

An appeal

- by -

Mohammed Shaieed Hanif a Director of Road Smart Transport Ltd.
(“Mr. Hanif”)

- 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: Shafik Bhalloo

FILE No.: 2014A/24

DATE OF DECISION: May 27, 2014

DECISION

SUBMISSIONS

Mohammed Shaheed Hanif on his own behalf as a Director of Road Smart Transport Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Mohammed Shaheed Hanif (“Mr. Hanif”), a Director of Road Smart Transport Ltd. (“RST”), has filed an appeal of a section 96 determination that was issued on August 8, 2013 (the “S. 96 Determination”).
2. By way of background, Craig Gowler (“Mr. Gowler”) and Chris Lawrence (“Mr. Lawrence”) (collectively, the “Complainants”) filed their complaints under section 74 of the *Act* on April 13 and April 23, 2012, respectively, alleging that RST failed to pay them regular wages and vacation pay (the “Complaints”). A delegate of the Director of Employment Standards (the “Director”) conducted an investigation of the Complaints and on March 28, 2013, issued a determination against RST (the “Corporate Determination”), finding wages and interest was owed to the Complainants totalling \$5,519.42. It was also determined that administrative penalties were owed in the amount of \$1,000.00.
3. The Corporate Determination included a notice to the Director of RST explaining his personal liability under the *Act*.
4. The Corporate Determination was sent on the same date to RST’s business address on 62nd Avenue in Surrey, British Columbia. It was also sent to the Registered and Records Office address for RST on Ashford Place in Surrey, British Columbia, and the Director’s mailing address which is the same address as that of RST’s registered and records office address. The mail addressed to RST’s business address was returned marked “refused/unclaimed” and the mail addressed to RST’s Registered and Records Office and to the Director’s mailing address was returned marked “moved/unknown”.
5. RST did not pay the amounts ordered in the Corporate Determination, nor did it appeal the Corporate Determination within the appeal period which expired on May 6, 2013.
6. Prior to the Corporate Determination, on April 19, 2012, the delegate conducted a BC Online Corporate Registry search of RST, and discovered that RST was incorporated on April 14, 2011, and Mr. Hanif was listed as its sole Director. After the Corporate Determination, on August 1, 2013, the delegate conducted a further search of RST, which revealed that Mr. Hanif was still listed as its director, and the search also confirmed that he was a director of RST between February 2, 2012, and April 5, 2012, when both Mr. Gowler and Mr. Lawrence earned or should have been paid wages by RST.
7. Subsequently, on December 4, 2012, April 24, 2012, and March 18, 2013, the delegate made attempts to contact Mr. Hanif and discovered, on March 18, 2013, that Mr. Hanif’s phone was no longer in service.
8. On August 8, 2013, the delegate issued the S. 96 Determination against Mr. Hanif, holding him personally liable for up to two months’ wages for each Complainant, totalling \$5,575.92, inclusive of accrued interest. However, the delegate did not find sufficient evidence that Mr. Hanif authorized, permitted or acquiesced in the contraventions of RST, and, therefore, did not hold him responsible for the administrative penalties

issued against RST in the Corporate Determination for contraventions of section 18 of the *Act* and section 46 of the *Employment Standards Regulation* (the “*Regulation*”).

9. The S. 96 Determination was sent to Mr. Hanif by registered mail at the address provided for him in the BC Online Corporate Registry search of RST. The S. 96 Determination was also sent to RST’s business address and to the Registered and Records Office address by registered mail. None of the S. 96 Determination mailings were claimed, and all of them were either returned “unclaimed” or marked “moved”.
10. The S. 96 Determination contains an express notice of the appeal deadline of 4:30 p.m. on September 16, 2013. Mr. Hanif did not file his appeal of the S. 96 Determination until over five (5) months after the expiry of the appeal date, namely on February 27, 2014.
11. In his appeal, Mr. Hanif states that evidence has become available that was not available at the time the S. 96 Determination was being made, and seeks the Employment Standards Tribunal (the “Tribunal”) to refer the matter back to the Director, presumably to cancel it.
12. Section 114(1) of the *Act* and Rule 22 of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”) permit the Tribunal to dismiss all or part of an appeal without seeking submissions from the other parties. I have decided that this appeal is an appropriate case for consideration under section 114(1) of the *Act* and, accordingly, I will assess the appeal based solely on the S. 96 Determination, Mr. Hanif’s submissions, and my review of the section 112(5) “record” that was before the Director when both the Corporate Determination and the S. 96 Determination were being made.
13. If the Tribunal is satisfied that Mr. Hanif’s appeal, or a part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Tribunal will invite Mr. Gowler, Mr. Lawrence and the Director to file Reply submissions on the appeal, and Mr. Hanif will be afforded an opportunity to make a final Reply to those submissions, if any.

ISSUE

14. The issue in this appeal is whether Mr. Hanif has shown any basis for this Tribunal to refer the S. 96 Determination back to the Director or to cancel it.

THE LATE FILING OF THE APPEAL

15. As indicated previously, the expiry date for filing an appeal of the S. 96 Determination was September 16, 2013. Mr. Hanif filed his appeal over five (5) months late, on February 27, 2014.
16. In his submissions, he explains that he “was not delivered any mail” and did not receive “[a] phone call regarding this”. He believes that the S. 96 Determination was forwarded to his previous mailing address, and he moved to his new address in May 2010.
17. I note the address Mr. Hanif has provided in his written submissions, including the Appeal Form, is the 62nd Avenue, Surrey, British Columbia address that is one of the addresses to which the S. 96 Determination was sent by registered mail, but marked “unclaimed” and returned to sender. I note that the address is different than the Ashford Place address shown for Mr. Hanif in all of the corporate searches of RST, but it is an address that appears to be a current address for contact with Mr. Hanif. Therefore, I am unconvinced that Mr. Hanif did not have notice of the S. 96 Determination particularly when he is continuing to use the 62nd street address in this appeal.

18. I also note that before issuing the S. 96. Determination, the delegate made three (3) phone calls to Mr. Hanif. In the final call, on March 18, 2013, the delegate discovered that telephone number for Mr. Hanif was out of service.
19. It is not the delegate's responsibility to chase after Mr. Hanif and make sure that all contact information for Mr. Hanif is up-to-date. If Mr. Hanif's mailing address or telephone number have changed, it is Mr. Hanif's responsibility to make sure the delegate is aware of that change.
20. I am not convinced that Mr. Hanif was unaware of the Complaints against RST that eventually led to the Corporate Determination. I am also not convinced that he was unaware of the S.96 Determination. If Mr. Hanif chooses, at some stage, not to participate in the complaint process or the appeal of the Corporate Determination or take delivery of the Corporate Determination or the S. 96 Determination at the addresses set out for him in the corporate searches, then he does so at his own peril.
21. I also note that Mr. Hanif has enclosed with his appeal a Writ of Seizure and Sale (the "Writ") issued out of the Supreme Court of British Columbia, ordering the Sheriff to "promptly...seize and sell at public auction or by tender for the best available price sufficient of the goods and chattels of [Mr. Hanif] to realize the sums set out on the back of this writ". The Writ was issued on August 28, 2013, and it shows the same address for Mr. Hanif at Ashford Place in Surrey, British Columbia as set out in all three (3) corporate searches of RST, and he appears to have received it at that address since he is producing it in his appeal. I find that it is more probable that he decided not to accept or claim both the Corporate Determination and the S. 96 Determination when they were sent to him by registered mail. I also think that it is more probable that Mr. Hanif felt compelled to appeal the S. 96 Determination once he received notice of the Writ.
22. In the circumstances, I do not find there exists any justification or basis to allow Mr. Hanif's late-filed appeal and therefore, pursuant to section 114(1)(b) of the *Act* I dismiss it.

NO REASONABLE PROSPECT THAT THE APPEAL WILL SUCCEED

23. While I need not go any further having made a determination to dismiss Mr. Hanif's late-filed appeal under section 114(1)(b) of the *Act*, I have reviewed the merits of Mr. Hanif's appeal, and I find that independent of my dismissal of the appeal on the basis that it is out of time, it also has no reasonable prospect of succeeding. I will explain this further below.
24. Mr. Hanif, in his written submissions, states:
- Chris Lawrence was a subcontractor, independent worker, and I never did any income tax deduction or vacation pay deduction for him, attached is his pay summary [*sic*].
- Craig Gowler was a subcontractor, independent worker, he worked for me for only 2 days and I fired him because he damaged the trailer in Hope, he was very abusive and threatened me so I paid him cash for his 2 days pay, there was no income tax or vacation pay from his pay [*sic*].
- They both are not telling the truth and making stories against me.
- Due to economy and very slow trucking business I had shut down my company in April, 2012.
25. I note that a person challenging a director's determination is limited to arguing those issues that arise under section 96 of the *Act*, namely:
- (i) Whether the person was a director when the wages were earned or should have been paid;

- (ii) Whether the amount of the liability imposed is within the limit for which a director may be found personally liable; and
- (iii) Whether circumstances exist that would relieve the director from personal liability under subsection 96(2).

26. The Director may issue a section 96 determination without holding a hearing based on the corporate records filed with, and maintained by, the Registrar of Companies. When an individual is recorded as a director of a company in the records maintained by the Registrar of Companies, a rebuttable presumption of fact arises that the individual actually is a director of the company in question. In *David Wilinofsky and Ron J. Wilinofsky* (BC EST # D106/99), the Tribunal indicated that this presumption is rebuttable by credible and cogent evidence that the Registrar's records are inaccurate. However, the evidentiary burden of proving that one is not a corporate director lies with the individual who denies such status.
27. In the case at hand, the delegate correctly relied on the corporate records filed with, and maintained by, the Registrar of Companies to issue the S. 96 Determination against Mr. Hanif. Mr. Hanif has not disputed that he was a director of RST during the material time in question. He has also not disputed the amount of the liability imposed on him, and there are no circumstances that would relieve him of personal liability under subsection 96(2) of the *Act* in this case.
28. I note that Mr. Hanif has invoked the new evidence ground of appeal, but nothing in his written submissions, nor in the documents he has attached, contain new evidence. Furthermore, the written submissions of Mr. Hanif are more in the nature of a challenge to the Corporate Determination because he is challenging the status of the Complainants, which challenge should have been dealt with in an appeal of the Corporate Determination. An appeal of a section 96 determination is not a proper venue for challenging findings and conclusions reached in a corporate determination. In these circumstances, I do not find there is any presumptive merit in Mr. Hanif's appeal and, therefore, in the alternative, I would dismiss it under section 114(1)(f) as having no reasonable prospect of succeeding.

CHALLENGE TO THE RECORD

29. I note that on March 19, 2014, the Tribunal disclosed the Director's "record" to Mr. Hanif, and gave him an opportunity to review and provide to the Tribunal his objections, if any, to the completeness of the "record" by April 8, 2014. Mr. Hanif did provide his written submissions stating that "some documents are not correct and doesn't match my records [*sic*"]". However, he did not disclose what did not match his records and what was inaccurate. The Director subsequently, on April 24, 2014, replied, stating that the "record" that was submitted to the Tribunal represented the entire record which was before the Director at the time the S. 96 Determination was issued. Mr. Hanif was provided the delegate's submissions and given the opportunity to make a final reply by May 15, 2014, but did not submit a reply. While I do not find that anything turns on Mr. Hanif's challenge of the Director's record, I find the challenge unmeritorious.
30. Based on my reasons delineated above, I find that there is no basis to disturb the S. 96 Determination. Pursuant to section 114(1)(b) and (f) of the *Act*, I find that Mr. Hanif's appeal is out of time and, in any event, has no reasonable prospect of success.

ORDER

31. Pursuant to section 115 of the *Act*, I confirm the S. 96 Determination made on August 8, 2013, against Mohammed Shaieed Hanif, a Director of Road Smart Transport Ltd.

Shafik Bhalloo
Member
Employment Standards Tribunal