

An appeal

- by -

Ken Meiklejohn, a Director of Ancient Mariner Industries Ltd.
(“Meiklejohn”)

- 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.: 2010A/9

DATE OF DECISION: April 15, 2010

DECISION

SUBMISSIONS

Ken Meiklejohn	on his own behalf
Lisa Marie Agostinho	on her own behalf
Tiberiu Jichici	on his own behalf
Donna Whalley	on her own behalf
Victor Lee	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Ken Meiklejohn (“Meiklejohn”) of a Determination that was issued on December 18, 2009, by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Meiklejohn was a director of Ancient Mariner Industries Ltd. (“Ancient Mariner”), an employer found to have contravened provisions of the *Act*, and was personally liable under Section 96 of the *Act* for an amount of \$40,298.52.
2. In this appeal, Meiklejohn says the Director erred in law and failed to observe principles of natural justice in making the Determination. Meiklejohn also submits there is evidence that has become available which was not available when the Determination was made. Meiklejohn seeks to have the Determination cancelled, in whole or in part.
3. The Tribunal has reviewed the appeal, the submissions and the material submitted by the parties, including the Section 112 (5) record filed by the Director, and has determined this appeal can be decided from the material in the file.

ISSUE

4. The issue in this case is whether there is any basis for concluding the Director erred in law or failed to observe principles of natural justice.

THE FACTS

5. On August 9, 2007, and January 25, 2008, the Director issued Determinations in favour of 15 complainants, former employees of Ancient Mariner Industries Ltd., in the amounts of \$31,907.95 and \$8,390.57, respectively, against Ancient Mariner Industries Ltd. (the “corporate Determinations”). The corporate Determinations also imposed administrative penalties on Ancient Mariner Industries Ltd. totalling \$2500.00. Neither of the corporate Determinations was appealed.
6. The corporate Determinations were delivered to Ancient Mariner and to the directors/officers of Ancient Mariner by registered mail to the registered and records office of the company.

7. The Determination under appeal indicates a search of the BC On-line Registrar of Companies showed that Ancient Mariner was incorporated on September 30, 1999, and that Meiklejohn was listed as a director of the company between March 1, 2001, and May 2, 2007, the period during which the wages were earned.
8. Based on the above information, the Director found Meiklejohn was personally liable under section 96 of the *Act*, which states in part:

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.

ARGUMENT AND ANALYSIS

9. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:
- 112. (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
- (a) the director erred in law;*
 - (b) the director failed to observe the principles of natural justice in making the determination;*
 - (c) evidence has become available that was not available at the time the determination was made.*
10. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to show an error in the Determination under one of the statutory grounds. A party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
11. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law (see *Britco Structures Ltd.*, BC EST # D260/03). The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
- 1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
 - 2. a misapplication of an applicable principle of general law;
 - 3. acting without any evidence;
 - 4. acting on a view of the facts which could not reasonably be entertained; and
 - 5. adopting a method of assessment which is wrong in principle.
12. The arguments made by Meiklejohn in this appeal can be summarized as follows:
- 1. Ancient Mariner was not properly served in respect of the corporate Determinations;
 - 2. the amount of the Determination under appeal is greater than the amount of the corporate Determinations;
 - 3. the Director did not observe principles of natural justice in making the Determinations against Ancient Mariner;

4. the Director erred in law; and
 5. there is new evidence.
13. The appeal contains no analysis of the alleged errors, although the final reply made by Meiklejohn provides some insight into the basis for asserting Ancient Mariner was neither properly served nor able to defend itself against the claims made by the complainants.
 14. In response to the appeal, the Director says the corporate Determinations were properly served, the amount of the Determination under appeal is the same amount as the total of the corporate Determination, Meiklejohn, as a director of Ancient Mariner, met with the delegate who was investigating the complaints and was provided with an opportunity to participate in the complaint investigation that led to the corporate Determinations, no error of law is shown and no new evidence has been provided.
 15. Some of the complainants have submitted replies to the appeal by Meiklejohn. Their submissions justifiably express a frustration with the continuing failure of Ancient Mariner, and Meiklejohn, to pay the wages owing to them, but do not assist in deciding this appeal.
 16. It is well established that section 96 of the *Act* is not meant to provide a further opportunity to dispute a company's liability for wages. Accordingly, Meiklejohn is precluded from arguing the issue of Ancient Mariner's wage liability. A director or officer appealing a Determination imposing personal liability under that provision is limited to arguing those issues which arise under Section 96 of the *Act*: *Kerry Steinemann, a Director/officer of Pacific Western Vinyl Windows & Doors Ltd.*, BC EST # D190/96. Those issues are: whether the individual was a director or officer of the company at the time wages were earned or should have been paid; whether the amount of the wage liability is within the limit for which a director or officer may be found personally liable under section 96; and whether the individual falls within any of the exceptions to personal liability found in subsection 96(2) of the *Act*.
 17. Meiklejohn does not dispute that he was a director of Ancient Mariner at the time the wages of the complainants were earned and should have been paid. He has provided no evidence that the wage liability imposed is not within the 2 month limit on wages for which he can be held personally liable. It is not alleged that any of the exceptions apply in this case and, if necessary, I find they do not.
 18. Accordingly, no basis for this appeal has been established and it is dismissed.

ORDER

19. Pursuant to Section 115 of the *Act*, I order the Determination dated December 18, 2009, be confirmed in the amount of \$40,298.52.

David B. Stevenson
Member
Employment Standards Tribunal