



An appeal

- by -

Scott Andrews, a Director and Officer of
Scott Andrews Investments Inc.

(“Mr. Andrews”)

- 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.: 2014A/75

DATE OF DECISION: August 12, 2014

DECISION

SUBMISSIONS

Scott Andrews on his own behalf as a Director and Officer of Scott Andrews Investments Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “Act”), Scott Andrews (“Mr. Andrews”), a Director and Officer of Scott Andrews Investments Inc. (“SAII”), has filed an appeal of a section 96 determination that was issued on March 25, 2014 (the “S.96 Determination”).
2. By way of background, on October 24, 2013, Curtis Stevenson (“Mr. Stevenson”) filed a complaint under section 74 of the *Act*, alleging that SAII contravened the *Act* by failing to pay him regular wages and annual vacation pay (the “Complaint”). On February 3, 2014, a delegate of the Director of Employment Standards (the “Director”) conducted a hearing into Mr. Stevenson’s Complaint, and issued a determination against SAII on March 25, 2014, finding wages and interest were owed to Mr. Stevenson in the total amount of \$7,093.96, including interest (the “Corporate Determination”). The Corporate Determination also levied administrative penalties of \$1,500.00 against SAII.
3. The Corporate Determination, which included a notice to directors and officers explaining their personal liability under the *Act* was sent to SAII by registered and regular mail to its registered and records office and also to its sole director and officer, Mr. Andrews at the same address provided for both in the two BC Online Corporate Registry searches of SAII the delegate conducted on October 1, 2013, and on March 19, 2014.
4. The Director also issued the S.96 Determination against Mr. Andrews on the same date as the Corporate Determination. The S.96 Determination held Mr. Andrews personally liable for up to two months’ wages for Mr. Stevenson, totalling \$7,093.96, inclusive of accrued interest. However, the delegate did not find sufficient evidence to conclude that Mr. Andrews authorized, permitted or acquiesced in the contraventions of SAII and, therefore, did not hold him responsible for any administrative penalties issued against SAII in the Corporate Determination.
5. The S.96 Determination was sent to Mr. Andrews by registered mail and by regular mail at the address provided for him in the BC Online Corporate Registry search of SAII.
6. The S.96 Determination, as with the Corporate Determination, contained an express notice of the appeal time and date of 4:30 p.m. on May 2, 2014. Mr. Andrews did not file his appeal of the S.96 Determination until about 52 days after the expiry of the appeal date on June 23 2014.
7. In his appeal, Mr. Andrews invokes all three grounds of appeal available under section 112(1) of the *Act*, namely, the Director breached the principles of natural justice and erred in law in making the S.96 Determination and new evidence has become available that was not available at the time the S.96 Determination was being made. Mr. Andrews is seeking the Tribunal to cancel the S.96 Determination.
8. Section 114(1) of the *Act* and Rule 22 of the *Tribunal Rules of Practice and Procedure* permit the Tribunal to dismiss all or part of an appeal without seeking submissions from the other parties. I have decided this appeal is an appropriate case for consideration under section 114(1) of the *Act*. Accordingly, I will assess the

appeal solely on the basis of the S.96 Determination, the Reasons for the S.96 Determination, Mr. Andrews' submissions, and my review of the section 112(5) "record" that was before the Director when both the Corporate Determination and S.96 Determination were being made.

9. If I am satisfied that Mr. Andrews' 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. Stevenson and the Director to file Reply Submissions and Mr. Andrews will be afforded an opportunity to make a final Reply to those submissions, if any.

ISSUE

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

SUBMISSIONS OF MR. ANDREWS

(a) The late filing of the Appeal

11. As noted previously, the expiry date for filing the appeal of S.96 Determination was May 2, 2014 but Mr. Andrews filed his appeal 52 days after the expiry date.
12. Mr. Andrews, I note, has filed identical submissions in support of his appeal of the S.96 Determination as the appeal of the Corporate Determination. In his email to the Tribunal on June 23, 2014 enclosing his Appeal of the S.96 Determination he appears to have cut and pasted from his earlier email to the Tribunal on June 19, 2014, (enclosing the appeal of the Corporate Determination) his explanation why the appeal of the S.96 Determination is filed late. In particular, he explains his late Appeal in his June 23 email as follows: "Late due to out of town". He also attaches the same hand written Appeal Submissions and documents previously submitted in the appeal of the Corporate Determination. In the handwritten Appeal Submissions, he states "this appeal is late because I was on holidays and had a family tragedy, for that I apologize for the delay."

(b) Submissions relating to the merits of the Appeal

13. With respect to the merits of the Appeal, as indicated, Mr. Andrews, makes identical submissions in this Appeal as in the Appeal of the Corporate Determination. He states that Mr. Stevenson was a subcontractor who paid his own taxes and CPP and other expenses, therefore, he was not entitled to holiday pay. He states that Mr. Stevenson "was making 40% of the one truck I had and that's it".
14. Mr. Andrews further submits that Mr. Stevenson was negligent "in so many ways" and caused him damages. He indicates that Mr. Stevenson stole fuel and failed to give proper notice to SAII before he quit. He also states that Mr. Stevenson damaged SAII's truck which went into the ditch because Mr. Stevenson failed to put the parking brakes on.
15. Mr. Andrews further submits that he and/or SAII suffered "loss of income of \$10,000.00 or more" because of Mr. Stevenson's negligence over the course of seven years. He states that he or SAII has had to pay several significant mechanics' bills for failure by Mr. Stevenson to check the oil levels in the truck and failure to maintain the truck he was provided by SAII.

16. Mr. Andrews attaches to his written submissions a Notice of Claim filed in the Provincial Court of British Columbia (Small Claims Court) by SAII against Mr. Stevenson for damage to SAII's truck and for theft of fuel. SAII is claiming \$14,277.78 in the action.
17. Mr. Andrews also attaches two mechanical bills from G.T. Mechanical for \$7,121.78 and \$1,702.78 purportedly for repairs to the truck that was provided to Mr. Stevenson. The invoices are dated September 5, 2012 and January 10, 2013 which is during the period Mr. Stevenson was working for SAII.
18. Mr. Andrews also states that the Delegate responsible for making the Corporate Determination "instead of looking at the evidence" decided to attach a lien against his house and freeze his bank accounts "for a judgment that is unlawful" and seeks the Tribunal to cancel the Corporate Determination. I note that Mr. Andrews has included with his written Appeal submissions a copy of the Certificate of Judgment filed on May 29, 2014 by the Director against Mr. Andrews residence.
19. Mr. Andrews has also included with his Appeal a letter from Coast Capital Savings advising him that his personal account has been "frozen" because of a Demand Notice from the Province of British Columbia in the amount of \$7,093.96.

ANALYSIS

(a) Late Appeal

20. As noted previously Mr. Andrews' submissions in the Appeal of the S.96 Determination are identical to his submissions in the Appeal of the Corporate Determination. Therefore, my analysis of the late filed appeal in this case is similar to my analysis of the same issue in the appeal of the Corporate Determination.
21. I note that Section 112(3) of the *Act* sets out Appeal deadlines to ensure Appeals are dealt with promptly. In the case of determinations 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. Andrews was sent the S.96 Determination by registered mail, and the S.96 Determination, at page 2, states "(s)hould you wish to Appeal this Determination, your Appeal must be delivered to the Employment Standards Tribunal by 4:30 pm on May 2, 2014". However, Mr. Andrews failed to comply with the stated deadline and filed his Appeal about 52 days past the expiry date on June 23, 2014.
22. Section 109(1)(b) of the *Act* permits the Tribunal to extend the time limit for an Appeal. In *Re: Tang*, BC EST # D211/96, the Tribunal explained the principles governing the exercise of its discretion under this section as follows:

Section 109(1)(b) of the *Act* provides the Tribunal with the discretion to extend the time limits for an Appeal. In my view, such extension should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an Appeal should be extended.
23. In *Blue World IT Consulting Inc.*, BC EST # D516/98, the Tribunal delineated the following non-exhaustive factors it may consider in deciding whether to grant an extension of the Appeal:
 - 1) there is a reasonable and credible explanation for the failure to request an Appeal within the statutory time limit;
 - 2) there has been a genuine and ongoing *bona fide* intention to Appeal the Determination;

- 3) the respondent party (i.e. the employer or the employee) as well as the Director of Employment Standards, must have been made aware of this intention;
- 4) the respondent party will not be unduly prejudiced by the granting of the extension; and
- 5) there is a strong *prima facie* case in favour of the appellant.

24. Having reviewed all of the considerations above in context of the facts in the Appeal of the S.96 Determination and for the reasons delineated below, I am not persuaded that this is a case where the Tribunal should exercise its discretion to grant an extension of time to file an Appeal.

25. First, I am not persuaded that there is a reasonable and credible explanation for Mr. Andrews' failure to request an Appeal within the statutory time limit. Mr. Andrews did not deny receiving both the Corporate Determination and the S.96 Determination in a timely fashion. However, Mr. Andrews says, in his email of June 23, 2014 to the Tribunal, the Appeal is "(l)ate due to out of town". In his written Appeal submissions he explains he "was on holidays" and there was "a family tragedy" that caused him delay in filing the Appeal. As for the holidays, I am not convinced that going away on a holiday, after he participated in the Complaint Hearing and knew that there was an impending corporate determination and possibly a director's determination, excuses his delay of 52 days to file an Appeal. As for the purported "family tragedy", Mr. Andrews does not provide any particulars other than make a bare assertion. There is no indication of when the alleged family tragedy occurred and no explanation of any efforts by him to contact the Tribunal to request an extension.

26. Second, I am not persuaded that there is any evidence of a genuine and ongoing *bona fide* intention on the part of Mr. Andrews to Appeal the S.96 Determination during the Appeal period. It appears to me that Mr. Andrews was likely motivated to Appeal the S.96 Determination when he received the Certificate of Judgment filed by the Director against his personal residence and the letter from his financial institution advising him that his personal bank account was frozen.

27. Third, there is no evidence that the Director or Mr. Stevenson were made aware of Mr. Andrews' intention to Appeal the S.96 Determination until after the late Appeal was filed.

28. Fourth, while there may not be any prejudice to Mr. Stevenson in granting Mr. Andrews an extension of time to Appeal, the Tribunal needs to be mindful of the need for a timely disposition of an Appeal, as well as the stated purpose in section 2(d) of the *Act*, which is "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this *Act*". In this case, even if I were persuaded by Mr. Andrews' explanation for the delay in filing his Appeal, I do not find that there is any prospect of success of his Appeal.

29. The last factor for consideration set out by the Tribunal in *Blue IT Consulting Inc., supra*, is whether there is a strong *prima facie* case in favour of the applicant warranting a grant of extension of the Appeal period. Having reviewed all of the submissions of Mr. Andrews in the Appeal very carefully, I am not convinced that there is a strong *prima facie* case in favour of Mr. Andrews. I do not find any evidence to support findings of a breach of natural justice or error of law on the part of the Director in making the S.96 Determination. I also do not find there is any evidential basis to successfully invoke the "new evidence" ground of appeal. Having said this, I will discuss more specifically the merits of Mr. Andrews' Appeal under the next heading below.

(b) Merits of Appeal

30. Although there exist ample basis to dismiss Mr. Andrews' late filed Appeal of the S.96 Determination under section 114(1)(b) of the *Act* without going any further and reviewing the merits of his appeal, I have reviewed

the merits of his appeal and find the Appeal has no reasonable prospect of success. I will explain my reasons below.

31. It should be noted that a person challenging a director's determination is limited to arguing those issues that arise under section 96 of the *Act*, 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 records 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 the case at hand, the delegate correctly relied on the corporate records filed with, and maintained by, the Registrar of Companies to issue the S. 96 Determination against Mr. Andrews. Mr. Andrews has not disputed that he was a director of SAII during the material time in question. He has also not disputed the amount of the liability imposed on him, and there are no circumstances that would relieve him of personal liability under subsection 96(2) of the *Act* in this case.
34. As indicated previously, I do not find there to be any evidence of error of law or breach of natural justice on the part of the Director. As for the new evidence ground of appeal, I do not see any evidence presented by Mr. Andrews that would qualify as new evidence under the Tribunal's test for admitting new evidence set out in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03. I also find that the evidence he adduces in this Appeal is irrelevant and not probative such as the yet to be determined Provincial (small claim) Court action of SAII against Mr. Stevenson and the purported invoices for mechanical repairs to the truck SAII provided Mr. Stevenson while he was working for SAII.
35. I also add that Mr. Andrews' submissions in this Appeal are more in the nature of a challenge to the findings of fact in the Corporate Determination which challenge is not appropriate in the appeal of the S.96 Determination. An appeal of a section 96 determination is not a proper venue for challenging findings and conclusions reached in a corporate determination. In the circumstances, I do not find there is any presumptive merit in Mr. Andrews' Appeal and I dismiss it under sections 114(1)(b) and 114(1)(f) as both out of time and, having no reasonable prospect of success.

ORDER

36. Pursuant to section 115 of the *Act*, I confirm the S. 96 Determination made on March 25, 2014, against Scott Andrews, a Director and Officer of Scott Andrews Investments Inc.

Shafik Bhalloo
Member
Employment Standards Tribunal