

An appeal

- by -

Jeong Soo Kim, a Director and Officer of Easywood Flooring Inc.
(“Mr. Kim”)

- 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.: 2012A/137

DATE OF DECISION: February 20, 2013

DECISION

SUBMISSIONS

Jeong Soo Kim

on his own behalf, a Director and Officer of Easywood Flooring Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) Jeong Soo Kim (“Mr. Kim”), a Director and Officer of Easywood Flooring Inc. (“Easywood”), has filed an appeal of a section 96 determination that was issued on October 22, 2012 (the “Section 96 Determination”) by a delegate (the “delegate”) of the Director of Employment Standards (the “Director”). The Section 96 Determination concluded that Mr. Kim was a director of Easywood, an employer found to have contravened provisions of the *Act*, at the time wages owed to Young Don Lee (“Mr. Lee”) were earned or should have been paid, and as such was personally liable under section 96 of the *Act* for an amount of \$8,986.68.
2. Further, pursuant to section 98(2) of the *Act*, the Section 96 Determination also found Mr. Kim personally liable for the administrative penalties issued against Easywood in the corporate determination issued on October 7, 2011 (the “Corporate Determination”). The penalties levied against Easywood in the Corporate Determination totalled \$3,000.00 for breaches of Part 3, sections 18, 27, and 28; Part 4, section 40; and Part 5, sections 45 and 46 of the *Act*.
3. In this appeal, Mr. Kim submits that the Director, in making the Section 96 Determination, failed to observe the principles of natural justice and he seeks to have the liability imposed against him in the cancelled.
4. 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 Section 96 Determination, Mr. Kim’s written submissions and my review of the section 112(5) “record” that was before the Director when both the Corporate Determination and the Section 96 Determination were being made.
5. I note that if the Tribunal is satisfied that Mr. Kim’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 may invite Mr. Lee and the Director to file a reply submission on the appeal, and Mr. Kim would be given an opportunity to make a final reply to those submissions, if any.

ISSUE

6. The issue in this appeal is whether Mr. Kim has shown that the Director failed to observe the principles of natural justice in making the Section 96 Determination and whether the Section 96 Determination should be cancelled.

THE FACTS

7. On June 5, 2009, Mr. Lee filed a complaint under section 74 of the *Act* alleging that Easywood contravened the *Act* by failing to pay him regular wages, statutory holiday pay, annual vacation pay and compensation for length of service (the “Complaint”).
8. A delegate investigated the Complaint. I note, based on the Reasons for the Section 96 Determination as well as the Director’s record in this appeal, Mr. Kim participated in a fact-finding session during the investigation process and provided the delegate with some evidence and information, which the delegate considered. I also note that the delegate sent a letter to Easywood, to the attention of Mr. Kim, on February 10, 2011, setting out her preliminary findings against Easywood and invited Easywood or Mr. Kim to provide a response to her preliminary findings by February 28, 2011. However, neither Easywood nor Mr. Kim responded. As a result, on October 7, 2011, the delegate issued the Corporate Determination against Easywood. The Corporate Determination included a notice to Directors and Officers of Easywood explaining their personal liability under the *Act*, and it was sent to Easywood and Mr. Kim by registered mail at the 108*** (redacted for privacy) address of Mr. Kim in Surrey which Mr. Kim provided to the Director about four months before on June 11, 2011, during the investigation of the Complaint. The appeal period for the Corporate Determination expired on November 14, 2011, and Easywood did not settle the Corporate Determination. However, on November 23, 2012, in excess of a year after the expiry date, Easywood filed its appeal of the Corporate Determination.
9. On June 9, 2009, the delegate conducted a corporate search of Easywood, which disclosed that Easywood was incorporated on January 2, 2007, and Mr. Kim was its Director and Officer. On October 12, 2012, the delegate conducted a further corporate search of Easywood, which showed that Mr. Kim continued as Easywood’s Director and Officer. The delegate relied on these searches as confirmation that Mr. Kim was a Director and Officer when Mr. Lee’s wages were earned, or should have been paid. Based on this information and pursuant to section 96 of the *Act*, the delegate issued the Section 96 Determination on October 22, 2012, holding Mr. Kim personally liable for up to two (2) months’ unpaid wages of Mr. Lee. The delegate also found that Mr. Kim, pursuant to section 98(2) of the *Act*, permitted or acquiesced in Easywood’s contravention of the *Act* and was, therefore, personally liable for the administrative penalties issued to Easywood in the Corporate Determination.

ARGUMENT

10. Mr. Kim has grounded his appeal of the Section 96 Determination as a failure by the Director to observe principles of natural justice. In his submissions, he has disclosed Easywood’s bank record from Sharons Credit Union from September 2007 to February 2009 with some highlighted entries, which appear to correspond to bank statements of Easywood previously produced in the investigation of the Complaint before the Corporate Determination was made. I also note that Mr. Kim has produced a letter of employment dated May 9, 2007, on Easywood’s letterhead addressed to Mr. Lee, which also was produced during the investigation of the Complaint before the Corporate Determination was made. Mr. Kim also includes T4 Statements of Remuneration Paid to Mr. Lee for 2007 to 2009 inclusive. In the Director’s record in this appeal, I see T4 Statements for Mr. Lee for 2007 to 2008 inclusive, but not 2009. Supplementing the above-mentioned documents is a brief written submission of Mr. Kim in which he states that Easywood closed its operations on March 1, 2009, and paid Mr. Lee fully the salary referred to in the labour market opinion document (a copy of which is produced by Mr. Kim in the appeal). Mr. Kim disagrees that Easywood owes Mr. Lee anything, and submits that the evidence showing Mr. Lee has been paid in full is in the T4 documents and the bank statements he has submitted with his appeal. He urges the Tribunal to cancel the Section 96 Determination.

ANALYSIS

11. A person challenging a director/officer determination is limited to arguing those issues that arise under section 96 of the *Act*, namely:
 - (i) Whether the person was a director/officer 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/officer may be found personally liable; and
 - (iii) Whether circumstances exist that would relieve the director/officer from personal liability under subsection 96(2).¹
12. 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). Any arguments questioning or raising the matter of the correctness of the corporate determination should not be raised in an appeal of a section 96 determination. Therefore, Mr. Kim may not challenge, in his appeal of the Section 96 Determination, the correctness of the Corporate Determination.
13. As concerns the Corporate Determination, the time for filing an appeal of that Determination expired and this Tribunal rejected Easywood's very late-filed appeal by dismissing that appeal under section 114(1)(b) and (f) of the *Act*.
14. I also note that in Mr. Kim's written submissions, he has not advanced any argument that may touch upon issues that arise under section 96 of the *Act*. He has not disputed or questioned that he was listed as a Director of Easywood at the time the wages of Mr. Lee were earned and should have been paid. He also does not dispute the amount of personal liability imposed on him under section 96 of the *Act*. This is understandable since the liability imposed on Mr. Kim is within the limit of personal liability under section 96, namely, two (2) months of Mr. Lee's wages. Mr. Kim has also not raised any issue, nor adduced any evidence, that would indicate circumstances that might exempt him from personal liability under section 96(2) of the *Act*.
15. While Mr. Kim has invoked the "natural justice" ground of appeal in section 112(1)(b) of the *Act*, he has not made any substantive submissions in support of the said ground of appeal. However, I note that on page R2 of the Reasons for the Section 96 Determination attached to Easywood's appeal, there is a brief handwritten note (presumably from Mr. Kim) stating "did not receive" next to the delegate's statement that the Corporate Determination was issued on October 7, 2011. There is also another handwritten note next to paragraph 3 on the same page stating, "did not know" next to the delegate's statement that the appeal period for the Corporate Determination expired on November 14, 2011. However, in the Director's record, there is a Canada Post Registered Mail Trace Sheet showing that the Corporate Determination was sent by registered mail on October 7, 2011, to both Easywood and Mr. Kim at the 108*** address in Surrey. While there is no evidence in the record that the Corporate Determination was successfully received by either Mr. Kim or Easywood around the time it was sent, the address it was sent to at 108*** in Surrey was the address that

¹ 96(2) Despite subsection (1), a person who was a director or an officer of a corporation is not personally liable for

- (a) any liability to an employee under section 63, termination pay or money payable in respect of individual or group terminations, if the corporation is in receivership,
- (b) any liability to an employee for wages, if the corporation is subject to action under section 427 of the *Bank Act* (Canada) or to a proceeding under an insolvency Act,
- (c) vacation pay that becomes payable after the director or officer ceases to hold office, or
- (d) money that remains in an employee's time bank after the director or officer ceases to hold office.

Mr. Kim, only about four months before, on June 11, 2011, provided to the Director as his and Easywood's new address. If that address subsequently changed before the Determination was issued, the onus is on Mr. Kim and Easywood to let the Director know in a timely fashion of the change. Any failure on their part to so advise the Director, in my view, effectively forecloses Mr. Kim or Easywood from successfully arguing denial of natural justice. In the circumstances, I find it was reasonable for the delegate to have relied upon and sent to the last known address of Easywood and Mr. Kim the latter provided to the delegate only a few months before the Corporate Determination was issued.

16. I also reiterate that an appeal of the Section 96 Determination is not an opportunity to contest the merits of the Corporate Determination, but instead an opportunity to argue issues, if any, that may legitimately arise under section 96 of the *Act*. In this appeal, Mr. Kim has not raised any relevant issues that may be raised under section 96 of the *Act*. Therefore, pursuant to section 114(1)(f) of the *Act*, I find that Mr. Kim's appeal of the Section 96 Determination has no reasonable prospect of success.

ORDER

17. Pursuant to section 114(1)(f) of the *Act*, I dismiss the appeal of the Section 96 Determination made on October 22, 2012, against Jeong Soo Kim, a Director and Officer of Easywood Flooring Inc.

Shafik Bhalloo
Member
Employment Standards Tribunal