



An appeal

- by -

Dana Harrison
a Director or Officer of DNT Enterprises Ltd.
(the “Appellant”)

- 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: Rajiv K. Gandhi

FILE No.: 2015A/140

DATE OF DECISION: January 20, 2016

DECISION

SUBMISSIONS

Dana Harrison on his own behalf as a Director or Officer of DNT Enterprises Ltd.

Kathleen Horan on behalf of the Director of Employment Standards

OVERVIEW

1. The facts underlying this appeal are somewhat convoluted.
2. On September 4, 2014, the Director of Employment Standards (the “Director”) issued a determination (the “Original Determination”) in which DNT Enterprises Ltd. (“DNT”), a British Columbia company, was found to be liable to pay to a former employee, John S. Harris (the “employee”), regular wages, overtime wages, statutory holiday pay, and annual vacation pay, according to sections 18, 40, 45, and 58 of the *Employment Standards Act* (the “*Act*”). The Director also required DNT to repay to the employee monies deducted from wages contrary to section 21 of the *Act*, and interest according to section 88 of the *Act*.
3. The aggregate liability of DNT to the employee, as at the date of the Original Determination, was \$4,418.60, plus section 88 interest, and to the Employment Standards Branch, \$3,000.00 in administrative penalties.
4. DNT did not appeal the Original Determination, and did not pay wages, interest or administrative penalties, as it was ordered to do.
5. On April 15, 2015, the Director issued a second determination (the “Second Determination”) in which Dana Harrison’s (the “Appellant”) son, Dustin Harrison, was found to be a director of DNT at the time wages should have been paid to the former employee and, as such, liable under section 96 of the *Act* to pay wages in the amount of \$4,574.51, inclusive of accrued interest.
6. The Second Determination was appealed on July 7, 2015, and cancelled by this Tribunal on September 10, 2015, following the admission of new evidence establishing that the Appellant, and not Dustin Harrison, was a director of DNT during the relevant time period (see BC EST # D094/15).
7. On September 22, 2015, the Director issued a third determination (the “Third Determination”), in which the Appellant was found to be liable under section 96 of the *Act* to pay those wages which DNT was ordered to pay in the Original Determination, together with interest calculated according to section 88 of the *Act* – \$4,657.01, in the aggregate.
8. In this appeal, the Appellant does not challenge his liability to pay. Rather, he challenges the Director’s calculation of the amount owed. Specifically, he seeks to vary the amount payable, on the basis that evidence has become available that was not available at the time the Third Determination was made – a permitted ground for appeal under section 112(1)(c) of the *Act*.
9. At this stage, I must consider whether or not it is appropriate to summarily dismiss all or part of this appeal, according to section 114(1) of the *Act*.

THE FACTS AND ANALYSIS

10. In considering this appeal, I have reviewed the Third Determination, the materials originally filed by the Appellant on October 30, 2015, the Director's Record (the "Record") submitted on November 16, 2015, and submissions from the Appellant received on November 23, 2015, and December 8, 2015.
11. In his submissions tendered December 8, 2015, the Appellant appeared to object to the completeness of the Record. However, the Appellant does not purport to say that the Director has tendered an incomplete record but, rather, the employee originally lodging the complaint, in respect of which the Original Determination was issued, failed to produce relevant information. This is not so much an objection to the Record, but a critique of the Original Determination.
12. I note that only the Third Determination is under appeal. At this stage, the Tribunal has no authority to upset the findings of the Director with respect to Original Determination, or the amount originally found to be due and payable by DNT. (Those findings are included at pages 43 to 46 of the Record.)
13. I make the point because submissions from the Appellant about the accuracy of what the former employee did or did not say, or do, are not relevant to the subject matter of this appeal.
14. Section 96(1) of the *Act* provides as follows:
- 96 (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.*
15. As noted, DNT in the Original Determination was found liable to pay wages in the aggregate amount of \$4,418.60.
16. In the Third Determination, the Director found that the Appellant was a director of DNT at the time those wages were earned or should have been paid. The Appellant does not appear to dispute that finding, nor does he seek to apply an exemption under section 96(2) of the *Act*.
17. The question to be answered, then, is whether or not \$4,418.60 is greater than what the former employee would have earned, as wages, in the span of two months? If it is greater, the personal liability of the Appellant under section 96 of the *Act* would be limited to two months' wages. If it is less, the personal liability of the Appellant under section 96 of the *Act* would equal the amount found to be due and owing, in the Original Determination, as wages.
18. The Director's calculation is found in the last paragraph starting at the bottom of page R3 of the Third Determination and is based on the premise that the employee's earning would have been – on average - \$819.63 per week, or \$7,103.52 for a two month period. Being an amount greater than \$4,418.60, it stands to reason that the Appellant's liability is for the full amount of wages as calculated in the Original Determination.
19. The Record is not particularly easy to follow but, having reviewed it page by page, I am satisfied that the Director's conclusion is correct on the evidence, even though my own calculation of two months' wages is slightly higher.
20. In this context the Appellant seeks to introduce fresh evidence that he says would lead the Director to a different result. Respectfully, I disagree.

21. In *Davies et. al.*, BC EST # D171/03, the Tribunal held that the onus rests with an appellant to meet a strict, four part test before any exercise of discretion to accept and consider fresh evidence:
- (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. The “fresh” evidence in this case consists of several accounting statements purporting to show amounts paid to the former employee in 2013. Unfortunately, these statements do not satisfy any part of the *Davies* test.
23. The information in the statements would have been available since 2013 and there is no explanation before me with respect to why these materials could not have been put to the Director prior to the Third Determination or, for that matter, the Original Determination.
24. More importantly, the accounting statements are not relevant to the material issue or question in this appeal, which is whether or not, for the purposes of calculating liability under section 96 of the *Act*, the amount determined to be payable in the Original Determination is less than, equal to, or greater than two months’ wages.
25. Even if I were to accept the statements at face value, they would not have led to a different conclusion. In fact, information in the statements would likely have led to the calculation of a higher amount with respect to what should have two months’ wages for the employee in question, thereby confirming the Director’s finding that the Appellant should be liable to pay \$4,418.60, plus interest.
26. The Appellant submits that the statements tend to show that the former employee was paid more than was claimed or ultimately found to be payable in the Original Determination and that his personal liability should be reduced, as a result. At this juncture and in this appeal, however, the findings of the Original Determination are unassailable.
27. For these reasons, I do not agree that the “fresh” evidence now before me should be admitted or that it would, in any event, change the outcome, and I conclude that this appeal has no reasonable prospect of success.

ORDER

28. This appeal is dismissed, pursuant to section 114(1)(f) of the *Act*. Pursuant to section 115 of the *Act*, I Order the Third Determination, issued on September 22, 2015, be confirmed in the amount of \$4,657.01, together with any further interest that has accrued under section 88 of the *Act*.

Rajiv K. Gandhi
Member
Employment Standards Tribunal