

An appeal

- by -

Karl Cocks, a Director and Officer of Barca Enterprises Ltd.
(“Mr. Cocks”)

- 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/51

DATE OF DECISION: June 4, 2015

DECISION

SUBMISSIONS

Karl Cocks on his own behalf as a Director and Officer of Barca Enterprises Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Karl Cocks (“Mr. Cocks”), a Director and Officer of Barca Enterprises Ltd. (“Barca”), has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 16, 2015 (the “Section 96 Determination”). The Section 96 Determination concluded that Mr. Cocks was a director and officer of Barca, an employer found to have contravened provisions of the *Act*, at the time wages owed were earned or should have been paid to Benson Lai, Tse Wan Ma, Benny C.M. Tsang and Tyrone Kwok Chu Wu (collectively, the “Complainants”), and, as such, was personally liable under section 96 of the *Act* for an amount of \$17,728.03, inclusive of accrued interest under section 88 of the *Act*.
2. In his appeal, Mr. Cocks has invoked the natural justice ground of appeal in section 112(1)(b) of the *Act*, and asks the Employment Standards Tribunal (the “Tribunal”) to cancel the Section 96 Determination.
3. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. As a result, I will assess the appeal based solely on a review of the Reasons for the Determination (the “Reasons”); the Appeal Form; written submissions made by Mr. Cocks; and the section 112(5) “record” that was before the delegate when the Section 96 Determination was being made (the “Record”). Pursuant to section 114 of the *Act*, the Tribunal has the discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in subsection 114(1). If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Complainants will, and the Director may, be invited to file further submissions. Conversely, if I find the appeal is not meritorious, I will dismiss it under section 114(1) of the *Act*.

ISSUE

4. The sole issue, at this stage of the appeal, is whether there is any reasonable prospect Mr. Cocks’ appeal will succeed.

THE FACTS

5. The Complainants each filed a complaint under section 74 of the *Act*, alleging that Barca contravened the *Act* by failing to pay them their last wages and accrued vacation pay, and by terminating their employment without proper working notice or wages in lieu of notice (the “Complaints”).
6. The Director investigated the Complaints and, on March 16, 2015, issued a determination against Barca (the “corporate determination”), which found Barca liable for wages to the Complainants in the total amount of \$19,222.13, inclusive of accrued interest. The Director also imposed an administrative penalty on Barca in the amount of \$2,500.00 for five (5) separate contraventions of the *Act* and the *Employment Standards Regulation* (the “*Regulation*”). The corporate determination included notice to directors and officers of Barca explaining

their personal liability under the *Act*. The corporate determination was sent to Barca with copies to its registered and records office, as well as to Mr. Cocks, as the only director and officer of Barca.

7. The delegate conducted a BC Online corporate search of Barca on October 27, 2014, which indicated that Barca was incorporated on August 5, 1992, with Karl Cocks listed as its only director and officer. The search also confirmed that Mr. Cocks was a director and officer between April and July, 2014, when the Complainants' wages were earned and should have been paid.
8. On December 12, 2014, the delegate sent letters to Barca's business address, its registered and records office and to Mr. Cocks. The letters discussed section 96 of the *Act* and explained that the directors or officers of corporations are personally liable to pay up to two (2) months' wages for each employee if they were a director or officer at the time wages were earned or should have been paid.
9. Having discovered, based on the corporate search of Barca, that Mr. Cocks was a director and officer of Barca during the period wages for the Complainants were earned or should have been paid, the delegate issued the Section 96 Determination at the same time as the corporate determination against Barca on March 16, 2015. The Section 96 Determination held Mr. Cocks personally liable for up to two (2) months' unpaid wages for each of the Complainants, which amount totalled \$17,728.03.
10. As there was insufficient evidence to indicate that Mr. Cocks authorized, permitted or acquiesced in the contravention of the *Act* by Barca, Mr. Cocks was not found liable for any administrative penalties levied against Barca.
11. Mr. Cocks, as indicated earlier, appeals the Section 96 Determination based on the natural justice ground of appeal. In support of his appeal, Mr. Cocks has advanced identical submissions for both his appeal of the Section 96 Determination and Barca's appeal of the corporate determination. The Tribunal dismissed the appeal of the corporate determination in a separate decision (*Barca*, BC EST # D051/15).

SUBMISSIONS OF MR. COCKS

12. As indicated above, Mr. Cocks has made identical submissions in his appeal of the Section 96 Determination and Barca's appeal of the corporate determination.
13. In the written submissions, Mr. Cocks states that the Complainants "are truly Owner/Operators" or independent contractors, and the Director, in the corporate determination, neglected to take this into consideration. Mr. Cocks submits that the Complainants knew why Barca was unable to meet its final payroll for its employees, as well as for the Complainants, and for other unsecured creditors. He indicates that Barca's largest account, BCLC, was served with a pre-judgment garnishing order by one of Barca's creditors, Trailer Wizards Ltd. ("TWL") which effectively caused Barca to shut down. Mr. Cocks states that the Employment Standards Branch, on behalf of the Complainants, "should have first rights on this money [that was garnished] to pay [Barca's] employees and employee deductions".
14. Mr. Cocks disputes that the Complainants were employees of Barca, and feels that they have taken advantage of any claims advanced by employees of Barca.
15. Mr. Cocks submits that Barca is now insolvent and he has lost hundreds of thousands of dollars.
16. He is asking that the Section 96 Determination against him, as well as the corporate determination against Barca (which was dealt with in a separate decision), be dismissed.

17. It should be noted that Mr. Cocks' written submissions contain, as an attachment, a fact sheet of the Employment Standards Branch entitled "Employee or Independent Contractor Factsheet" explaining how to determine whether a worker is an employee or an independent contractor. I note Mr. Cocks has made some handwritten notes on the fact sheet which do not really convey any substantive argument.
18. He has also attached correspondence between the delegate and himself, prior to the Determination being made, relating to the court proceeding by TWL against Barca, and the amounts garnished by TWL from BCLC, which amount appears to be held in court. Mr. Cocks also attaches a copy of the garnishing order before judgment, as well as an affidavit of a representative of TWL in support of the garnishing order that was issued to TWL. I have read these materials carefully and do not find it necessary to set them out in any greater detail here.

ANALYSIS

19. It is now settled law in the Tribunal's decisions pertaining to an appeal of a determination made under section 96 of the *Act*, that the appellant is limited to arguing only 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).
20. Further, it is also settled law that 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, Mr. Cocks may not make any submissions questioning or raising the matter of the correctness of the corporate determination in this appeal. However, as indicated previously, Mr. Cocks is advancing identical written submissions in the appeal of the Section 96 Determination as in the appeal of the corporate determination. These submissions, in my view, only challenge the merits of the corporate determination and are, therefore, inappropriate for consideration in the appeal of the Section 96 Determination. Further, the Tribunal dealt with the merits (or lack thereof) of Mr. Cocks' submissions in the appeal of the corporate determination, and dismissed Barca's appeal.
21. Having said this, with respect to the issues that arise under an appeal of a section 96 determination, Mr. Cocks is not disputing that he was a director of Barca, and so listed in the corporate search of Barca at the time the wages of the Complainants were earned and should have been paid by Barca. He also does not dispute the amount of personal liability imposed on him, which amount is within the limit of his personal liability set out in section 96 of the *Act*. He also does not raise any issue, nor adduce any evidence that indicates circumstances that might exempt him from personal liability under section 96(2) of the *Act*. In the circumstances, I find that Mr. Cocks has failed to establish any relevant basis for me to cancel the Section 96 Determination.
22. Finally, I note that while Mr. Cocks has checked off the box in the Appeal Form representing the natural justice ground of appeal, he has not presented any evidentiary basis to support that ground of appeal.
23. In the result, I find that Mr. Cocks' 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

- ²⁴. Pursuant to section 115 of the *Act*, I order the Section 96 Determination, dated March 16, 2015, be confirmed in the amount of \$17,728.03, together with any interest that has accrued under section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal