

An appeal

- by -

Patricia Frazier a Director or Officer of Sundance Forest Management Ltd.
(“Frazier”)

- 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: Carol L. Roberts

FILE No.: 2013A/11

DATE OF DECISION: May 16, 2013

DECISION

SUBMISSIONS

Patricia Frazier

on her own behalf, a Director or Officer of Sundance Forest Management Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) Patricia Frazier, a Director or Officer of Sundance Forest Management Ltd., (“Sundance”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (“the Director”) on January 22, 2013.
2. On December 3, 2012, the Director issued a Determination ordering Sundance to pay its former employee, Gregory Larsen, \$3,410.65 in wages, annual vacation pay, unauthorized deductions and interest. The Director also imposed six administrative penalties in the total amount of \$3,000 for Sundance’s contravention of sections 17, 18, 21, 27, 28 and 58 of the *Act*, for a total amount payable of \$6,410.65. The deadline for filing an appeal of the Determination was 4:30 pm on January 10, 2013.
3. On January 22, 2013, the Director’s delegate found that “(t)o date, no appeal has been received and the Determination amount has not been paid by Sundance Forest Management Ltd.” The delegate further determined that Ms. Frazier was a Director and Officer of the company at the time the complainants’ wages were earned and payable. The delegate therefore determined that Ms. Frazier was personally liable to pay \$3,424.47, representing not more than two months’ of Mr. Larsen’s unpaid wages pursuant to section 96 of the *Act*. The delegate concluded that there was insufficient evidence that Ms. Frazier authorized, permitted or acquiesced in Sundance’s contraventions, and found Ms. Frazier not personally liable for the administrative penalties.
4. Ms. Frazier filed an appeal of the Determination on February 27, 2013, on the grounds that the Director failed to observe the principles of natural justice in making the Determination. She also contended that evidence had become available that was not available at the time the Determination was being made.
5. Section 114 of the *Act* and Rule 22 of the Tribunal’s *Rules of Practice and Procedure* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria.
6. I find that this appeal can be decided based on Ms. Frazier’s ’s written submissions, the Section 112(5) “record” that was before the delegate at the time the decision was made, the Determination and the Reasons for the Determination.

ARGUMENT

7. The December 3, 2012, Corporate Determination, which included a notice to directors and officers explaining their personal liability under the *Act*, was sent to Sundance with copies to the registered and records office and to Patricia Frazier, Sundance’s sole director and officer.

8. The Corporate Determination contained the following “Notice to Directors/Officers”:

If a Determination is issued against a director/officer of a company, the director/officer may not argue the merits of the Determination against the company by appealing the director/officer Determination.

There are only three grounds on which a Determination made against a director/officer may be appealed:

- 1) That the person appealing was not a director/officer of the company at the time wages were earned or should have been paid.
- 2) That the calculation of the director/officer’s personal liability is incorrect; and/or
- 3) That the director/officer should not be liable for the penalty, where a penalty has been assessed, on the grounds that he or she did not authorize, permit or acquiesce in the company’s contravention.

9. Ms. Frazier says she has suffered from serious health problems and has not worked since the summer of 2011. She says she has been unable to make decisions, that she could not go outside and collect her mail, and that bills overwhelmed her. As a result, she says she was unable to “defend herself properly” against Mr. Larsen’s allegations. She also says that she is unable to pay the amount determined owing.

ANALYSIS

10. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- the director erred in law;
- the director failed to observe the principles of natural justice in making the determination;
- evidence has become available that was not available at the time the determination was made.

11. Section 115 of the *Act* provides that, after considering whether the grounds of appeal have been met, the Tribunal may, by order

- (a) confirm, vary or cancel the determination under appeal; or
- (b) refer the matter back to the director.

12. Once corporate liability has been established, directors cannot, through an appeal of a determination of director liability, reargue the issue of a company’s liability for wages unless they can establish fraud or fresh evidence that is decisive to the merits of the issue. (*Steinemann*, BC EST # D180/96). Although Sundance appealed the corporate determination, I dismissed that appeal (BC EST # D045/13). I found that, not only had Sundance failed to establish a *prima facie* case, the appeal had been filed beyond the statutory time for filing such appeal.

13. Section 96 of the *Act* provides as follows:

- (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.
- (2) Despite subsection (1), a person who was a director or an officer of a corporation is not personally liable for

(a) any liability to an employee under Section 63, termination pay or money payable in respect of an individual or group terminations, if the corporation is in receivership,

(b) any liability to an employee for wages, if the corporation is subject to an action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act,

...

14. Ms. Frazier does not deny that she is, or continues to be a Director or Officer of Sundance. She also does not deny that the wages found to be owed are for a two month period in which she was a Director or Officer. Furthermore, she does not argue, or present any evidence to suggest that any of the provisions of subsection 96(2) apply.
15. Although Ms. Frazier's grounds of appeal are that the Director failed to observe the principles of natural justice and that evidence has become available that was not available at the time the Determination was being issued, nothing in her submissions addresses either of these grounds of appeal.
16. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker. Ms. Frazier has not established that the Director's delegate failed to comply with principles of natural justice. She was served with the Corporate Determination and was aware of the potential liability as a director if that Determination was not satisfied.
17. I am also not persuaded that evidence has become available that was not available at the time the Determination was being made. At no time during the investigation did Ms. Frazier inform the delegate that she was medically incapable of participating in the investigation or seek additional time in which to provide evidence. While I accept that Ms. Frazier suffers from a medical condition, the record confirms that she participated in the investigation. She is not able to, in effect, have a re-investigation of the complaint simply because she objects to the Determination.
18. Furthermore, the suggestion Ms. Frazier cannot afford to pay the wages determined owing, for which she provides no proof, is not a ground of appeal. As I noted in my decision dismissing the appeal of the corporate determination, I sympathize with Ms. Frazier's medical condition. However, she ought to have sought whatever help she considered necessary to attend to company business. An employer's statutory obligations under the *Act* cannot be avoided because of a director's illness.

ORDER

19. Pursuant to Section 115(1)(a) of the *Act*, I Order that the Determination, dated January 22, 2013, be confirmed in the amount of \$3,424.47 together with whatever further interest that has accrued under Section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal