights of Mr. Wright. There is no requirement for the delegate to hold a hearing before making a determination under section 96. A delegate may simply rely on the corporate records filed with and maintained by the Registrar of Companies to issue a section 96 determination (see *Azam S. Tousei, a Director of Darya Construction Inc.*, BC EST # D055/13). The delegate did just that in this case, that is, rely upon the searches that showed Mr. Wright as a director of WSP and make a presumption of fact that Mr. Wright was indeed WSP’s director at the time Mr. Nagle’s wages were earned or should have been paid. This presumption is rebuttable and Mr. Wright may challenge it in the appeal, however, neither Mr. Wright nor his counsel say that the corporate records are wrong, nor do they say that Mr. Wright was not a Director at the time the wages of Mr. Nagle were earned and should have been paid.
20. Counsel also argues that the decision of the delegate in the S. 96 Determination is wrong in law because the delegate did not make any finding that Mr. Wright was a Director of WPS at the time the wages of Mr. Nagle were earned. I find that the delegate, based on the corporate searches of WPS, did make such a finding. The delegate states at page R3 of the Reasons, under the heading “Conclusion”, “I have determined that Mr. Wright was a director of WPS at the time the wages owed were earned or should have been paid and that

Mr. Wright is personally liable to pay up to 2 months' unpaid wages for Mr. Nagle". This conclusion was based on the presumption of fact made by the delegate based on her review of the corporate records of WSP showing Mr. Wright as its sole director. One would think that if Mr. Wright had any evidence to show that he was not a Director of WPS at the time Mr. Nagle's wages were earned and should have been paid then he would have said so and adduced credible and cogent evidence challenging that conclusion in his or his counsel's appeal submissions. In the circumstances, I am not persuaded that an error of law was made by the delegate in this case.

21. With respect to the new evidence ground of appeal, the governing test for allowing new evidence on appeals is delineated in *Re Merilus Technologies Inc.*, BC EST # D171/03. The appellant adducing new evidence must satisfy four conditions before the new evidence will be considered, namely:
 - 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.
22. In this case, no "new evidence" or purported "new evidence" is adduced by Mr. Wright for the Tribunal to review whether it meets the "new evidence" test in *Re Merilus Technologies* decision. Instead, counsel's focus here is again on Mr. Wright not having the ability to present at a hearing evidence of his status with WPS that "could have an effect on the Delegate's decision". However, what that evidence may be is not disclosed by counsel. Therefore, I am not persuaded that Mr. Wright has successfully made out a case under the new evidence ground of appeal.
23. In the circumstances, I find no reason to conclude there is any error in the S. 96 Determination. Pursuant to section 114(1)(f) of the *Act*, I find that Mr. Wright's appeal of the S. 96 Determination has no reasonable prospect of success.

ORDER

24. Pursuant to section 115 of the *Act*, I confirm the S. 96 Determination made on November 19, 2013, against Randolph Wright, a Director of Wright Powerline Services Inc..

Shafik Bhalloo
Member
Employment Standards Tribunal