

An appeal

- by -

Jonathon Daniel Slamko, Director of 0826765 BC Ltd. carrying on business as
Biothera Clinics

(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: Carol-Ann Hart

FILE No.: 2011A/6

DATE OF DECISION: March 31, 2011

DECISION

SUBMISSIONS

| | |
|-------------------|---|
| Alfred Catalina | on behalf of Jonathan Daniel Slamko |
| Karen Eisenzimmer | on her own behalf |
| Megan Roberts | for of the Director of Employment Standards |

OVERVIEW

1. This is an appeal by Jonathon Daniel Slamko, Director of 0826765 BC Ltd. (the “Appellant” or “Mr. Slamko”), pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), of a Determination of the Director of Employment Standards (the “Director”) issued on December 2, 2010 (the “Determination”).
2. In the Determination, the Delegate concluded that Mr. Slamko was a director of 0826765 BC Ltd., an employer found to have contravened provisions of the *Act* and the *Regulation*. Mr. Slamko was found to be personally liable under section 96 of the *Act* for wages and interest in the amount of \$2901.56 and under section 98(2) of the *Act* for the mandatory administrative penalties imposed on 0826765 BC Ltd. carrying on business as Biothera Clinics in the amount of \$1500.00.
3. A determination dated December 2, 2010 was issued against 0826765 BC Ltd. carrying on business as Biothera Clinics (the “Corporate Determination”). In the Corporate Determination, the Delegate for the Director (the “Delegate”) found that compensation for length of service in the amount of \$1248.00, and vacation pay of \$1611.56 was owing to Karen Eisenzimmer by 0826765 BC Ltd. carrying on business as Biothera Clinics (“Biothera Clinics”). Three mandatory administrative penalties of \$500.00 each were imposed under section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) for contraventions of sections 58 and 63 of the *Act*, and s. 46 of the *Regulation*.
4. In this appeal, Mr. Slamko contends that there is new and relevant evidence, and appears to challenge the merits of the Corporate Determination. He requests that the Determination be changed or varied.
5. The Corporate Determination was also appealed by 0826765 BC Ltd. carrying on business as Biothera Clinics, and that appeal has been dismissed.

FACTS

6. According to the Determination, as of November 15, 2010, Mr. Slamko was listed as the sole director of 0826765 BC Ltd. pursuant to the BC OnLine Corporate Registry. He was a director at the time the wages found owing in the Corporate Determination were earned and payable, and the outstanding wages and penalties had not been paid. The Delegate wrote that the Determination and the Corporate Determination were issued on the same date because neither Biothera Clinics nor Mr. Slamko had participated in the investigation.
7. The Corporation Determination sets out that initially, a complaint was filed by Karen Eisenzimmer, alleging that her former employer had failed to pay vacation pay and compensation for length of service, in contravention of the *Act*. Ms. Eisenzimmer was employed as a Laser Technician and Receptionist for Biothera Clinics, a laser hair therapy clinic, from May 5, 2008 until May 7, 2010, when her employment was terminated. The employer dismissed Ms. Eisenzimmer without notice or pay in lieu of notice.

8. An investigation was conducted by the Delegate. Biothera Clinics contended that Ms. Eisenzimmer was trying to steal two hair lasers worth several hundred dollars each, and consequently, her employment was terminated for cause. Ms. Eisenzimmer maintained that she had not attempted to steal the lasers, and therefore Biothera Clinics had terminated her employment without cause.
9. The Delegate determined that Biothera Clinics did not have just cause to terminate the employment of Ms. Eisenzimmer; and compensation for length of service, vacation pay, and interest were found to be owing to Ms. Eisenzimmer.
10. The Delegate noted in the Determination that despite the requests and demands made to the employer and Mr. Slamko for records, and the time in which to provide the records being extended; Biothera Clinics and Mr. Slamko did not provide the records or any documentation during the investigation.

ISSUE

11. The first issue in this case is whether the appeal period should be extended.
12. The second issue is whether the Determination should be changed or varied on the basis that there is new evidence which was not available at the time the Determination was being made?

ANALYSIS

Should the period in which to file the appeal be extended?

13. The appeal was filed on January 11, 2011, which was one day following the expiry of the period in which to appeal. Under section 109(1)(b) of the *Act*, the Tribunal may extend the time for requesting an appeal, even though the appeal period has expired. The appellant has the onus of establishing that the period in which to file an appeal should be extended.
14. In a letter dated January 11, 2011 written by Melissa Pearson, Assistant Program Coordinator, Biothera Clinics, a request was made for an extension of time to file the appeal on the basis that written statements and documentation from an accountant had not been received. It was noted that the deadline for filing the appeal fell on a Monday, and the clinic was closed on Mondays.
15. The Delegate noted that the appeal was filed one day late, despite the fact that Mr. Slamko was given repeated opportunities to provide the evidence which had subsequently been submitted in support of the appeal. She indicated that the Director would not take any position on accepting the late appeal.
16. The Tribunal has held consistently that it should not grant extensions under Section 109(1)(b) as a matter of course, and it should exercise its discretionary powers only where there are compelling reasons to do so. There was no compelling reason to extend the appeal period put forward in this case. Efforts should have been made to ensure that all evidence was available so that it could be provided before the expiry of the appeal period. In any event, I have determined, as set out below, that the appeal would not succeed on its merits.

Should the Determination be changed or varied on the basis that there is new evidence which was not available at the time the Determination was being made?

17. On appeal of a determination of personal liability of a director under s. 96 of the *Act*, the issues which may be contested are: whether the person was a director at the time the wages were earned and should have been

paid, and whether the amount of the determination falls within the maximum of two-months' unpaid wages. In the Appeal Form and the documentation attached, Mr. Slamko has not contested the findings made on these issues. There are exceptions to personal liability of directors for unpaid wages set out in s. 96(2), but none of those exceptions is applicable in this case.

18. Concerning s. 98(2) of the *Act*, and the mandatory administrative penalties, the argument must be limited to whether the director authorized, permitted or acquiesced in the contravention of the *Act* or Regulations which led to the imposition of the penalties. (See *Mitton*, BC EST # D025/06).
19. In *Styro-Mold Manufacturing*, BC EST # D076/07, the policy reasons for limiting the issues which may be raised by directors on appeal were outlined as follows, at page 4:

The policy reason underlying this approach is that the enforcement mechanisms of the *Act* are meant to operate quickly and inexpensively, and permitting corporate directors to re-litigate a finding of corporate liability would undermine the fulfillment of that goal.

20. Mr. Slamko maintained in his statement filed with the appeal that he was not at the office on the date that Karen Eisenzimmer was terminated for theft. This evidence is insufficient to avoid a finding of liability for penalties pursuant to section 98(2) of the *Act* on the basis that he, as a director, authorized permitted or acquiesced in the contraventions of the *Act* and the *Regulation*. The Record shows that there were many communications between the Delegate and Mr. Slamko prior to the Determination and the Corporate Determination being issued. On November 18 and 24, 2010, the Delegate sent to Mr. Slamko her preliminary findings on compensation for length of service, vacation pay, interest, penalties and director's liability for unpaid wages and penalties. Mr. Slamko was aware of the termination and the vacation pay issue, and permitted these matters to continue unaddressed. He did not comply with the Demand for Records issued on October 8, 2010 and he failed to provide any documentation prior to the issuance of the Determination and the Corporate Determination.
21. It is clear that the Appellant disagrees with findings of fact and conclusions reached by the Delegate in the Corporate Determination. However, the Appellant has failed to meet the onus of proving that an appeal of the Determination should be allowed; and the appeal of the Corporate Determination was unsuccessful.
22. In summary, the appeal filed by Jonathon Daniel Slamko, Director of 0826765 BC Ltd. carrying on business as Biothera Clinics is dismissed. The appeal was filed late, and the application for an extension of time to file the appeal was denied. In any event, the appeal would have been dismissed on its merits.

ORDER

23. Pursuant to section 114 of the *Act*, I order the appeal dismissed and the Determination against Jonathon Daniel Slamko, Director of 0826765 BC Ltd. carrying on business as Biothera Clinics dated December 2, 2010 is confirmed together with any interest that has accrued under section 88 of the *Act*.

Carol-Ann Hart
Member
Employment Standards Tribunal