



An appeal

- by -

Goodwin Gibson, a Director or Officer of Vidwrx Inc.
(“Mr. Gibson”)

- 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.: 2017A/25

DATE OF DECISION: April 24, 2017

DECISION

SUBMISSIONS

Roselle P. Wu

counsel for Goodwin Gibson, a Director or Officer of Vidwrx Inc.

J. Gareth Morley

counsel for the Attorney General of British Columbia

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Goodwin Gibson, a Director or Officer of Vidwrx Inc., (“Mr. Gibson”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on January 20, 2017.
2. The Determination found Mr. Gibson was a director of Vidwrx Inc. (“Vidwrx”), an employer found to have contravened provisions of the *Act*, at the time wages were earned or should have been paid to three former employees of Vidwrx (“the Complainants”) and as such was personally liable under section 96 of the *Act* for wages in the amount of \$25,099.31.
3. This appeal is grounded in assertions the Director erred in law, failed to observe principles of natural justice in making the Determination and new evidence becoming available that was not available when the Determination was being made. Mr. Gibson seeks to have the Determination cancelled.
4. In correspondence dated March 6, 2017, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and, following such review, all or part of the appeal might be dismissed.
5. The appeal, among other things, raises a constitutional question relating to the applicability of section 96 of the *Act vis.* Mr. Gibson. The Tribunal has jurisdiction to decide constitutional questions arising in proceedings under the *Act* other than those relating to the *Canadian Charter of Rights and Freedoms*; see section 45(1) of the *Administrative Tribunals Act*, RSBC 2004, ch. 45 (the “*ATA*”) and section 110 of the *Act*.
6. Counsel for Mr. Gibson has attached correspondence to the appeal establishing notice of constitutional question has been delivered by Mr. Gibson to the Attorney Generals of Canada and British Columbia: see section 46 of the *ATA* and section 8 of the *Constitutional Question Act*, RSBC 1996, ch. 68. The Tribunal has invited submissions on the constitutional question from those parties. The Attorney General of Canada has opted not to intervene in the matter at this stage; the Attorney General of British Columbia has filed a submission on the constitutional question.
7. The section 112(5) record (the “record”) has been provided to the Tribunal by the Director and a copy has been delivered to counsel for Mr. Gibson, who has been provided with the opportunity to object to its completeness. No objection to the completeness of the record has been received and, accordingly, the Tribunal accepts it as being a complete record of the material that was before the Director when the Determination was made. Mr. Gibson seeks in this appeal to add additional evidence to the record.

8. I have decided this appeal is appropriate for consideration under section 114 of the *Act*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal, the submission of the Attorney General for British Columbia on the constitutional question, my review of the material that was before the Director when the Determination was being made and any other material allowed by the Tribunal to be added to the record. Under section 114(1) of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

- 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 that 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.*

9. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and the Complainants will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal can succeed.

ISSUE

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

THE FACTS

11. The facts relating to this appeal are brief.
12. Vidwrx was a video production company with its headquarters in Vancouver, BC. Comments made in the complaints, the Determination and the appeal indicate the company ceased operations in July 2016.
13. The Complainants, former employees of Vidwrx, filed complaints with the Director alleging Vidwrx had contravened the *Act* by failing to pay regular wages, annual vacation pay and compensation for length of service. The Director investigated the complaints and, on December 16, 2016, issued a Determination against Vidwrx (the “corporate determination”) which found Vidwrx had contravened sections 17 and 18 of the *Act* in respect of the employment of the Complainants and was liable for wages to them in the amount of \$30,728.23. The Director also found Vidwrx had contravened section 46 of the *Employment Standards Regulation*. The Director imposed administrative penalties on Vidwrx in the amount of \$3,500.00.

14. The details of each Complainant's employment and the calculations of wages owed are set out in attachments to the corporate determination. The corporate determination was sent by registered mail to Vidwrx and copied to Mr. Gibson and the other directors of record of Vidwrx.
15. A BC On-line: Registrar of Companies corporate search conducted by the Director on July 28, 2016, indicated Vidwrx was registered in British Columbia as an extra-provincial company on November 9, 2007, and filed its last annual report on November 9, 2015. The corporate registry refers persons to the incorporating jurisdiction, in the case of Vidwrx, federal jurisdiction, for a list of directors. A search by the Director of Corporations Canada for Federal Corporation Information, current to July 2016, lists Mr. Gibson as one of three directors of Vidwrx.
16. The searches confirmed, and the Director found, Mr. Gibson was listed as a director of Vidwrx during the period the Complainants' wages were earned or should have been paid.
17. Based on the information acquired and the findings made, the Director concluded Mr. Gibson was liable under section 96 of the *Act* for the amount set out in the Determination. Mr. Gibson was not found liable for the administrative penalties imposed on Vidwrx in the corporate determination.
18. The corporate determination has not been appealed; the statutory time limit for filing an appeal of the corporate determination has expired.

ARGUMENT AND ANALYSIS

19. This appeal makes substantially the same arguments that were raised in earlier appeals by Mr. Gibson, which were dismissed in two decisions of the Tribunal: BC EST # D005/17 and BC EST # D006/17. Applications for reconsideration of these decisions were refused by the Tribunal in BC EST # RD032/17. More particularly, nothing new is added in this appeal to the arguments made in the earlier appeals.
20. The decision on the reconsideration applications considered the conclusion reached in the appeal decisions on the constitutional question and rejected the submissions of Vidwrx on that issue.
21. Mr. Gibson argues he was not personally liable under section 96 of the *Act* for the wages found owing to the Complainants because as a director of a company incorporated under the *Canada Business Corporations Act*, R.S. 1985, C-44, section 96 of the *Act* is inoperative against him.
22. On the constitutional question, I adopt and apply all of the reasoning found in the appeal decisions (BC EST # D005/17 and BC EST # D006/17) and the decision on the reconsideration applications (BC EST # RD032/17) and similarly dismiss that argument in this appeal.
23. Mr. Gibson also questions the calculations of the wages found owing to the Complainants in the corporate determination, contending he is unable to address the correctness of the wage calculations because he has not been provided with the documents supporting the wage claims. This argument echoes that made in an earlier appeal, where Mr. Goodwin alleged the Director failed to observe principles of natural justice by not providing Mr. Gibson with a copy of the complaints made by two of the Complainants.
24. This argument was answered in the earlier appeal decision, BC EST # D006/17.
25. To reiterate what was stated in that decision concerning the challenge by Mr. Gibson to the calculation of the wages owed in that case: a person challenging a determination issued under section 96 of the *Act* is limited to

arguing those issues which arise under that provision, which are whether the person was a director or officer when the wages were earned or should have been paid, whether the amount of the liability imposed is within the limits for which a director or officer may be found personally liable and whether circumstances exist that would relieve the director or officer from personal liability under section 96(2) of the *Act*. That person is precluded from raising and arguing the corporate liability.

26. The argument raised once again in this appeal relates directly to the process resulting in the corporate determination, not to Mr. Gibson's personal liability under section 96. It is irrelevant to his section 96 liability whether Mr. Gibson received all of the supporting documents relating to the wage claims of the Complainants. It is only relevant that the corporation was aware of the claims being made by each of the Complainants and was provided with the opportunity to respond to those claims see section 77 of the *Act*. In this case, the wage claims were investigated and the corporate determination has been issued.
27. A copy of the corporate determination was delivered to Mr. Gibson. The statutory time period for an appeal of the corporate determination has expired without any appeal being filed. More specifically, Vidwrx has made no allegation that it was denied the opportunity to know the claims being made by each of the Complainants to whom wages were awarded in the corporate determination and to respond to those claims.
28. For the same reasons as Mr. Gibson, as a director or officer of a corporation, is precluded from raising and arguing the corporate liability, he is precluded from alleging a breach of natural justice related to the process that resulted in the corporate determination. The right to raise such a claim belongs to the corporation and, as indicated, no such claim has been made by the corporation.
29. The Director does not have any obligation to provide Mr. Gibson with the opportunity to respond to the merits of the claims made by the Complainants. That opportunity belonged to Vidwrx, which was the party under investigation for the wage claims being made: see section 77 of the *Act*. The opportunity to respond was provided to Vidwrx prior to the corporate determination being issued.
30. If Mr. Gibson claims denial of natural justice, it can only be raise in the context of those matters he is allowed to raise in an appeal of a determination issued under section 96 of the *Act*. Otherwise, he is bound by the corporate determination and the failure of Vidwrx to appeal any aspect of it.
31. In respect of his challenge to the amounts found owing to each Complainant in the Determination, those are based on the findings made in the corporate determination, which are set out in the calculations for each of the Complainants. There is no basis for arguing (and no argument) that the wages found owing to each of the Complainants do not represent 2 months' wages.
32. I find no merit in this appeal and I find it has no reasonable prospect of succeeding. The appeal is dismissed under section 114 of the *Act*; the purposes and objects of the *Act* are not served by requiring the other parties to respond to it.

ORDER

33. Pursuant to section 115 of the *Act*, I order the Determination dated January 20, 2017, be confirmed in the amount of \$25,099.31, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal