



An appeal

- by -

Peter Arney Larsen, a Director or Officer of 24/7 Excavating Ltd.
(“Mr. Larsen”)

- 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.: 2015A/41

DATE OF DECISION: July 7, 2015

DECISION

SUBMISSIONS

James J.D. Wagner

counsel for Peter Arney Larsen, a Director or Officer of
24/7 Excavating Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Peter Arney Larsen, a Director or Officer of 24/7 Excavating Ltd. (“Mr. Larsen”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on December 16, 2014.
2. The Determination concluded that Mr. Larsen was a director and officer of 24/7 Excavating Ltd. (“24/7”), an employer found to have contravened provisions of the *Act*, at the time wages owed were earned or should have been paid to Floyd Tayler (“Mr. Tayler”) and as such was personally liable under section 96 of the *Act* for an amount of \$7,558.35.
3. In this appeal, Mr. Larsen alleges the Director erred in law and failed to observe principles of natural justice in making the Determination.
4. This appeal has been filed with an appeal of a Determination issued against 24/7. The submission filed in support of this appeal is the same appeal submission as that made on behalf of 24/7.
5. The appeal was filed late.
6. On April 8, 2015, the Tribunal notified the parties that an appeal and a request for an extension of the appeal deadline had been received from Mr. Larsen, requested production of the section 112(5) “record” (the “record”) from the Director and notified the parties, among other things, that no submissions were being sought from the other parties pending review of the appeal by the Tribunal and that following such review all, or part, of the appeal might be dismissed.
7. The “record” was provided by the Director to the Tribunal and a copy was sent to Mr. Larsen, which was advised of his right to object to the completeness of the “record”. Mr. Larsen objected to the completeness of the “record”. That objection has been addressed in the decision addressing the appeal of 24/7 and need not be repeated here. It suffices to say here the objection was found to have no merit.
8. 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 appeal and written submission made by Mr. Larsen and my review of the “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 period;*

- (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.*

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

10. 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

11. The facts relating to this appeal are brief.
12. Mr. Tayler filed a complaint with the Director alleging 24/7 had contravened the *Act* by failing to pay him all wages owed. The Director investigated the complaint and, on October 30, 2014, issued a Determination against 24/7 (“the corporate determination”) which found 24/7 liable for wages to Mr. Tayler in the amount of \$7,532.11. The Director also imposed administrative penalties on 24/7 in the amount of \$3,000.00. The corporate determination was sent by registered and regular mail to 24/7, with a copy to Mr. Larsen.
13. 24/7 appealed the corporate determination. The appeal was dismissed: see BC EST # D066/15.
14. BC On-line searches conducted by the Director on September 16, 2011, and October 28, 2014, showed 24/7 was incorporated on January 8, 2007. The information in the October 28, 2014, search was current to October 3, 2014. Mr. Larsen was listed as the sole director and officer of 24/7. The Director found Mr. Larsen remained a director and officer of 24/7 through the period September 16, 2011, to October 28, 2014, which covers the period during which Mr. Tayler’s wages were earned or should have been paid.
15. Based on the information acquired and the findings made, the Director concluded Mr. Larsen was liable under section 96 of the *Act* for the amount of the Determination being addressed in this decision. Mr. Larsen was not found liable for the administrative penalties imposed on 24/7.
16. The Determination was sent to Mr. Larsen by registered mail to the address shown for him in the corporate records. A copy of the Determination was also sent to the registered and records office of 24/7 listed in the corporate records on file.

ARGUMENT

17. The appeal does not specifically address Mr. Larsen’s personal liability as a director and officer of 24/7 under section 96 of the *Act*, but rather repeats the arguments made in the appeal of the corporate determination. As

noted in this decision, it is unnecessary to review the arguments made against the corporate determination in this appeal.

18. Mr. Larsen does not challenge the Director's finding that he was a director or officer of 24/7 when the wages of Mr. Tayler were earned or should have been paid; nor does he argue the amount found owing exceeds the limit for personal liability of a director or officer under section 96 or that the circumstances described in section 96(2) apply to relieve him from personal liability.
19. This appeal is entirely dependent on the success or failure of the corporate determination.

ANALYSIS

20. As a result of amendments to the *Act* which came into effect on November 29, 2002, 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 being made.*

21. There are two aspects to this appeal that compel its dismissal. The first relates to the effect of the decision on the appeal of the corporate determination. The second relates to the allowable scope of an appeal of a section 96 Determination. The two are related.
22. On the first matter, I have already noted this appeal is a mirror of the appeal by 24/7 of the corporate determination. That appeal was dismissed in BC EST # D066/15.
23. Second, it is well established that a person challenging a director/officer Determination is limited to arguing those issues which arise under section 96: whether the person was a director/officer when the wages were earned or should have been paid; whether the amount of the liability imposed is within the limit for which a director/officer may be found personally liable; and whether circumstances exist that would relieve the director/officer from personal liability under subsection 96(2). The director/officer is precluded from arguing the corporate liability: see *Kerry Steineman, Director/Officer of Pacific Western Vinyl Windows & Doors Ltd.*, BC EST # D180/96. Accordingly, the arguments that question the correctness of the corporate determination may not be raised in this appeal.
24. Specifically, Mr. Larsen may not question the validity of the Director finding 24/7 is liable for wages owing to Mr. Tayler.
25. As noted above, Mr. Larsen does not argue the correctness of the Director's conclusion about his status as a director and officer of 24/7.
26. There is no possibility this appeal can succeed and it is dismissed under section 114(f) of the *Act*.
27. I need not address the request to extend the appeal period.

ORDER

28. Pursuant to section 115 of the *Act*, I order the Determination dated December 16, 2014, be confirmed in the amount of \$7,558.35, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal