

An appeal

- by -

Sukhdev Sidhu, a Director and Officer of Sidhu Brother Trucking Ltd.
(“Mr. Sidhu”)

- 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.: 2017A/62

DATE OF DECISION: June 20, 2017

DECISION

SUBMISSIONS

Jasdeep S. Auja

counsel for Sukhdev Sidhu, a Director and Officer of Sidhu Brother Trucking Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Sukhdev Sidhu (“Mr. Sidhu”), a Director and Officer of Sidhu Brother Trucking Ltd. (“SBTL”), has filed an appeal of a section 96 determination that was issued on January 20, 2017 (the “S. 96 Determination”).
2. By way of background, David Stubbs (“Mr. Stubbs”) filed a complaint under the *Act* on November 17, 2016, alleging that SBTL contravened the *Act* by failing to pay him annual vacation pay and statutory holiday pay. It appears from the Record (as there is no written reasons for the S.96 Determination filed with Mr. Sidhu’s appeal) that the delegate conducted a hearing into Mr. Stubbs’ complaint and issued a determination against SBTL on January 20, 2017 (the “Corporate Determination”), finding wages and interest were owed to Mr. Stubbs in the total amount of \$2,272.69. The Corporate Determination also levied administrative penalties in the amount of \$2,500 under section 29 of the *Employment Standards Regulation* (“*Regulation*”). The total amount of the Corporate Determination is \$4,772.69.
3. The Corporate Determination, which included a notice to directors and officers explaining their personal liability under the *Act*, was sent by registered mail to its business address on Ewart Street in Burnaby and its registered and records office on Garden Street in Abbotsford and to its sole director and officer, Mr. Sidhu, at the address provided for him in the B.C. Online Corporate Registry search of SBTL conducted by the delegate on November 18, 2016.
4. The Director also issued the S. 96 Determination against Mr. Sidhu on the same date as the Corporate Determination. The S. 96 Determination held Mr. Sidhu personally liable for not more than two (2) months’ unpaid wages owed to Mr. Stubbs, totalling \$2,675.92, inclusive of interest. The delegate did not find sufficient evidence to conclude that Mr. Sidhu authorized, permitted or acquiesced in the contraventions of the *Act* specified in the Corporate Determination and therefore, did not hold him responsible for any administrative penalties issued against SBTL in the Corporate Determination.
5. The S. 96 Determination was sent to Mr. Sidhu by registered mail at the Hilda Street address in Burnaby provided for him in the B.C. Online Corporate Registry search of SBTL previously mentioned and to the Ewart Street, Burnaby business address of SBTL and to SBTL’s registered and records office address.
6. The S. 96 Determination, as with the Corporate Determination, contained “Appeal Information” setting out expressly the appeal deadline of 4:30 p.m. on February 27, 2017.
7. Mr. Sidhu appeals the S.96 Determination, alleging the Director failed to observe the principles of natural justice in making the S.96 Determination and there is new evidence available that was not available at the time the S. 96 Determination was being made. Mr. Sidhu seeks to have the Determination referred back to the Director.

8. Mr. Sidhu's appeal was received by the Tribunal on April 24, 2017, without a copy of the reasons for the S.96 Determination ("the reasons"). The appeal was filed outside of the statutory time limit set out in subsection 112(3) of the *Act*. The appeal contains a request for an extension of the statutory time period to file the appeal. It should be noted that the Corporate Determination was also appealed by SBTL under similar circumstances, outside of the statutory time limit, and contained a request for an extension of the time period to appeal. In a separate decision, I dismissed the appeal of the Corporate Determination (see *Sidhu Brothers Trucking Ltd.*, BC EST # D067/17).
9. In correspondence dated April 26, 2017, the Tribunal notified the parties, among other things, that no submissions are being sought from any of them pending review of the appeal by the Tribunal and that following such a review all, or part, of the appeal might be dismissed. If the Tribunal does not dismiss all of the appeal or does not confirm all of the determination, the Tribunal will invite Mr. Stubbs and the Director to file reply submissions on the question of whether to extend the deadline to file the appeal and may request submissions on the merits of the appeal. Mr. Sidhu will then be given an opportunity to make a final reply to the submissions, if any.
10. The Tribunal received the section 112(5) "record" (the "Record") from the Director on May 2, 2017, and forwarded a copy of the same to Mr. Sidhu, and provided the latter an opportunity to object to its completeness. Mr. Sidhu did not object to the completeness of the Record. Accordingly, the Tribunal accepts the Record as complete.
11. Section 114(1) of the *Act* permits the Tribunal to dismiss all or part of an appeal without seeking submissions from the other parties. I have decided that this appeal is appropriate to consider under section 114(1). Accordingly, I will assess the appeal solely on the basis of the S. 96 Determination, counsel's submissions, and my review of the Record when the Corporate Determination and the S. 96 Determination were being made. If I am satisfied that Mr. Sidhu's appeal or part of it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Tribunal will invite Mr. Stubbs and the Director to file reply submissions to the question of whether to extend the deadline to file the appeal and may request submissions on the merits of appeal. Mr. Sidhu will then be afforded an opportunity to make a final reply to those submissions, if any.

ISSUE

12. The issue in this appeal is whether Mr. Sidhu has shown any basis for this Tribunal to cancel the S. 96 Determination.

SUBMISSIONS OF MR. SIDHU

13. Counsel's submissions on behalf of Mr. Sidhu are similar to those filed in the appeal of the Corporate Determination and some are identical such that it is confusing at times if counsel is referring to the S.96 Determination or the Corporate Determination.
14. Counsel states "at all material times Sukhdev Sidhu was the director and principal of [SBTL]".
15. Counsel attaches a BC Company Search of SBTL conducted on April 22, 2017, which shows Mr. Sidhu is SBTL's sole Director and Officer with a mailing address at Hilda Street, in Burnaby (the same address that the delegate of the Director previously sent Mr. Sidhu the Corporate Determination and the S.96 Determination).

16. Counsel states Mr. Sidhu “currently resides at [****] Mckee Street in the city of Surrey.”
17. He states that Mr. Sidhu first became aware of the “Determination ER138-738” (which is the same identification number for both the S.96 Determination and the Corporate Determination) on or about March 30, 2017, when he was informed by a representative of the Canadian Western Bank (the “Bank”) where SBTL has accounts. Attached to counsel’s written submission are documents from the bailiffs the Bank received in respect of both the S.96 Determination and the Corporate Determination.
18. Counsel states, “(a)s soon as the Applicant became aware of the Determination they retained Nordel Law Group LLP to represent them with respect to this appeal”.
19. On April 5, 2017, counsel requested from the delegate of the Director “written reasons and the record on which the Determination was made”. On closer reading of the email exchanges between counsel and the delegate, counsel requests written reasons for both the Corporate Determination and the S.96 Determination. By letter of same date, the delegate only responded to counsel’s request as it related to the Corporate Determination and denied counsel’s request as SBTL failed to comply with the deadline of February 6, 2017, for making a written request for the reasons. I note that although there was no notice in the S. 96 Determination about the deadline for making a written request for the reasons, the Delegate did not provide the written reasons for the S.96 Determination to counsel.
20. Counsel states that the only documents Mr. Sidhu is able to rely upon to make his appeal are the record from Canada Post dated December 7, 2016, showing how service of the Notice of Hearing and Demand for Employer Records was made; the S.96 Determination; the delegate’s letter of April 5, 2017, dismissing SBTL’s request for reasons and the Bailiff’s letter to the bank dated March 28, 2017.
21. Counsel argues that Mr. Sidhu should be “afforded the opportunity to make further submissions once a more complete record is provided, but [he] will make submissions in any event.” He then argues that natural justice requires that a party should not be found in default of a proceeding if he is unaware of it. He states that a hearing conducted in the absence of an affected party “goes to the heart of natural justice” as it denies the party the right to be heard. Any decision made at such a hearing should be set aside or the matter “re-heard with the [affected] party in attendance.”
22. Counsel also submits that Mr. Sidhu “was never personally served with the notice of hearing in respect of the Determination and never attempted to avoid service of any documents.” He adds that as a director of SBTL, Mr. Sidhu is largely occupied at job sites and with vendors and spends limited time at the office.
23. Counsel adds that SBTL has “several staff and employees... [who] manage the facilities on a day to day basis.” As December and January are exceptionally busy months for SBTL, SBTL had temporary employees assisting.
24. Counsel states that SBTL has trained its receptionist and temporary receptionists with respect to incoming mails. Mr. Sidhu “cannot recall receiving any notice or documents in relation to the hearing.” Mr. Sidhu also does not know a “G. Gill” who is shown on the Canada Post sheet as having received documents from the Employment Standards Branch at the registered and records office address of SBTL. He further states that SBTL has “never received any correspondence in any form, from anybody located at that address in relation to these proceedings.”

25. As for Mr. Sidhu's address, he states the latter "currently resides at [****] McKee Street in the City of Surrey, British Columbia, and has lived there for approximately two years." He states that Mr. Sidhu did not receive any correspondence at the said address from the Director.
26. Counsel adds Mr. Sidhu says he was never contacted by telephone or by any other means in relation to this proceeding. He only became aware of the proceeding and the S.96 Determination (or the Corporate Determination) when first informed by the Bank. He then contacted counsel "as soon as practicable" and retained counsel on March 31, 2017.
27. Counsel submits that while the Branch imposed a deadline of February 27, 2017, to appeal the S.96 Determination (and/or the Corporate Determination), Mr. Sidhu only became knowledgeable of it on March 30, 2017. In the circumstances, counsel argues, Mr. Sidhu should be afforded an extension of time to appeal the S.96 Determination (and/or the Corporate Determination) and "there should be a re-hearing of this matter as of right" to allow Mr. Sidhu "to present his evidence and make submissions as to why Section 45 and Section 58 of the Act were not violated."
28. Finally, counsel also argues that Mr. Sidhu has a meritorious defence. He states that while Mr. Sidhu "is unaware of the evidence submitted" by Mr. Stubbs, "the evidence presented was not correct." He then challenges the merits Mr. Stubbs' complaint stating as follows:

The Applicant submits the pay stubs take into account vacation pay and statutory holiday pay that was provided to Mr. Stubbs. Attached as Exhibit "F" are pay stubs for the employee from January 1 2016 through October 4, 2016.

The Applicant submits that even if the delegate finds the employee is entitled to vacation or statutory holiday pay, he is not entitled to the amount awarded by the delegate.

The pay stubs submitted by the Applicants show that Mr. Stubbs was paid \$1,327.68 in holiday pay. The Employee was terminated for cause in October.

It is unclear, how the amounts were calculated or what evidence was submitted, but the Applicants submit that they have a defense that is worthy of investigation at a re-hearing

ANALYSIS

29. Section 112(3) of the *Act* delineates appeal deadlines to ensure that appeals are dealt with promptly, as one of the stated purposes of the *Act* is "to provide fair and efficient procedures for resolving disputes over the application and interpretation of [the]Act" (subsection 2(d)).
30. In the case of a determination served on a person by registered mail, subsection 112(3)(a) of the *Act* provides that the appeal period is "30 days after the date of service of the determination". In this case, Mr. Sidhu was sent the S. 96 Determination by registered mail. At page 2 of the S.96 Determination, it states "(s)hould you wish to appeal this Determination, your Appeal must be delivered to the Employment Standards Tribunal by 4:30 p.m. on February 27, 2017". Mr. Sidhu submitted his appeal on April 24, 2017, over a month-and-a-half after the expiry of the date for filing his appeal. While Mr. Sidhu has applied for an extension of time to appeal, he has failed to include a copy of the Director's written reasons for the S.96 Determination with his late appeal. It was on April 5, 2017, that counsel asked the delegate of the Director for the reasons. To date, the delegate has inexplicably not provided the written reasons for the S.96 Determination or responded to counsel's request.

31. In a challenge of a determination issued under section 96 of the *Act*, the appellant is *limited* to arguing those issues that arise under section 96, namely:
- (i) whether the person was a director when the wages were earned or should have been paid;
 - (ii) whether the amount of the liability imposed is within the limit for which a director may be found personally liable; and
 - (iii) whether circumstances exist that would relieve the director from personal liability under subsection 96(2).
32. The Director may issue a section 96 determination without holding a hearing based on the corporate records filed with, and maintained by, the Registrar of Companies. When an individual is recorded as a director of a company in the records maintained by the Registrar of Companies, a rebuttable presumption of fact arises that the individual actually is a director of the company in question. In *David Wilinofsky and Ron J. Wilinofsky* (BC EST # D106/99), the Tribunal indicated that this presumption is rebuttable by credible and cogent evidence that the Registrar's record are inaccurate. However, the evidentiary burden of proving that one is not a corporate director lies with the individual who denies such status.
33. In this case, the delegate properly relied on the corporate records of SBTL filed with, and maintained by, the Registrar of Companies, to make the S. 96 Determination against Mr. Sidhu. Moreover, in his written submissions counsel confirms that Mr. Sidhu, "at all materials times ... was the director and principal of [SBTL]". I would add furthermore that that Mr. Sidhu does not dispute he was a director of SBTL *during the material time the Mr. Stubbs was employed by SBTL and should have been paid his wages*. Mr. Sidhu also does not dispute the amount of the liability imposed on him, or present evidence of any circumstances that would relieve him of personal liability under subsection 96(2) of the *Act*.
34. While Mr. Sidhu has invoked the natural justice and the new evidence grounds of appeal under subsections 112(1)(b) and (c) of the *Act*, I find that he has not established any or sufficient factual basis under these grounds of appeal. I also find that Mr. Sidhu's appeal of the S.96 Determination, in large part, is an attempt to challenge the Corporate Determination. An appeal of the S.96 determination is not an opportunity for a challenge to the corporate decision. In the circumstances, I do not find there is any presumptive merit in Mr. Sidhu's appeal and I dismiss it under section 114(1)(f) of the *Act*.

ORDER

35. Pursuant to section 115 of *Act*, I confirm the S. 96 Determination made on January 20, 2017, against Sukhdev Sidhu, a Director and Officer of SBTL, together with any additional interest that has accrued pursuant to section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal