

An appeal

- by -

Muhammad Mazhar Ali Khan, a Director of ASMSM Canada Investment Inc.
carrying on business as Broadacres Care Facility
("Mr. Khan")

- 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.: 2016A/29

DATE OF DECISION: April 14, 2016

DECISION

SUBMISSIONS

Muhammad Mazhar Ali Khan on his own behalf as a Director of ASMSM Canada
Investment Inc. carrying on business as Broadacres Care
Facility

OVERVIEW

1. Pursuant to section 112 of the Employment Standards Act (the “Act”), Muhammad Mazhar Ali Khan (“Mr. Khan”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on January 14, 2016. In that Determination, the Director found that Mr. Khan was a director of ASMSM Canada Investment Inc. carrying on business as Broadacres Care Facility (“Broadacres”) at the time wages owing to Debra Garrett (“Ms. Garrett”) and Nancy Meredith (“Ms. Meredith”) were earned or should have been paid. The Director ordered Mr. Khan to pay the amount of \$6,771.57, representing not more than two months’ outstanding wages, plus \$518.27 interest.
2. Mr. Khan appeals the Determination contending that the delegate erred in law and failed to observe principles of natural justice in making the Determination.
3. This decision is based on Mr. Khan’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.

FACTS AND ARGUMENT

4. Ms. Garrett and Ms. Meredith (the “complainants”) filed complaints with the Director of Employment Standards alleging that Broadacres had contravened the *Act* in failing to pay wages owing.
5. On September 5, 2014 following an investigation into the allegations, the Director issued a Determination concluding that Broadacres had contravened the *Act* and finding that wages were owing in the amount of \$14,637.96 plus interest in the amount of \$252.66 (the “Corporate Determination”). The Director also imposed administrative penalties in the total amount of \$1,500 for Broadacres’ contraventions of the *Act*.
6. The Determination, which included a notice to directors and officers regarding their personal liability for wages under the *Act*, was sent by registered mail to Broadacres’ registered and records office as well as to its officers and directors.
7. The appeal period for the Corporate Determination expired October 14, 2014. The Determination was not appealed, and between January 29, 2015, and August 27, 2015, Broadacres paid \$7,866.39 of the amount owing.
8. A February 13, 2014, Corporate Search indicated that Broadacres was incorporated on November 29, 2010, and that Mr. Khan was listed as a director. Mr. Khan continued to be a director until February 28, 2014.
9. The delegate found that as Mr. Khan was a Broadacres director between November 29, 2010, and February 28, 2014, when the complainants’ wages were earned or should have been paid, Mr. Khan was liable for up to two months of the complainants’ unpaid wages. The delegate was unable to find that Mr. Khan authorized,

permitted or acquiesced in the contravention and concluded that he was not personally liable for the administrative penalties.

10. Mr. Khan contends that he did not respond to the initial complaints because of health issues and because of health issues facing his mother. He says that because he did not respond, a “default judgement” was issued against Broadacres. He now seeks to have the Determination against Broadacres and himself cancelled.
11. Mr. Khan also contends that he (together with his wife, who has also filed an appeal) purchased Broadacres by way of an asset purchase on December 16, 2013, and that the previous owner terminated the employment contracts of all of the employees, including the complainants. Although Mr. Khan made other allegations against the complainants, it is unnecessary to recite those arguments as they are not relevant to the appeal.

ANALYSIS

12. Section 114(1) of the *Act* provides that 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 or vexatious, 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 that 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.
13. 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 being made.
14. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I conclude that Mr. Khan has not met that burden and dismiss the appeal.

Failure to observe the principles of natural justice

15. Although Mr. Khan contends that the Director failed to observe the principles of natural justice, there is nothing in the appeal documentation that refers to this ground of appeal. The Tribunal recognizes that parties without legal training often do not appreciate what natural justice means. Natural justice does not mean that the delegate accepts one party’s notion of “fairness”. Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker. There is nothing in the appeal submission supporting this ground of appeal. The record confirms that Mr. Khan received, by e-mail, the Demand for Documents regarding the complaints and that

he also participated in a mediation session, which was ultimately unsuccessful, prior to the issuance of the Corporate Determination.

16. Furthermore, Broadacres paid a substantial sum towards the wages determined owing following the issuance of the Determination.
17. Therefore, I find that Mr. Khan was aware of his potential liability as a director or officer of Broadacres for unpaid wages owing to the complainants.

Error of Law

18. 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...

19. While the record confirms that Mr. Khan purchased Broadacres in December 2013, BC Registry Services records confirms that he was a corporate director during the time the complainants' wages were earned and should have been paid.
20. Mr. Khan's submissions relate to the delegate's conclusions on the Corporate Determination. Not only has the time for an appeal of the Corporate Determination expired, Broadacres admitted liability and paid a portion of the wages outstanding following the issuance of that Determination.
21. 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)
22. I find no basis to conclude that the delegate erred in law in her conclusion.
23. The appeal is dismissed.

ORDER

24. Pursuant to section 115 of the *Act*, I deny the appeal. I Order that the Determination, dated January 14, 2016, be confirmed in the amount of \$7,289.84 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