

An appeal

- by -

Azam S. Tousi a Director of Darya Construction Inc.
(“Ms. Tousi”)

- 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.: 2013A/37

DATE OF DECISION: July 11, 2013

DECISION

SUBMISSIONS

Azam S. Tousi on her own behalf, a Director of Darya Construction Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) Azam S. Tousi, a Director of Darya Construction Inc., (“Ms. Tousi”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on April 30, 2013.
2. The Determination concluded that Ms. Tousi was a director of Darya Construction Inc. (“Darya”), an employer found to have contravened provisions of the *Act*, at the time wages owed were earned or should have been paid to two employees, Sam Mousavi (“Mr. Mousavi”) and Parvaneh Azizi (“Ms. Azizi”), and as such was personally liable under Section 96 of the *Act* for an amount of \$9,802.02.
3. In this appeal, Ms. Tousi, while not relying on any specific ground of appeal listed in Section 112(1), asks the Tribunal to cancel the Determination.
4. The Tribunal has 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 appeal and written submission made by Ms. Tousi, and my review of the section 112(5) “record” that was before the Director when the Determination was being made. Under section 114, 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), which states:

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 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.*
5. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), Mr. Mousavi and Ms. Azizi 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

6. The issue in this appeal is whether Ms. Tousi has shown the Determination should be cancelled.

THE FACTS

7. The facts relating to this appeal are brief.
8. Mr. Mousavi and Ms. Azizi filed complaints with the Director alleging Darya had contravened the *Act* by failing to pay wages, statutory holiday pay and annual vacation pay. The Director investigated the complaint and, on November 2, 2012, issued a Determination against Darya (“the corporate determination”) which found Darya liable for wages to the claimants in the amount of \$17,434.45. The Director also imposed administrative penalties on Darya in the amount of \$2,000.00. The corporate determination was sent to the registered and records office of Darya and to its listed directors, including Ms. Tousi. The corporate determination included notice to directors and officers of their personal liability under the *Act*. The section 112(5) Record indicates the corporate determination was successfully delivered to Ms. Tousi at the address being used by her for this appeal.
9. Darya appealed the corporate determination. The appeal was dismissed. Darya sought reconsideration of the appeal decision. Reconsideration was denied.
10. A BC On-line search conducted by the Director on March 2, 2012, showed Darya was incorporated on June 21, 2011. Ms. Tousi was not listed as a director of the company at that time. The Registry records show a Notice of Change of Directors, adding Ms. Tousi as a director of Darya, was filed September 8, 2011. A BC On-line search conducted by the Director on April 10, 2013, showed Ms. Tousi was still listed as a director of Darya. The Director found Ms. Tousi was a director of Darya during the time the claimants’ wages were earned or should have been paid.
11. Based on the information acquired and the findings made, the Director concluded Ms. Tousi was liable under section 96 of the *Act* for the amount of the Determination being addressed in this decision.

ARGUMENT

12. The submission filed by Ms. Tousi in support of her appeal asserts she was not a director of Darya, that she did nothing there. It relays a sad tale of how she was used by Majid Mojahed, who is listed in the section 112(5) “record as the “Incorporator” and as another director of Darya, and how the entire experience has adversely affected her health and her financial circumstances.

ANALYSIS

13. When considering the relative merits of an appeal, the Tribunal looks at whether there is some substance to the appeal on its face. In doing so, the Tribunal considers the statutory grounds of appeal and well established principles which operate in the context of appeals generally and, more precisely, to the particular issues raised in the appeal.
14. The grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

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

15. The Tribunal has established that an appeal under the *Act* is intended to be an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds of review identified in section 112. This burden requires the appellant to provide, demonstrate or establish a cogent evidentiary basis for the appeal.
16. The Determination clearly indicates the amount of the liability imposed on Ms. Tousi under section 96 was within the limit of personal liability and there is nothing in the Determination or the material in the file that would indicate circumstances that might exempt Ms. Tousi from personal liability.
17. One of the principles that operates in the context of this appeal is expressed in the Tribunal's decision, *David Wilinofsky and Ron J. Wilinofsky*, BC EST # D106/99: the Director may issue a section 96 Determination relying on the corporate records filed with and maintained by the Registrar of Companies; where an individual is recorded as a director or officer of a company in the records maintained by the Registrar, a rebuttable presumption of fact arises that the individual actually is a director and/or officer of the company in question. This presumption may be rebutted by credible and cogent evidence that the Registrar's records are inaccurate; the evidentiary burden of proving that one is not a corporate director or officer lies with the individual who denies such status.
18. There can be no dispute that Ms. Tousi was listed as a director of Darya at the time the wages of the claimants were earned and should have been paid. The finding of the Director was based on the result of the on-line corporate searches of the Registrar of Companies. The authenticity of these searches has not been challenged. Ms. Tousi does not say the records are wrong; she only asserts she was not a director. She says that she "did not do anything there", suggesting she did not take part in the business. However, whether she did or didn't take part in the activities of the business does not matter from the perspective of the personal liability imposed under the *Act* on directors (and officers) of corporations. The test for liability under section 96 is not a functional one where the person is listed as a director or officer in the corporate records, as Ms. Tousi was in this case: see *Lucille M. Pacey, a Director or Officer of Mosaic Technologies Corporation*, BC EST # D121/04. The Tribunal also confirmed, in *Director of Employment Standards (Re Michalkovic)* (BC EST # RD047/01), that it will be a rare and exceptional case where an individual listed as a director or officer in the corporate records will not be found to be a director or officer for the purposes of section 96 of the *Act*.
19. In sum, the assertions made by Ms. Tousi in this appeal do not rebut the presumption which operates as a result of her being listed as a director of the Darya in the Registrar's records and, accordingly, based on the established facts and the law, the Director was legally correct to have found her to be personally liable under section 96 of the *Act*.
20. Although no grounds of appeal have been identified by Ms. Tousi, I have examined this appeal from the perspective of each of the statutory grounds listed in section 112(1) of the *Act* and find no reason to conclude there is any error in the Determination.
21. There is no error of law. There are no natural justice concerns raised by this case. Ms. Tousi received the corporate determination containing notice of her possible personal liability and although not specifically invited to make a submission regarding her personal liability, she had the opportunity to do so. In any event,

the appeal process has provided the opportunity she did not take before the Determination was issued and does not compel a different conclusion than was reached by the Director. In the circumstances it is neither fair nor efficient that any further examination of Ms. Tousi's personal liability under section 96 of the *Act* be conducted: see *Sardar Barahmand, a Director of Diar Restaurant Ltd., also known as Diyar Restaurant*, BC EST # D050/13.

22. No new or additional evidence has been advanced in the appeal.
23. One cannot but feel sorry for the difficulties that have befallen Ms. Tousi as a result of this venture, but the *Act* is clear in its application to her circumstances and compels the conclusion that there is no error in the Determination.
24. The appeal must be dismissed and the Determination confirmed.

ORDER

25. Pursuant to section 115 of the *Act*, I order the Determination dated April 30, 2013, be confirmed in the amount of \$9,802.02, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal