

An appeal

- by -

Scott Kelly, a Director of Wundr Software Inc.

(“Mr. Kelly”)

- 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: David B. Stevenson

FILE No.: 2015A/24

DATE OF DECISION: April 22, 2015

DECISION

SUBMISSIONS

Scott Kelly

on his own behalf, as a Director of Wundr Software Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Scott Kelly (“Mr. Kelly”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on December 24, 2014.
2. The Determination concluded that Mr. Kelly was a director of Wundr Software Inc. (“Wundr”), an employer found to have contravened provisions of the *Act*, at the time wages owed were earned or should have been paid to Blake Fisher (“Mr. Fisher”) and Andre Lopes (“Mr. Lopes”) and as such was personally liable under section 96 of the *Act* for an amount of \$16,351.74.
3. In this appeal, Mr. Kelly submits evidence has become available that was not available when that Determination was being made.
4. 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 appeal and written submission made by Mr. Kelly and my review of the section 112(5) “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), which states:
 - 114 (1) *At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of the appeal if the tribunal determines that any of the following apply:*
 - (a) *the appeal is not within the jurisdiction of the tribunal;*
 - (b) *the appeal was not filed within the applicable time limit;*
 - (c) *the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;*
 - (d) *the appeal was made in bad faith or filed for an improper purpose or motive;*
 - (e) *the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
 - (f) *there is no reasonable prospect the appeal will succeed;*
 - (g) *the substance of the appeal has been appropriately dealt with in another proceeding;*
 - (h) *one or more of the requirements of section 112(2) have not been met.*
5. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, Mr. Fisher and Mr. Lopes will, and the Director may, 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

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

THE FACTS

7. The facts relating to this appeal are brief.
8. Mr. Fisher and Mr. Lopes filed complaints with the Director alleging Wundr had contravened the *Act* by failing to pay them all wages owed. The Director investigated the complaint and, on December 24, 2014, issued a Determination against Wundr (“the corporate determination”) which found Wundr liable for wages to Mr. Fisher and Mr. Lopes in the amount of \$19,246.32. The Director also imposed administrative penalties on Wundr in the amount of \$1,500.00. Mr. Kelly, and other directors on record, were notified of their potential liability under section 96 of the *Act* in correspondence from the Director dated November 19, 2014.
9. Wundr appealed the corporate determination. That appeal has been dismissed: see *Wundr*, BC EST # D038/15.
10. Wundr is a federally incorporated company. A search of Corporations Canada records conducted by the Director on November 19, 2014, showed Wundr was incorporated federally on July 28, 2011. Mr. Kelly was listed as a director of Wundr. The wages claimed by Mr. Fisher and Mr. Lopes were earned and/or should have been paid no later than August 8, 2014, for Mr. Fisher, and September 4, 2014, for Mr. Lopes. The Director found Mr. Kelly was a director of Wundr during the period wages were earned or should have been paid to Mr. Fisher and Mr. Lopes.
11. Based on the information acquired and the findings made, the Director concluded Mr. Kelly was liable under section 96 of the *Act* for the amount of the Determination being addressed in this decision.

ARGUMENT

12. Mr. Kelly submits evidence has come available that was not available at the time the Determination was being made.
13. In support, he has filed a copy of his resignation as a director of Wundr, dated and made effective November 17, 2014, together with an email of the same date confirming his resignation and attaching a copy of it. While he does not specifically say so, the suggestion from this evidence is that he should not be considered a director of Wundr under section 96.
14. Mr. Kelly has also submitted evidence relating to the financial position of Wundr when he joined the Board of Directors in May 2014 and has related how he contributed a significant amount of personal funds in interim funding to help Wundr continue as a going concern while long term funding was sought.
15. He asserts the amount found owing to Mr. Fisher in the corporate determination has not taken into account that Mr. Fisher was, as he understood, to receive a portion of his salary in capital stock of Wundr. On that basis, he argues the amount in the corporate determination is not justified and he should not be held liable for it.

16. He contends that but for an absence of any tangible assets remaining in Wundr, the company would be in receivership.

ANALYSIS

17. While I find the circumstances in which Mr. Kelly has become embroiled to be unfortunate, most of the concerns he has raised do not involve his liability under the *Act*, but raise matters that, if they are addressed at all, must be addressed in a different forum than a proceeding before the Tribunal.
18. Mr. Kelly relies on the “new” evidence ground of appeal. The admission of “new evidence” is discretionary. The Tribunal has established that appeals based on “new evidence” require an appellant to, at a minimum, demonstrate that the evidence sought to be admitted with the appeal was not reasonably available and could not have been provided during the complaint process. This ground of appeal also requires the appellant to show, not merely state, the evidence is relevant to a material issue arising from the complaint, that it is credible, in the sense that it be reasonably capable of belief, and that it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03.
19. Mr. Kelly seems to challenge the Director’s finding that he was a director of Wundr. He has provided evidence related to his resignation. This evidence does not satisfy the necessary criteria for allowing new evidence in an appeal. This evidence is immaterial to whether he is personally liable under section 96, since regardless of whether he resigned as a director of Wundr effective November 19, 2014, the evidence in the “record” in clearly shows he was a director of Wundr when the wages of Mr. Fisher and Mr. Lopes were earned or should have been paid.
20. My assessment of the other evidence submitted with the appeal and factual assertions made in the appeal satisfies me that none of it meets the criteria for “new” evidence, because it was reasonably available and could have been provided to the Director before the Determination was made or is simply not relevant to the issue raised in the appeal.
21. Relating to his submission concerning the amount found owing to Mr. Fisher in the corporate determination, it is well established that a person challenging a director/officer Determination is limited to arguing those issues which arise under section 96: whether the person was a director/officer when the wages were earned or should have been paid; whether the amount of the liability imposed is within the limit for which a director/officer may be found personally liable; and whether circumstances exist that would relieve the director/officer from personal liability under subsection 96(2). 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. Specifically, Mr. Kelly may not question the validity of the Director finding Wundr is liable for wages owing to Mr. Fisher or the amount of the wages owing; arguments that question the correctness of the corporate determination may not be raised in this appeal and will not be addressed.
22. The facts do not show that circumstances described in section 96(2) would apply to relieve Mr. Kelly from personal liability. For the purpose of this appeal, the pertinent question under section 96(2) is whether, as a matter of fact, the corporation is subject to a proceeding under section 427 of the *Bank Act* or to a proceeding under an insolvency act, not whether it *could have been* subjected to such proceedings.
23. In sum, I find no basis for allowing the “new” evidence or disturbing the Determination. I find there is no possibility this appeal can succeed and it is dismissed under section 114(f) of the *Act*.

ORDER

24. Pursuant to section 115 of the *Act*, I order the Determination dated December 24, 2014, be confirmed in the amount of \$16,351.74, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal