

An appeal

- by -

Harvey Malo, a Director of Foothills Acoustics Ltd.  
(“Mr. Malo”)

- 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.:** 2014A/29

**DATE OF DECISION:** April 29, 2014

## DECISION

### SUBMISSIONS

Janice Malo on behalf of Harvey Malo, a Director of Foothills Acoustics Ltd.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Harvey Malo (“Mr. Malo”), a Director of Foothills Acoustics Ltd. (“Foothills”), a company that operated in the construction business, has filed an appeal of a section 96 determination that was issued on January 29, 2014 (the “S. 96 Determination”).
2. By way of background, on December 5, 2013, Betty Kam (“Ms. Kam”), formerly a manager at Foothills, filed a complaint with the Director of Employment Standards (the “Director”) alleging that Foothills contravened the *Act* by failing to pay her wages, vacation pay and compensation for length of service (the “Complaint”).
3. On January 29, 2014, after concluding his investigation, a delegate of the Director issued a determination against Foothills (the “Corporate Determination”) finding that Foothills owed wages and interest to Ms. Kam totaling \$18,815.35. The Determination also levied an administrative penalty of \$500.00 against Foothills for contravening section 18 of the *Act* for failing to pay Ms. Kam, within 48 hours of the termination of her employment, all outstanding wages, including regular wages, compensation for length of service and vacation pay.
4. Both the Corporate Determination and the S. 96 Determination (collectively “the Determinations”) were issued at the same time because Foothills had ceased operating its construction business at the time Ms. Kam filed the Complaint, and the Director felt it was necessary to act expediently so as to secure assets and possibly afford Ms. Kam the opportunity to collect the amount awarded to her.
5. I note the Corporate Determination included a Notice to Directors and Officers of Foothills, explaining their potential personal liability under the *Act*. The Corporate Determination was sent to Mr. Malo at the business address of Foothills, as well as to Foothills’ lawyers. Foothills did not pay the amount ordered in the Corporate Determination, but appealed both Determinations, using identical submissions. The appeal of the Corporate Determination, which was dealt with separately, was dismissed (see *Foothills Acoustics Ltd.*, BC EST # Dxxx/14).
6. With respect to the S. 96 Determination, I note on December 5, 2013, the delegate conducted a BC Online: Registrar of Companies – Corporation Search, and found that Foothills was incorporated on September 29, 1988, in Alberta and, thereafter, registered in British Columbia on December 11, 1991. I also note that the delegate conducted a search of the Alberta Corporate Registration System on December 5, 2013, and discovered that Mr. Malo was Foothills’ sole Director. The search also confirmed that Mr. Malo was a Director when Ms. Kam’s wages were earned or should have been paid. As a result, the delegate issued the S. 96 Determination against Mr. Malo, holding Mr. Malo personally liable for up to two months’ unpaid wages in the amount of \$13,650.00, plus interest in the amount of \$114.44, for a total of \$13,764.44. However, the delegate did not find Mr. Malo personally liable for the administrative penalty levied against Foothills as there was insufficient evidence to conclude that Mr. Malo authorized, permitted or acquiesced in the contravention of Foothills.

7. Mr. Malo, with the assistance of his spouse, Janice Malo (“Mrs. Malo”), appeals the S. 96 Determination on the grounds that new evidence has become available that was not available at the time the S. 96 Determination was made, and seeks to have the liability imposed on him cancelled.
8. 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 Rule 22. Accordingly, I will assess the appeal based on the Reasons for the S. 96 Determination, Mrs. Malo’s submissions on behalf of Mr. Malo, and my review of the section 112(5) “record” that was before the delegate when the Determinations were being made.
9. If the Tribunal is satisfied that Mr. Malo’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 Ms. Kam and the Director to file reply submissions on the appeal, and Mr. Malo will be afforded an opportunity to make a final reply to those submissions, if any.

## ISSUE

10. The issue in this appeal is whether Mr. Malo has shown that the S. 96 Determination should be cancelled based on “new evidence”.

## THE S.96 DETERMINATION AND THE “RECORD”

11. The Director’s ‘record’ in this appeal includes both the British Columbia and Alberta corporate searches of Foothills, conducted by the delegate on December 5, 2013. The Alberta corporate search, as previously indicated, shows Foothills was incorporated on September 29, 1988, in Alberta with Mr. Malo as its sole Director. The British Columbia corporate search shows that Foothills was extra-provincially registered in British Columbia on December 11, 1991.

## SUBMISSIONS ON BEHALF OF MR. MALO

12. Mrs. Malo, on behalf of Mr. Malo, encloses medical letters from both Mr. Malo’s family physician, Dr. Kevin Oswald (“Dr. Oswald”), and his oncologist, Dr. Kong E. Khoo (“Dr. Khoo”). Mrs. Malo states in her submissions:

I have submitted doctor information that clearly indicates Harvey was not in [sic] sound mind or body to know or write a termination letter for Betty Kam.

If you require more detailed information (before making a decision) from Dr [sic] Koo (Oncologist) through the months of June-October, an extension would be required to allow time for me to get that information.

After reviewing the evidence, noting dates of doctor visits, dates of hospitalizations and radiation treatments, its [sic] evident Harvey was in critical condition from the time of discovering the tumor in June of 2013 to present time, through the closer [sic] of his company, and incapable of fulfilling his duties as owner, director and manager of Foothills Acoustics.

13. Mrs. Malo then goes on to review in more detail Mr. Malo’s medical condition, explaining that the symptoms Mr. Malo suffered as a result of his brain tumor, including the radiation treatments he underwent, took “pieces of Harvey’s memory, changed his personality and has made it incapable of him ever working again never mind, run and manage a business [sic]”. She also goes on to explain that Mr. Malo has “become

someone she does not recognize or know”. She states “[he] cannot drive a vehicle; he lost his writing skills, can’t keep thoughts straight, [has] difficulty with comprehension, has problems with balance and lots of confusion”. She also provides a summary of what sorts of actions Mr. Malo has had to take in terms of treatment since June 2013, and how his condition has deteriorated since that time.

14. I have reviewed the medical records, including letters, provided by Dr. Oswald and Dr. Khoo, and, while I do not find it necessary to review in great detail the explanations of both physicians regarding Mr. Malo’s condition here, both physicians are of the view that Mr. Malo is suffering from cancer to his brain, and his condition has been deteriorating since the summer of 2013 and that his condition is serious and he is incapable of working.
15. I also note that Mrs. Malo, in her submissions, asks why Ms. Kam has proceeded with her Complaint, and what would have persuaded her to do this. Mrs. Malo goes on to suggest the possibility that Ms. Kam was influenced by the Employment Standards Branch to pursue a larger claim than what Ms. Kam may have initially contemplated pursuing. I do not find it necessary to set out in any more detail those submissions here because I find them irrelevant.
16. Mrs. Malo concludes her submissions by asking:

Should a person be held responsible for something they had no control over? Taking advantage of Harvey’s condition, Betty knew exactly what she had to gain by not getting a termination letter. She was the *office manager*, had written termination letters in the past, she knows the rules. She could have just been thankful to Harvey for treating her like a queen the past nineteen years and moved on. I know it’s difficult to believe a person could take advantage of someone so ill for their own personal financial gain, but in the case 056-245, that’s exactly what has happened. It’s unethical what she had done, knowing the condition Harvey is in. It’s immoral.

But...unethical or not, it wouldn’t be enough for the Board to reverse the determination which is why I’ve asked his doctors to confirm what I’ve tried to tell you in the past. His illness is severe, the damage is permanent and his cancer is terminal.

17. I also note Mrs. Malo has included with her written submissions a copy of the Certificate of Judgment for the sum of \$13,764.44 attached against Mr. Malo’s property in Kelowna. This evidences that the delegate has commenced collections proceedings against Mr. Malo based on the S. 96 Determination.

## ANALYSIS

18. When challenging a determination made under section 96 of the *Act*, the applicant 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 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).
19. I note the Director may issue a section 96 determination without holding a hearing, as in this case, based on the corporate records filed with, and maintained by, the Registrar of Companies. I also note that 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. In

*David Wilinofsky and Ron J. Wilinofsky*, BC EST # D106/99, the Tribunal noted that this presumption, however, is rebuttable by credible and cogent evidence that the Registrar's records are inaccurate. The burden of proving that one is not a corporate director lies with the individual who denies such status. In this case, there is no dispute that Mr. Malo was a Director of Foothills at all material times.

20. I also note that there is no dispute with respect to the amount of the liability imposed in terms of the limit for which a Director may be found personally liable.
21. Further, none of the circumstances that would exclude liability of Mr. Malo under section 96(2) arise in this case.
22. Having said this, I do want to note that the evidence of Mr. Malo's medical condition is not lost upon me. It is most unfortunate that Mr. Malo has to battle a serious illness that has left him both physically and mentally in a very difficult predicament. However, the medical evidence which Mrs. Malo has adduced on behalf of Mr. Malo in this appeal including her own impassioned submissions about Mr. Malo's medical condition, while completely credible and believable, are not relevant or material to those issues that arise under an appeal of a section 96 determination.
23. Relatedly, the medical evidence, including Mrs. Malo's impassioned submissions, do not meet the "new evidence" test in the Tribunal's decision in *Re: Merilus Technologies Inc.*, BC EST # D171/03. The evidence fails at least two of the four conjunctive requirements of the test, namely, the evidence is neither relevant to the issues (arising under section 96 of the *Act*), nor does the evidence 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 any of the issues (that arise under section 96 of the *Act*).
24. In the circumstances, I am unable to find any basis to cancel the S. 96 Determination. Pursuant to section 114(1)(f) of the *Act*, I find that Mr. Malo's appeal has no reasonable prospect of success.

## **ORDER**

25. Pursuant to section 115 of the *Act*, I confirm the S. 96 Determination made on January 29, 2014.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**