

An appeal

- by -

Ryan Bray,
a Director of 0955958 B.C. Ltd. carrying on business as RB Contracting
("Mr. Bray")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2016A/3

DATE OF DECISION: March 8, 2016

DECISION

SUBMISSIONS

Ryan Bray

on his own behalf as a Director of 0955958 B.C. Ltd.
carrying on business as RB Contracting

OVERVIEW

1. This is an application filed by Ryan Bray (“Mr. Bray”), pursuant to subsection 109(1)(b) of the *Employment Standards Act* (the “*Act*”), to extend the time for filing an appeal of a determination issued against him on November 16, 2015, under subsection 96(1) of the *Act* (the “Section 96 Determination”). This latter provision provides as follows: “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. The present appeal was filed concurrently with – and is otherwise identical to – an appeal of a determination issued against 0955958 B.C. Ltd. carrying business as RB Contracting (“RB Contracting”) on October 2, 2015, ordering RB Contracting to pay its former employee, Dominic Vendittelli (“Mr. Vendittelli”), the total sum of \$10,133.92 on account of unpaid wages and section 88 interest (the “Corporate Determination”). This latter sum included \$3,496.00 for regular wages, \$4,873.50 for overtime pay, \$539.39 for statutory holiday pay, \$930.92 for vacation pay and \$294.11 on account of section 88 interest. By way of the Corporate Determination, RB Contracting was also ordered to pay \$2,500 on account of five separate \$500 monetary penalties. Thus, the total amount of the Corporate Determination was \$12,633.92.
3. By way of the Section 96 Determination, Mr. Bray, being one of two RB Contracting directors as recorded in the B.C. Corporate Registry (the other being Breeanna Bray), was ordered to pay Mr. Vendittelli the total sum of \$10,165.06 including section 88 interest accrued to the date of the Section 96 Determination. The delegate determined that there was insufficient evidence before him to find Mr. Bray liable for any monetary penalties under subsection 98(2) of the *Act*.
4. The deadline for appealing the Section 96 Determination, calculated in accordance with the “deemed service” provisions contained in section 122 of the *Act*, was December 24, 2015. Mr. Bray filed his appeal, and an otherwise identical appeal of the Corporate Determination, on January 4, 2016. Accordingly, Mr. Bray’s appeal was filed approximately 1 ½ weeks after the statutory appeal deadline expired.
5. In a decision that is being issued concurrently with this decision, I refused to extend the appeal period relating to the Corporate Determination and summarily dismissed that appeal pursuant to subsections 114(1)(b), (f) and (h) of the *Act*. My reasons for decision in this appeal should be read in conjunction with my reasons in the appeal of the Corporate Determination (see *RB Contracting*, BC EST # D038/16).
6. Although the delay involved in the appeal of the Section 96 Determination is not lengthy – and I also note that the time between the appeal deadline and the actual appeal filing date spanned the Christmas/New Year’s holiday period – I am nonetheless of the view that it would not be appropriate to extend the appeal period in this matter.
7. In adjudicating this application, I have reviewed the Section 96 Determination issued against Mr. Bray on November 16, 2015, the delegate’s written “Reasons for the Determination” (the “delegate’s reasons”), the

subsection 112(5) “record” that was before the delegate when the Section 96 Determination was issued, and Mr. Bray’s various submissions.

FINDINGS AND ANALYSIS

8. As noted above, Mr. Bray’s appeal of the Section 96 Determination issued against him is in all respects identical to the appeal he filed with respect to the Corporate Determination. Although both appeals are, on their face, based on the “new evidence” ground of appeal (subsection 112(1)(c) of the *Act*), Mr. Bray’s various submissions also arguably raise “error of law” (subsection 112(1)(a) of the *Act*) and “natural justice” (subsection 112(1)(b) of the *Act*) issues. For the reasons set out in my decision concerning the Corporate Determination appeal, I find that none of the arguments raised with respect to the merits of the appeal has any merit.
9. As a result of my decision in the RB Contracting appeal, the Corporate Determination now stands as a final order. In an appeal of a determination issued under subsection 96(1) of the *Act*, the scope of the appeal is, except in extraordinary circumstances that do not apply here, limited to questions regarding the individual’s status (*i.e.*, was the individual a corporate director or officer when the relevant wage claims crystallized?), whether the amount of the determination has been correctly calculated in light of the “2-month” liability ceiling, or whether any of the defences set out in subsection 96(2) applies (see *Neudorf*, BC EST # D076/07).
10. Mr. Bray concedes that he is a director of RB Contracting and he has not suggested, in his appeal submissions, that the amount of the Section 96 Determination has been incorrectly calculated in light of the 2-month liability ceiling, or that any subsection 96(2) defence applies. Thus, this appeal has no reasonable prospect of succeeding and, accordingly, must be dismissed under subsection 114(1)(f) of the *Act*.
11. With respect to the application to extend the appeal period, while the delay involved is relatively modest, given that this appeal has no merit whatsoever, I do not believe it would be appropriate to extend the appeal period. Further, and apart from the merits and the relatively modest delay, I would not be inclined to extend the appeal period in any event. Canada Post records indicate that the Section 96 Determination was sent, by registered mail, to Mr. Bray at two separate addresses on November 16, 2015, and the envelopes were available for pickup (and notices were left to that effect) on November 17, 2015. Both envelopes were ultimately returned to the Employment Standards Branch (the sender) as “unclaimed”.
12. In my view, it is reasonable to assume that Mr. Bray, having previously been served with the Corporate Determination, deliberately chose not to claim any further mail from the Employment Standards Branch particularly given that he had been placed on notice that a further determination might be issued against him personally under subsection 96(1) of the *Act*. Perhaps he was under the erroneous view that by evading service, he would not be legally required to respond to the Section 96 Determination, or that it was not a valid legal document until it was actually in his hands. Regardless of what Mr. Bray’s thoughts may have been, the Section 96 Determination was lawfully served on him (in accordance with the *Act*’s deemed service provisions) and he failed to file an appeal of that determination within the statutory time period.
13. As I detailed in my reasons relating to the Corporate Determination, Mr. Bray has not provided a credible explanation for his failure to file a timely appeal – he only took steps to appeal the Section 96 Determination after he learned about the execution proceedings taken by the Director against him.
14. Given the foregoing, it follows that Mr. Bray’s application to extend the appeal period is refused.

ORDER

15. Mr. Bray's application to extend the appeal period is refused. Pursuant to subsection 114(1)(b), (f) and (h) of the *Act*, this appeal is dismissed. Pursuant to subsection 115(1)(a) of the *Act*, the Section 96 Determination is confirmed as issued in the amount of \$10,165.06 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal