



An appeal

- by -

Timothy S. Vasko also known as Tim Vasko, a Director and Officer of
Convergent Media Network Ltd., Convergent Media Network Ltd. carrying on
business as CMaeON Connected Market Enterprises on Demand and 1 To 1 Real
Process Technology Ltd.

(“Mr. Vasko”)

- 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.: 2017A/20

DATE OF DECISION: March 21, 2017

DECISION

SUBMISSIONS

Timothy S. Vasko also known as Tim Vasko on his own behalf as a director and officer of Convergent Media Network Ltd., Convergent Media Network Ltd. carrying on business as CMaeON Connected Market Enterprises on Demand and 1 To 1 Real Process Technology Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Timothy S. Vasko also known as Tim Vasko (“Mr. Vasko”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on January 9, 2017 (the “Determination”).
2. The Determination concluded that Mr. Vasko was a director and officer of Convergent Media Network Ltd., Convergent Media Network Ltd. carrying on business as CMaeON Connected Market Enterprises on Demand and 1 To 1 Real Process Technology Ltd. (collectively “the Employers”), an employer found to have contravened provisions of the *Act*, at the time wages were earned or should have been paid to Julius Epman (“Mr. Epman”) and, as such, was personally liable under section 96 of the *Act* for an amount of \$9,672.27 inclusive of accrued interest pursuant to section 88 of the *Act*.
3. In his Appeal Form, Mr. Vasko has checked off two boxes for grounds of appeal, namely, the Director breached the principles of natural justice in making the Determination and new evidence has become available that was not available at the time the Determination was made. He is seeking the Employment Standards Tribunal (the “Tribunal”) to cancel the Determination.
4. In correspondence dated February 21, 2017, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending review of the appeal by the Tribunal and, following such review, all or part of the appeal might be dismissed.
5. On February 22, 2017, the Director sent the section 112(5) record (the “Record”) to the Tribunal and the Tribunal sent a copy of the same to Mr. Vasko. Mr. Vasko was provided an opportunity to object to its completeness. No objection to the completeness of the Record has been received and, accordingly, the Tribunal accepts it as being complete.
6. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I am assessing this appeal based solely on the Determination, the Reasons for the Determination (the “Reasons”), the Appeal Form, the written submissions made by Mr. Vasko and my review of the Record that was before the Director when the Determination was being made. Under section 114 of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons listed in subsection 114(1). If satisfied the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, Mr. Epman and the Director will be invited to file further submissions. On the other hand, if it is found the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

ISSUE

7. The issue to be considered at this stage of the proceeding is whether the appeal should be dismissed under section 114(1) of the *Act*.

THE FACTS

8. Mr. Epman filed a complaint under section 74 of the *Act* alleging that the Employers contravened the *Act* by failing to pay him all wages (the “Complaint”). The Director held a hearing of the Complaint and, on May 18, 2016, issued a determination against the Employers (the “corporate determination”) which found the Employers liable for wages to Mr. Epman in the total amount of \$12,283.53 inclusive of interest. The Director also imposed an administrative penalty on the Employers in the amount of \$3,000.00 pursuant to section 29 of the *Employment Standards Regulation* (the “*Regulation*”). It was further determined the Employers were jointly and severally liable for the payment of the wages to Mr. Epman pursuant to section 95 of the *Act*.
9. The corporate determination, which included a notice to directors and officers explaining their personal liability under the *Act*, was sent to each of the Employers with copies to the registered and records office and to the directors and officers.
10. The Employers appealed the corporate determination and, on October 19, 2016, the Tribunal dismissed the appeal but varied the total amount of wages owed to Mr. Epman to \$12,559.31 plus accrued interest of \$194.16 for a total of \$12,753.47.
11. Pursuant to a garnishing order served on the Employer’s bank, to date, the Employers have only paid \$2,595.16 of the corporate determination with \$10,158.31 remaining unpaid.
12. On January 20, 2016, the delegate conducted a BC Online: Registrar of Companies – Corporation Search of Convergent Media Network Ltd. (“Convergent”) which showed that Convergent was incorporated on December 22, 2015, and Mr. Vasko was listed as a director and an officer.
13. On January 4, 2017, the delegate conducted a further BC Online corporate search of Convergent, which confirmed that Mr. Vasko was still listed as a director and an officer.
14. On March 1, 2016, the delegate conducted a BC Online: Registrar of Companies – Corporation Search of 1 To 1 Real Process Technology Ltd. (“Real Process”) which showed that Real Process was incorporated on April 8, 2008, and Mr. Vasko was listed as a director and an officer. A further search conducted on January 4, 2017, confirmed that Mr. Vasko continued to be listed as a director and an officer of Real Process.
15. All of the above corporate searches of the Employer confirmed that Mr. Vasko was a director and an officer of the Employers between November 10, 2014, and October 15, 2015, when Mr. Epman’s wages were earned or should have been paid.
16. As a result, the delegate issued the Determination against Mr. Vasko, holding the latter personally liable for up to two (2) months’ unpaid wages owing to Mr. Epman including vacation pay thereon totaling \$9,360 plus interest to date.
17. As there was insufficient evidence to indicate that Mr. Vasko authorized, permitted or acquiesced in contravention of the *Act*, he was not found liable for the administrative penalty levied against the Employers.

18. Mr. Vasko appeals the Determination based on the “natural justice” and “new evidence” grounds of appeal, and is seeking the Tribunal to cancel the Determination.

SUBMISSIONS OF MR. VASKO

19. Together with his written submission on the merits of the appeal, Mr. Vasko attaches an Independent Service Agreement between Mr. Epman and Real Process and “affiliated companies” (the “Agreement”), which Mr. Vasko appears to have signed on behalf of the companies. He also attaches a copy of the Notice of Claim filed by the Employers against Mr. Epman on June 27, 2016, in the Provincial Court of British Columbia (Small Claims Court) claiming damages or “Contract Payments” and filing and service fees totaling \$25,176 (the “Small Claim Action”).
20. In the written submissions, Mr. Vasko argues that the Determination finding him personally liable is wrong because the calculation of the amount owing to Mr. Epman cannot be made until the Employer’s Small Claim Action is heard and a judgment is delivered. He states the “Company has a valid right to due process in the Court of British Columbia” and the “contractual rights of the Company must be heard under due process...” first. In the Small Claim Action, the Employers are alleging, among other things, fraudulent misrepresentations on the part of Mr. Epman and breach of the Agreement. Mr. Vasko states the Agreement contains an indemnity clause in favour of the Employer. He states the Small Claim Action of the Employers is for an amount in excess of that awarded Mr. Epman in the Determination. He anticipates that a judgment in favour of the Employers in the Small Claims Action will either result in nothing owing to Mr. Epman or require an offset against any amounts owing to the latter. In the circumstances, he submits that he “cannot be considered to have a personal liability” and the Determination should be cancelled.
21. I also note that Mr. Vasko, in his submissions, states that he “should not be liable for the penalty”. He is, I think, referring to the matter of the administrative penalties levied against the Employers in the corporate determination pursuant to the *Regulation*. I think Mr. Vasko may have misread the Determination as the Determination did not levy any administrative penalties against him as a director and officer of the Employers.

ANALYSIS

22. Section 96 of the *Act* provides as follows:

Corporate officer’s liability for unpaid wages

- 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.
- (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,
- ...

23. It is settled law in the Tribunal’s decisions that in an appeal of a determination made under section 96 of the *Act* the appellant is limited to arguing only those issues that arise under section 96 of the *Act*, namely:

- Whether the person was a director when the wages were earned or should have been paid;
- Whether the amount of liability imposed is within the limit for which a director may be found personally liable;
- Whether circumstances exist that would relieve the director from personal liability under subsection 96(2).

24. It is also settled law that the director/officer is precluded from arguing the corporate liability in an appeal of a section 96 determination (see *Kerry Steinemann, Director/Officer of Pacific Western Vinyl Window & Doors Ltd.*, BC EST # D180/96). Therefore, Mr. Vasko may not make any submissions questioning or raising the matter of the correctness of the corporate determination in this appeal.
25. In this case, I do not find Mr. Vasko arguing any issues that arise under section 96 of the *Act*. He does not dispute that he was a director and officer of both Employers when the wages were earned or should have been paid to Epman.
26. I also note that Mr. Vasko does not dispute whether the amount of liability imposed on him is within the limit for which a director may be found personally liable. Instead, he raises the issue of a potential judgment the Employers may get in the Small Claim Action against Mr. Epman that may extinguish the Employers' liability for any wages to Mr. Epman or call for an offset against the amount awarded to Mr. Epman and thus impact his liability, if any, under section 96. In my view, the Employers' Small Claims Action and whether or not the Employers are triumphant in that action and whether or not they are entitled to any contractual indemnity from Mr. Epman are all irrelevant considerations under section 96 or in an appeal of a section 96 determination.
27. Finally, I note Mr. Vasko also does not adduce any evidence that indicates circumstances that might exempt him from personal liability under section 96(2) of the *Act*.
28. In the circumstances, I am not persuaded that Mr. Vasko has established any basis for me to interfere with the Determination. I further note that while Mr. Vasko has appealed under the "natural justice" and the "new evidence" grounds of appeal, I do not find there is any support in his submissions for either of these grounds of appeal. In the result, I find that Mr. Vasko's appeal of the Determination has no reasonable prospect of any success, and I dismiss it pursuant to section 114(1)(f) of the *Act*.

ORDER

29. Pursuant to section 115 of the *Act*, I order the Determination, dated January 9, 2017, be confirmed, together with any interest that has accrued under section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal