

An appeal

- by -

Christopher Brough, a Director of Hot Street Productions Ltd.
(“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: Rajiv K. Gandhi

FILE No.: 2017A/08

DATE OF DECISION: April 18, 2017

DECISION

SUBMISSIONS

Christopher Brough on his own behalf as a Director of Hot Street Productions Ltd.

OVERVIEW

1. On December 30, 2016, a delegate of the Director of Employment Standards (the “Director”) issued a determination (the “Corporate Determination”) in which Hot Street Productions Ltd. (“Hot Street”), a British Columbia company, was found liable to pay regular wages, overtime wages, and annual vacation pay, to sixteen former employees according to sections 17, 18, 40, and 58 of the *Employment Standards Act* (the “*Act*”). The Director also required Hot Street to reimburse a number of those employees for expenditures attributable to the business of Hot Street, according to section 21 of the *Act*, and interest according to section 88.
2. As at the date of the Corporate Determination, the aggregate liability of Hot Street to these sixteen employees was \$50,880.38 before interest.
3. The Corporate Determination has not been appealed.
4. On the same day, the Director issued a second determination (the “Personal Determination”) confirming the personal liability of the Appellant, Christopher Brough, to pay wages in the aggregate amount of \$50,880.38, according to section 96(1) of the *Act*.
5. The Corporate Determination and the Personal Determination are the third “set” of determinations in a series of three, relating to outstanding wages payable by Hot Street.
6. As with the other determinations, the Appellant seeks to cancel the Personal Determination for two reasons. Firstly, he says that the Director has failed to observe the principles of natural justice in making the Personal Determination. Secondly, he says that evidence has become available that was not available when the Personal Determination was made. Both are permitted grounds of appeal, respectively according to sections 112(1)(b) and 112(1)(c) of the *Act*.
7. At this stage, I must consider whether or not it is appropriate to summarily dismiss part or all of this appeal, according to section 114(1) of the *Act*. To that end, I have reviewed the Corporate Determination, the Personal Determination, and:
 - (a) the Director’s record (the “Record”), received on February 6, 2017;
 - (b) submissions from the Appellant, received on January 3, 2017, January 11, 2017, and February 10, 2017.

THE FACTS AND ANALYSIS

8. Section 96(1) of the *Act* provides that 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.”

9. According to records filed with BC Registry Services, the Appellant served as one of two directors of Hot Street from incorporation on December 15, 2015, to his resignation or removal, effective July 7, 2016, and filed with BC Registry Services on August 16, 2016. The second director, Xiaomin Zhang, served in that capacity from incorporation on December 15, 2015, until July 4, 2016. Notice of her resignation or removal was not filed with BC Registry Services until August 25, 2016.
10. Wages determined to be payable were earned by the complainant employees while the Appellant and Ms. Zhang were directors of the Company.
11. In *Michalkonic*, BC EST # RD047/01, the Tribunal considered the liability of a director under section 96(1), and reasoned that (emphasis added):
 - (a) the determination of director status should be narrowly construed;
 - (b) the Director may presumptively rely on corporate records filed with the Registrar of Companies when establishing the status of an individual for the purposes of assessing liability under section 96(1);
 - (c) the presumption is rebuttable where it can be shown, on a balance of the probabilities, that those records are inaccurate;
 - (d) in rare and exceptional circumstances, it may be appropriate to find that a person is not a director despite those records, but not simply because that person did not actually perform the functions, duties or tasks of a director or officer.
12. Intent is not relevant. If wages are owed by a company, any person who was a director of that company when those wages were earned is personally liable to pay, subject only to the two-month cap embedded in section 96(1) and those specific statutory defences set out in section 96(2) (these defenses do not apply, in this instance).

Natural Justice
13. Sections 76 and 77 of the *Act* confers upon the Director the duty to receive, review, and where appropriate, investigate or adjudicate complaints alleging contraventions of both the *Act* and the *Employment Standards Regulation*. Natural justice, in turn, demands that the Director exercise that duty fairly, in good faith, and with a view to the public interest (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48 at paragraph 2).
14. On appeal, the onus rests with the Appellant to demonstrate some breach of the principles of natural justice requiring remedy. I am unable to find anything in the Appellant's submissions specifically addressing that point of appeal.
15. The Appellant may be arguing a breach because the Director does not appear to have taken similar action against other parties. While I agree that there may be other people the Director might investigate, whether or not the Director does so has nothing to do with whether or not, in relation to the Appellant, some principle of natural justice has been breached.
16. I find that the Appellant has not satisfied the burden imposed, and I dismiss this ground of appeal.

New Evidence

17. In *Davies et. al.*, BC EST # D171/03, the Tribunal held that the onus rests with an appellant to meet a strict four-part test before any exercise of discretion to accept and consider new evidence:
- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - (b) the evidence must be relevant to a material issue arising from the complaint;
 - (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
 - (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
18. I have reviewed the materials annexed to the Appellant's submissions. Much of it is either included in the Record or could have been provided to the Director at the time of the Director's investigations. Some of it relates to the Corporate Determination, and some of it to a time frame that is not relevant to either the Personal Determination or the Corporate Determination.
19. Ultimately, I find that the materials tendered by the Appellant fail the first and second part of the *Davies* test. Even if that were not the case, and even if I found the evidence to be credible under part three, I judge the probative value to be low. Nothing in what I have seen would lead to a different outcome, in my opinion, and I conclude that part four of the *Davies* test has not been met.
20. Accordingly, I dismiss this ground of appeal.

Conclusion

21. I am sympathetic to the position in which the Appellant finds himself. I accept the Appellant's submission that he has attempted to be forthright in his dealings with affected employees, and to have the other director and the controlling Hot Street investor make payment to those employees. As noted above, the materials before me do not disclose what if any steps the Director has taken under section 96(1) with respect to those individuals, both of whom appear to have some presence in British Columbia.
22. A material part of the Appellant's argument is that he did not have access to the banking or financial records of Hot Street during his tenure as a director. I point to two observations made by the reconsideration panel in *Michalkovic* that I consider significant – firstly, according to what is now Part 5, Division 1 of the *Business Corporations Act*, no designation of an individual as a director is valid unless that individual consents to the appointment, in writing or by action; secondly, that "...directors must be cognizant of their responsibilities and the potential risks of a directorship..." (at page 9, quoting McLeod J., Saskatchewan Court of the Queen's Bench, in *Dreaver v. Saskatchewan Treaty Indian Women's Council*, 1994 CanLII 4823 (Sask QB) at paragraph 48).
23. The Appellant was a Hot Street director at all relevant times. It is not enough for the Appellant to show (or allege) that he had no access to Hot Street financial information or bank accounts, or did not perform some or all of the duties of a corporate director. Neither sympathy for his predicament nor the possibility that there are other people from whom the Director might extract payment means that I can ignore the Appellant's liability under the *Act*.

24. I conclude that no basis has been established upon which I can properly interfere with the Personal Determination.
25. In view of this, I do not believe it necessary to address the Appellant's application for an extension of time.
26. For these reasons, the appeal is dismissed pursuant to section 114(1)(f) of the *Act*.

ORDER

27. Pursuant to section 115 of the *Act*, the Personal Determination is confirmed.

Rajiv K. Gandhi
Member
Employment Standards Tribunal