

An appeal

- by -

Justin Ryan Eveline, a Director of 0947584 B.C. Ltd. carrying on business as
Under the Bridge
("Mr. Eveline")

- 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/35

DATE OF DECISION: July 16, 2013

DECISION

SUBMISSIONS

Justin Ryan Eveline on his own behalf, a Director of 0947584 B.C. Ltd. carrying on business as Under the Bridge

OVERVIEW

1. Pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) Justin Ryan Eveline (“Mr. Eveline”), a Director of 0947584 B.C. Ltd. carrying on business as Under the Bridge (“Under the Bridge”), has filed an appeal of a Determination issued by a delegate (the “delegate”) of the Director of Employment Standards (the “Director”) on March 28, 2013.
2. In a separate Determination issued March 28, 2013, (the “Corporate Determination”) the Director ordered Under the Bridge to pay its former employees, Sharlynn K. A. Morrison and Chelsey K. Prior, wages and interest in the amount of \$1,658.76. The delegate further found that Mr. Eveline was a director of Under the Bridge at the time wages were earned or should have been paid.
3. The Director has ordered Mr. Eveline to pay wages in the amount of \$1,658.76, representing not more than two months’ unpaid wages, plus interest, under section 96 of the *Act*. The date for appealing the Determination was 4:30 p.m. May 6, 2013.
4. Mr. Eveline filed his appeal on May 30, 2013, contending that the delegate failed to comply with principles of natural justice in making the Determination. The Tribunal disclosed the appeal submission to the Director and a redacted copy to each of the complainants. Although Mr. Eveline initially disagreed with the contents of the record, he subsequently confirmed in a telephone conversation with Tribunal staff that he did not object to the completeness of the record.
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. These reasons are based on Mr. Eveline’s written submissions, the Section 112(5) “record” that was before the delegate at the time the decision was made and the Reasons for the Determination. If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under Section 114 (1), the Respondent and the delegate may be invited to file further submissions. If the appeal is not meritorious, it will be dismissed.

FACTS AND ARGUMENT

7. On March 12, 2013, the delegate sent correspondence to Mr. Eveline, Under the Bridge’s sole director and officer, explaining his personal liability if wages were found to be unpaid:

If wages are determined to be outstanding, please be advised that the Employment Standards Branch will attempt to collect any outstanding amounts from Under the Bridge. If assets cannot be recovered from Under the Bridge, the Employment Standards Branch may pursue Under the Bridge’s Directors and Officers for any outstanding wages in accordance with section 96 of the Act. In part, this provision states that “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.”

8. The Determination also 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 the 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. Mr. Eveline's submissions repeats the arguments he made on Under the Bridge's behalf on the appeal of the Corporate Determination, which are, that he did not receive the Determination until May 30, 2013, and that the Director failed to observe principles of natural justice in making the Determination.

ANALYSIS

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

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). I have dismissed Under the Bridge's appeal of the Corporate Determination (BC EST #D056/13). I found that, not only had Under the Bridge 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 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. Mr. Eveline does not deny that he is, or continues to be a Director or Officer of Under the Bridge. He also does not deny that the wages found to be owed are for a period in which he was a Director or Officer. Furthermore, he does not argue, or present any evidence to suggest that any of the provisions of subsection 96(2) apply.
15. Although Mr. Eveline's grounds of appeal are that the Director failed to observe the principles of natural justice, I am not persuaded that he has substantiated this ground of appeal on either the Corporate Determination or the Director Determination.
16. I am satisfied that the delegate informed Mr. Eveline of the case being made against Under the Bridge and gave him full opportunity to reply. I am also satisfied that the delegate notified Mr. Eveline of his personal liability, if that corporate determination was not satisfied.

ORDER

17. Pursuant to Section 115 (1)(a) of the *Act*, I Order that the Determination, dated March 28, 2013, be confirmed in the amount of \$1,658.76 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