

An appeal

- by -

Sukhwinder Kaur Gill, a Director or Officer of White Buffalo Restaurant & Bar
Inc. carrying on business as ABC Country Restaurant
(“Ms. Gill”)

- 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.: 2015A/55

DATE OF DECISION: May 29, 2015

DECISION

SUBMISSIONS

Sukhwinder Kaur Gill

on her own behalf as a Director or Officer of White Buffalo Restaurant & Bar Inc. carrying on business as ABC Country Restaurant

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Sukhwinder Kaur Gill (“Ms. Gill”), a Director or Officer of White Buffalo Restaurant & Bar Inc. carrying on business as ABC Country Restaurant (“WBRB”), has filed an appeal of the determination issued by a delegate of the Director of Employment Standards (the “Director”) on April 3, 2015 (the “Section 96 Determination”).
2. The Section 96 Determination concluded that Ms. Gill was a director of WBRB, an employer found to have contravened provisions of the *Act*, at the time wages owed were earned or should have been paid to Michael Lawson (“Mr. Lawson”), and as such was personally liable under section 96 of the *Act* for an amount of \$1,715.43, inclusive of accrued interest under section 88 of the *Act*.
3. In this appeal, Ms. Gill is relying on the error of law ground of appeal in section 112(1)(a) of the *Act*, and asks the Employment Standards Tribunal (the “Tribunal”) to cancel the Section 96 Determination.
4. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. Therefore, at this stage, I will assess the appeal based solely on the Reasons for the Determination (the “Reasons”), the Appeal Form and written submissions made by Ms. Gill, and my review of the section 112(5) “record” (the “Record”) that was before the Director when the Section 96 Determination was being made. Under section 114, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in subsection 114(1) of the *Act*. If I am satisfied the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1), Mr. Lawson will, and the Director may, be invited to file further submissions. On the other hand, if it is found that the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

ISSUE

5. The issue at this stage of this appeal is whether there is any reasonable prospect the appeal will succeed.

THE FACTS

6. Mr. Lawson filed a complaint under section 74 of the *Act*, alleging that WBRB contravened the *Act* by failing to pay him compensation for length of service and vacation pay.
7. The Director investigated the complaint and, on July 14, 2014, issued a determination against WBRB (the “corporate determination”), which found WBRB liable for wages to Mr. Lawson in the amount of \$1,680.98, inclusive of accrued interest. The Director also imposed an administrative penalty on WBRB in the amount of \$500.00 for contravention of section 63 of the *Act*. The corporate determination was sent to the registered and records office of WBRB and to its listed directors, including Ms. Gill. The corporate determination included notice to directors and officers explaining their personal liability under the *Act*. The corporate determination appears to have been successfully delivered to Ms. Gill at the address she is using for this appeal.

8. WBRB did not appeal the corporate determination, and the time for filing an appeal expired on August 21, 2014.
9. A BC On-line search, conducted by the Director on June 25, 2014, showed that WBRB was incorporated on August 14, 2012. Ms. Gill was listed as a director of the company at that time. The Director conducted a further BC On-line search of the company on March 20, 2015, which showed that the WBRB was not in good in standing but there were no changes in the corporate history indicated in this search. The search did indicate that WBRB attempted to file for dissolution on October 29, 2014, but there was a delay, and the dissolution of the company had not occurred at the time of the Section 96 Determination. In any event, the Director found that Ms. Gill was a director of WBRB during the time Mr. Lawson's wages were earned or should have been paid.
10. Based on the information acquired and findings made, the Director concluded that Ms. Gill was liable under section 96 of the *Act* for the amount of the corporate determination, namely, \$1,715.43, inclusive of accrued interest.

SUBMISSIONS OF MS. GILL

11. Ms. Gill provides very brief written submissions in support of her appeal, which I propose to set out verbatim below. She states in her submissions:

Please note we purchased business in September 2012, as per contract of purchase and sale (Term and condition #2) the seller was suppose [sic] to terminate the employment of all employee [sic], and seller also was responsible for termination and vocation [sic] payment.

Even though we did hire some of the current employees, we did not hire Michael Lawson. Since he was never employed by us, I do not feel that we should be responsible for his vacation and termination pay.

Therefore, I am filing an appeal to cancel the Determination[.]

If you have any question please do not hesitate to call us [telephone number redacted].

Thanks [sic] You

Sukhwinder Kaur Gill

12. Ms. Gill attaches a copy of the Contract of Purchase and Sale (the "Contract"), showing that she and Harjinder S. Gill purchased the restaurant from Harpinder Chahal. The Contract is dated August 06, 2012.

ANALYSIS

13. In an appeal of a determination made under section 96 of the *Act*, the applicant 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 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).
14. The director/officer is precluded from arguing the corporate liability in an appeal of a section 96 determination (see *Kerry Steinemann, Director/Officer of Pacific Western Vinyl Window & Doors Ltd.*, BC EST # D180/96). Therefore, Ms. Gill may not make any submissions questioning or raising the matter of the correctness of the corporate determination in her appeal.

15. Having said this, I note that the argument of Ms. Gill that the seller, pursuant to the Contract, was to terminate the employment of all employees including Mr. Lawson and pay termination and vacation pay to all employees at or around the time of the completion of the transaction, was previously advanced by WBRB during the investigation of Mr. Lawson's complaint and before the corporate determination was made. In the Reasons for the corporate determination, the delegate, based on the evidence obtained during the investigation, concluded that the seller did not terminate the employment of its employees and Ms. Gill or WBRB continued the employment of the employees after the disposition of the restaurant happened. In the case of Mr. Lawson, the delegate notes in the corporate determination that he was on leave from work due to medical reasons, and his employment was also not terminated by the seller. He notes that WBRB was aware that Mr. Lawson was an employee of the seller and intended to return to work after the conclusion of his medical leave. In the circumstances, since Mr. Lawson was employed at the time the business was disposed of, the delegate concluded that section 97 of the *Act* applied to his employment, and he became employed by WBRB. However, when WBRB later refused to return him to work from his medical leave, it effectively terminated his employment. In the circumstances, the delegate concluded that Mr. Lawson was entitled to compensation for length of service pursuant to section 63 of the *Act*, and so ordered in the corporate determination. As indicated, it is not proper for Ms. Gill to now question or dispute the correctness of the corporate determination in the appeal of the Section 96 Determination.
16. As for those issues that arise under an appeal of the Section 96 Determination, I note, first, that Ms. Gill does not dispute that she was a director of WBRB, and so listed in the corporate search of WBRB at the time the wages of Mr. Lawson were earned and should have been paid. She also does not dispute the amount of personal liability imposed on her, which amount is within the limit of her personal liability prescribed in section 96 of the *Act*. She also does not raise any issue, nor adduce any evidence, that would indicate circumstances that might exempt her from personal liability under section 96(2) of the *Act*.
17. Further, I have also examined this appeal from the perspective of each of the statutory grounds listed in section 112(1) of the *Act*, although Ms. Gill only checked off one ground of appeal in the Appeal Form, namely, the error of law ground. I do not find any evidentiary basis to conclude that there is any error in the Section 96 Determination on the basis of any of the available grounds of appeal in section 112. In these circumstances, I find that Ms. Gill's appeal of the Section 96 Determination has no reasonable prospect of any success, and I dismiss it pursuant to section 114(1)(f) of the *Act*.

ORDER

18. Pursuant to section 115 of the *Act*, I order the Section 96 Determination, dated April 3, 2015, be confirmed in the amount of \$1,715.43, together with any interest that has accrued under section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal