

An appeal

- by -

Dave Nickerson,
a Director of Tyhee Gold Corp.
("Mr. Nickerson")

- 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.: 2016A/17

DATE OF DECISION: March 21, 2016

DECISION

SUBMISSIONS

Dave Nickerson on his own behalf as a Director of Tyhee Gold Corp.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Dave Nickerson (“Mr. Nickerson”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on December 15, 2015 (the “Determination”).
2. The Determination concluded that Mr. Nickerson was a director of Tyhee Gold Corp. (“TGC”), an employer found to have contravened provisions of the *Act* at the time wages owed were earned or should have been paid to Ravina Narsaiya (“Ms. Narsaiya”) and Carolyn Cornell (“Ms. Cornell”) (collectively, the “Complainants”) and, as such, was personally liable under section 96 of the *Act* for an amount of \$20,486.04 inclusive of accrued interest pursuant to section 88 of the *Act*.
3. In his appeal, Mr. Nickerson submits that the Director erred in law in making the Determination, and seeks the Tribunal to cancel the Determination as it pertains to Ms. Narsaiya.
4. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I am assessing this appeal based solely on the Determination, the Reasons for the Determination (the “Reasons”), the appeal and written submissions made by Mr. Nickerson, and my review of the section 112(5) “record” (the “Record”) that was before the Director when the Determination was being made. Under section 114 of the *Act*, the Employment Standards Tribunal (the “Tribunal”) has discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons listed in subsection 114(1). If satisfied the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, Ms. Narsaiya will, and the Director may, be invited to file further submissions. On the other hand, if it is found the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

ISSUE

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

THE FACTS

6. The Complainants filed a complaint under section 74 of the *Act* alleging that TGC contravened the *Act* by failing to pay them all wages, including compensation for length of service. The Director investigated the complaint and, on August 26, 2015, issued a determination against TGC (the “corporate determination”) which found TGC liable for wages to the Complainants in the total amount of \$41,480.54 inclusive of interest. The Director also imposed an administrative penalty on TGC in the amount of \$500.00. The corporate determination, which included a notice to directors and officers explaining their personal liability under the *Act*, was sent to TGC with copies to the registered and records office and to the directors and officers of TGC individually. The appeal period for the corporate determination expired on October 5, 2015, and no appeal was filed by TGC, and the latter did not pay the corporate determination amount.

7. On July 9, 2015, the delegate conducted a BC Online: Registrar of Companies – Corporation Search of TGC which showed that TGC was incorporated on March 3, 1993, and Mr. Nickerson was listed as a director.
8. On December 1, 2015, the delegate conducted a further BC Online corporate search of TGC, which confirmed that Mr. Nickerson was still listed as a director. The searches confirmed that Mr. Nickerson was a director between January 1, 2014, and May 29, 2015, when the Complainants’ wages were earned or should have been paid.
9. As a result, the delegate issued the Determination against Mr. Nickerson, holding the latter personally liable for up to two (2) months’ unpaid wages for each of the Complainants.
10. As there was insufficient evidence to indicate that Mr. Nickerson authorized, permitted or acquiesced in contravention of the *Act*, he was not found liable for the administrative penalty levied against TGC.
11. Mr. Nickerson appeals the Determination based on the “error of law” ground of appeal, and is seeking the Tribunal to change or vary the Determination in relation to Ms. Narsaiya only.

SUBMISSIONS OF MR. NICKERSON

12. Mr. Nickerson’s submissions are very brief. He states that Ms. Narsaiya is a Chartered Professional Accountant employed by TGC in the role of a Controller. Therefore, he submits, section 31(b) of the *Employment Standards Regulation* applies, and she is excluded from the application of the *Act*.

ANALYSIS

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

Corporate officer’s liability for unpaid wages

- 96 (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 individual or group terminations, if the corporation is in receivership,
 - (b) any liability to an employee for wages, if the corporation is subject to action under section 427 of the *Bank Act* (Canada) or to a proceeding under an insolvency Act,
- ...

14. It is 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:
 - Whether the person was a director when the wages were earned or should have been paid;
 - Whether the amount of liability imposed is within the limit for which a director may be found personally liable;

- Whether circumstances exist that would relieve the director from personal liability under subsection 96(2).
15. 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. Nickerson may not make any submissions questioning or raising the matter of the correctness of the corporate determination in this appeal. However, in his very brief written submissions, he raises the issue of the status of Ms. Narsaiya to make a claim under the *Act* because of her alleged professional status as a Chartered Professional Accountant. These submissions, in my view, challenge the merits of the corporate determination and are, therefore, inappropriate for consideration in the appeal of the Determination. The appropriate venue for raising this issue would have been in the appeal of the corporate determination, but TGC did not appeal the corporate determination.
16. Having said this, with respect to the issues that do arise under an appeal of a section 96 determination, Mr. Nickerson is not disputing that he was a director of TGC, and so listed in the corporate searches of TGC, at the time the wages of the Complainants (including particularly, Ms. Narsaiya), were earned and should have been paid by TGC. 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 these circumstances, I find that Mr. Nickerson has failed to establish any relevant basis for me to cancel the Determination.
17. I do not find Mr. Nickerson to have established any error of law on the part of the Director in making the Determination.
18. In the result, I find that Mr. Nickerson's appeal of the Determination has no reasonable prospect of any success, and I dismiss it pursuant to section 114(1)(f) of the *Act*.

ORDER

19. Pursuant to section 115 of the *Act*, I order the Determination, dated December 15, 2015, be confirmed, together with any interest that has accrued under section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal