

An appeal

- by -

Craig Kernal Koka, an Officer of Tisho Services Inc.
(“Mr. Koka”)

- 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/55

DATE OF DECISION: August 21, 2014

DECISION

SUBMISSIONS

Craig Kernal Koka on his own behalf as an Officer of Tisho Services Inc.
Mica Nguyen on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Craig Kernal Koka (“Mr. Koka”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 28, 2014 (the “Section 96 Determination”).
2. The Section 96 Determination concluded that Mr. Koka was an officer of Tisho Services Inc. (“Tisho”), an employer found to have contravened provisions of the *Act*, at the time wages owed to Randal D. Archibald, Sheri Catchpole, and Baljinder Grewal (collectively, the “Complainants”) were earned, or should have been paid, and, as such, was personally liable under section 96 of the *Act* for an amount of \$25,897.93, inclusive of accrued interest.
3. Mr. Koka has filed an appeal of the Section 96 Determination arguing that the Director erred in law in making the Section 96 Determination, and seeks the Employment Standards Tribunal (the “Tribunal”) to cancel the Section 96 Determination.
4. Rule 22 of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”) and section 114 of the *Act* set out the Tribunal’s discretionary power to dismiss all or part of an appeal without seeking submissions from the parties. As a result, the Tribunal initially considered Mr. Koka’s appeal based solely on the following: (i) Reasons for the Section 96 Determination (the “Reasons”); (ii) Mr. Koka’s written submissions; (iii) the section 112(5) “record” that was before the Director when the Section 96 Determination was being made (the “Record”); (iv) Mr. Koka’s submissions challenging the completeness of the Record; (v) the Director’s submissions in response to Mr. Koka’s objections to the Record and (vi) Mr. Koka’s final submissions.
5. In the course of the Tribunal’s initial assessment of the appeal, the Tribunal took notice of a document submitted by Mr. Koka with his Appeal Form entitled Notice of Resignation of Director and Employee, dated May 15, 2012 (the “Notice of Resignation”), which Mr. Koka purportedly signed and submitted to Tisho. Mr. Koka claims this document and the “purchase contract” (the “Share Purchase Agreement”) for the sale of his shares in Tisho to Justin Bessler (“Mr. Bessler”) were submitted by him to the delegate of the Director but appear to be missing from the Record in this appeal.
6. The Director, in response, acknowledges that the Record is missing the Notice of Resignation, as well as a shareholder’s resolution entitled “Tisho Services Inc.” wherein the shareholders of Tisho approved the resignation of Mr. Koka as a director and appointed Mr. Bessler as a director (“Shareholder’s Resolution”). The Director submits these documents were inadvertently left out from the Record but submits that the other documents, namely, the Share Purchase Agreement and the email dated September 7, 2013, from Mr. Koka’s lawyer, Mr. Oliver Hamilton, which, *inter alia*, speaks to Mr. Koka’s resignation as an officer and director of Tisho (“Counsel’s Email”) were not provided by Mr. Koka to the delegate before the Section 96 Determination. The Director argues that the latter documents were both “clearly available during the course of the Branch’s investigation as indicated by the dates of the documents” and Mr. Koka was provided “the

opportunity to provide [the said] evidence to the Branch but failed to do so”. Therefore, the Director appears to argue, the last two documents – the Share purchase Agreement and Counsel’s Email - should be rejected as new evidence in this appeal. This Tribunal will address the Director’s latter argument separately in this decision; however, the Notice of Resignation the Director admittedly failed to include in the Record may have some probative value in terms of determining a material issue in this appeal, namely, whether or not Mr. Koka resigned as an officer of Tisho before the Complainants earned wages with Tisho and should have been paid. The Tribunal, therefore, decided not to dismiss the appeal under section 114 of the *Act* and so notified the parties on June 27, 2014, and requested the Director to provide the Tribunal with individual copies of the Record of each Complainant. The Director complied with the request and delivered to the Tribunal the requested documents.

7. On July 15, 2014, the Tribunal disclosed the individual copies of the Record to each Complainant and advised the Complainants and the Director that they may provide written submissions on the merits of the Appeal and particularly on the scope of the Notice of Resignation and whether Mr. Koka’s stated resignation in the document as a “Director and Employee” encompassed his resignation as an officer of Tisho as of May 15, 2012. The deadline for the submissions was 4:00 p.m. on July 29, 2014. [I note Tribunal correspondence dated July 15, 2014, incorrectly referred to the Notice of Resignation as dated May 12, 2012]
8. The Tribunal received written submissions from the Director, but not from the Complainants. The Tribunal then disclosed the submissions to Mr. Koka and afforded Mr. Koka an opportunity to file his final reply by August 15, 2014. Mr. Koka did not provide a final reply.
9. Pursuant to section 36 of the *Administrative Tribunals Act* which is incorporated in the *Act* (pursuant to s. 103), and Rule 8 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In this appeal, none of the parties have requested an oral hearing and, in my view, the appeal can be adjudicated on the basis of the Record, the written submissions of the parties, the Corporate Determination, the Section 96 Determination and the Reasons.

ISSUE

10. The questions in this appeal are: (i) Did the Director err in law in making the Section 96 Determination? (ii) Is there any basis to cancel the Section 96 Determination?

THE FACTS AND SUBMISSIONS OF THE PARTIES

11. Tisho operated a trucking and transportation business, and employed the Complainants in various capacities, such as Dispatcher, Operations Employee Supervisor, and Truck Driver, before it ceased operations in May or June 2013.
12. The Complainants filed their complaints against Tisho under section 74 of the *Act*, alleging that the latter contravened the *Act* by failing to pay them wages.
13. A delegate of the Director conducted an investigation into the Complainants’ allegations and issued a determination against Tisho on December 30, 2013 (the “Corporate Determination”), finding that the latter owed wages and interest to the Complainants totalling \$52,712.57. The Corporate Determination also levied administrative penalties in the amount of \$2,000.00 against Tisho.
14. The Corporate Determination included a Notice to the Directors and Officers of Tisho, explaining their personal liability under the *Act*, and it was sent by registered mail to Tisho’s last known operating location

with copies to the Registered and Records Office, and to the Director and Officer of Tisho shown on the two BC Online corporate searches of Tisho, conducted on May 9, 2013, and September 5, 2013, respectively. The corporate searches showed Mr. Bessler as the sole director of Tisho and Mr. Koka as the sole officer (President) of Tisho. There is no dispute that the Corporate Determination was received by Mr. Koka. Indeed, there is a Canada Post-Track Sheet produced by the Director indicating that the Corporate Determination was successfully delivered to Mr. Koka.

15. The appeal period for the Corporate Determination expired on February 6, 2014, without Tisho filing an appeal or paying the amounts ordered in the Corporate Determination to the Complainants.
16. The delegate of the Director, based on the said corporate searches of Tisho, which identified Mr. Koka as an Officer (President) of Tisho between May 23, 2012, and April 28, 2013, when the Complainants' earned wages or should have been paid, went on to issue the Section 96 Determination, holding that Mr. Koka was personally liable for up to two months' unpaid wages for each of the Complainants. The total amount of the Section 96 Determination Mr. Koka was ordered to pay the Complainants, inclusive of interest, is \$25,897.93.
17. With respect to the administrative penalties levied against Tisho in the Corporate Determination, the delegate found that there was insufficient evidence that Mr. Koka authorized, permitted or acquiesced in the contraventions of Tisho and, therefore, did not find Mr. Koka personally liable for the administrative penalties.
18. On May 1, 2014, Mr. Koka filed an appeal of the Section 96 Determination (which was received by the Tribunal on May 2, 2014). In the Appeal Mr. Koka argues that the Director erred in law in making the Section 96 Determination. Mr. Koka attaches to the Appeal Form a brief written submission, together with an email from his lawyer, who appears to have represented him in the sale of his shares in Tisho to Mr. Bessler. Mr. Koka has also attached to the Appeal Form a handful of pages of the Share Purchase Agreement, together with the Notice of Resignation and the Shareholder's Resolution.

(i) Appeal submissions of Mr. Koka

19. In his very brief written submissions in support of the appeal, Mr. Koka contends that he "was no longer director, officer or employee of the Company as of May 15, 2012". He also states that "there was no money owing to employees of [sic] the date of sale per contract".
20. In Counsel's Email, which Mr. Koka has attached to the Appeal Form, counsel refers to Article 3.5(c) of the Share Purchase Agreement which states that "the Company will owe no amounts for salaries, pensions, bonuses, commissions or other remuneration of any nature, including accrued vacation pay and unpaid earned wages of the present or former officers, directors, employees, sales persons, consultants and agents of the Company, as at the Closing". Counsel's Email also refers to Article 6.2(f), (h) and (i) which requires resignation of all the officers and director of Tisho, and the requirement to produce any documents necessary to appoint the purchaser, Mr. Bessler, as a director and President of Tisho, among other things.
21. I also note that Counsel's Email states that Mr. Koka "resigned as a director and an employee of Tisho (an officer - President) but Tisho failed to make its corporate records filing with the registry and so it was not updated by Tisho. That does not change the fact [that Mr. Koka] had resigned and [had] nothing to do with the company since May 11, 2012." Counsel also reiterates that Mr. Koka "formally and effective [sic] resigned as of the completion date (Closing) of the share purchase on May 11, 2012" and that "ESB must look to the company (Tisho) and Mr. Bessler it [sic] director and officer...[who] was to be appointed as Tisho's President."

(ii) Submissions of Mr. Koka and the Director pertaining to the Director's Record

22. On May 6, 2014, the Tribunal requested the Director provide the Tribunal with the Record that was before the Director at the time the Section 96 Determination was made. On May 7, 2014, the Director delivered the Record, which the Tribunal then sent to Mr. Koka to review and to provide the Tribunal with any objections to the completeness of the Record.
23. On May 23, 2014, the Tribunal received Mr. Koka's objections to the Record. Mr. Koka's objections number three. The first objection is that the Record does not contain materials which "provide information/confirmation of wages lost" such as "timesheets" of the Complainants. The second objection is that in the case of one of the Complainants, namely, Ms. Grewal, her claim of lost wages dating back to November 14, 2011, is not substantiated and requires production of Records supporting her start date of employment with Tisho as her employment was transferred to Tisho from the latter's predecessor. The final objection to the Record is that it is missing "copies of a purchase contract with Mr. Bessler" which, Mr. Koka says, support that he was "no longer an employee, officer nor director of Tisho" as of May 15, 2012.
24. On June 9, 2014, the delegate of the Director submitted a response to Mr. Koka's objections to the Record. With respect to the first objection of Mr. Koka, the delegate notes that "information/confirmation of wages lost", including items such as "timesheets", do not form part of the Record in the Section 96 Determination but were part of the record in the Corporate Determination. It was the Corporate Determination that was used to calculate Mr. Koka's liability under the Section 96 Determination once the corporate searches of Tisho disclosed Mr. Koka was an officer of Tisho at the time the Complainants' wages were earned and should have been paid.
25. With respect to Mr. Koka's second objection to the Record, the delegate submits that Mr. Koka "is precluded from arguing the corporate liability" or "the matter of the correctness of the Corporate Determination" in the appeal of the Section 96 Determination.
26. With respect to Mr. Koka's third objection, as previously noted in the Overview section of this decision, the delegate submits that Mr. Koka failed to submit to the Employment Standards Branch (the "Branch") the "Purchase Contract" but did submit the Notice of Resignation and the Shareholder's Resolution (which the delegate failed to include when submitting the Record to the Tribunal). However, these latter documents, the Director argues, "only speak to the issue of Mr. Koka's resignation as a director of Tisho effective May 15, 2012" and do not indicate that Mr. Koka resigned as an officer of Tisho.
27. The Director, in my view, goes farther than to merely respond to Mr. Koka's challenge of the Record at this stage, and argues that section 96 of the *Act* imposes two months' wage liability on both directors and officers of a corporation. Since Mr. Koka is listed as an officer of Tisho on the corporate searches, there is a rebuttable presumption of fact arising that Mr. Koka is an officer of Tisho. According to the Director, Mr. Koka has failed to provide any evidence to substantiate his position that the corporate searches of Tisho are incorrect and he has failed to meet the evidentiary burden of proving that he is not an officer of Tisho and, therefore, the Section 96 Determination against Mr. Koka as an officer of Tisho should stand.
28. With respect to the "Share Purchase Agreement dated May 11, 2012", as well as counsel's "email correspondence dated September 7, 2013", the Director argues that this evidence "was clearly available during the course of the Branch's investigation" but Mr. Koka failed to produce it. It would appear that the Director is asking that this evidence not be considered in the appeal of the Section 96 Determination as it fails to meet the test for admitting 'new evidence' on appeal. In the circumstances, the Director submits that the appeal should be dismissed and the Section 96 Determination be confirmed.

(iii) (Further) Submissions of the Director on the merits of the Appeal

29. The Director, in the written submissions on the merits of the appeal and the scope of the Notice of Resignation, reiterates the factual background to the case and argument on the merits of the appeal previously provided in the Director's response to Mr. Koka's objections to the completeness of the Record. I propose to set out verbatim the Director's relatively brief submissions on the merits below:

Merits of Appeal

The Delegate takes the position Mr. Koka's appeal lacks merit and he has failed to substantiate the Corporate Searches are inaccurate.

Mr. Koka submitted via email the following two items received by the Branch on September 9, 2013.

- Document titled "Resignation of Director and Employee" dated May 15, 2012
- Document titled "Tisho Services Inc." dated May 15, 2012

The Delegate submits the above noted evidence only speaks to the issue of Mr. Koka's resignation as a Director of Tisho effective May 15, 2012. Mr. Koka's evidence fails to indicate in any manner that Mr. Koka resigned as an Officer of Tisho. Section 96 of the Act clearly places the two months' wage liability on both Directors and or Officers of a Corporation. Mr. Koka is listed as an Officer of Tisho on the Corporate Searches. As such, a reputable presumption of fact arises that Mr. Koka is an Officer of Tisho. The onus is on Mr. Koka to substantiate the Corporate Searches are inaccurate. However, Mr. Koka has failed to provide any clear and cogent evidence which indicates that the Corporate Searches are incorrect. The Delegate argues Mr. Koka failed to meet the evidentiary burden of substantiating that he is not an Officer of Tisho. As such, the Director Determination named Mr. Koka to be an Officer of Tisho at the time the Complainants' wages were earned or should have been paid. Further, the Director Determination does not at any time name Mr. Koka to be a Director of Tisho.

(iv) Final Reply of Mr. Koka

30. Mr. Koka was invited to file his final reply by August 15, 2014, but did not.

ANALYSIS

31. In an appeal of a determination issued under section 96 of the *Act*, the appellant is limited to arguing only those issues that arise under section 96 of the *Act*, namely:
- (i) Whether the person was a director/officer when the wages were earned or should have been paid;
 - (ii) Whether the amount of liability imposed is within the limit for which a director/officer may be found personally liable;
 - (iii) Whether circumstances exist that would relieve the director/officer from personal liability under subsection 96(2).
32. It should also be noted that in an appeal of a section 96 determination, the director/officer is precluded from arguing the corporate liability or the merits of the corporate determination (see *Kerry Steinemann, Director/Officer of Pacific Western Vinyl Window & Doors Ltd.*, BC EST # D180/96).
33. It should further be noted that the Director may issue a section 96 determination based on the corporate records filed with, and maintained by, the Registrar of Companies. However, when an individual is recorded as a Director or Officer 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 or officer of the company in question. In *Re: Wilinofsky* (BC EST # D106/99), the Tribunal noted 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 or officer lies with the individual who denies such status.

34. Having said this, I note, based on my review of the reasons for the Corporate Determination (which forms part of the Record in this appeal), on August 21, 2013, the delegate, before making the Corporate Determination, wrote to Tisho and to Mr. Koka enclosing a Demand for Employer Records. Subsequently, on September 5, 2013, the delegate notes Mr. Koka telephoned him and left a message. In subsequent emails and phone communications with Mr. Koka, the delegate notes that Mr. Koka sent him a copy of his "Resignation as a Director of Tisho" dated May 15, 2012. While the delegate describes the document as "Resignation of Director" it is more accurately entitled "Resignation of Director *and Employee*" [italics mine]. I have also defined this document earlier in this decision as the Notice of Resignation.
35. In addition to the descriptive title or heading of the Notice of Resignation, it is noteworthy that in the body of the document Mr. Koka states: "I resign as the director *and as an employee of the Company* effective May 15, 2012" [italics mine]. Neither delegate involved in making the Corporate Determination and the Section 96 Determination address in their reasons the italicized words in the heading or the complete substantive content of the Notice of Resignation. While the content of the Notice of Resignation may not have been relevant in the Corporate Determination because the status of Mr. Koka as an officer was not in issue, it most certainly is material in the Section 96 Determination where Mr. Koka's status as an officer of Tisho is a central issue. In my view, the delegate should have considered or addressed in the Reasons the language I have identified in italics above in the Notice of Resignation but failed to do so. Instead, the delegate simply relied on the corporate searches of Tisho, without more, in concluding that Mr. Koka was an officer of Tisho at the material time the Complainants earned wages with Tisho and should have been paid.
36. Having said this, I note the delegate, in context of the appeal of the Section 96 Determination, states that both the Notice of Resignation and the Shareholder's Resolution "only speak to the issue of Mr. Koka's resignation as a Director of Tisho effective May 15, 2012" but not as an officer. While I agree that the Shareholder's Resolution speaks of Mr. Koka's resignation as a director of Tisho, I am unable to agree that the Notice of Resignation is so limited. More particularly, I am unable to agree that the words "*and Employee*" in the heading and the words "*and as an employee of the Company*" in the body of the Notice of Resignation are gratuitous and without any meaning. Employees of a corporation may range from entry level up to an officer level such as a president or a secretary. In my view, the Notice of Resignation, in the heading and in the body of the document, unequivocally references the resignation of Mr. Koka as an *employee* and this includes his resignation as an officer (president) of Tisho as of May 15, 2012. I find the Notice of Resignation and its contents described above serve as credible and cogent evidence rebutting the presumption arising from the corporate records of Tisho. In the result, I find that the delegate erred in law in making the Section 96 Determination by acting on a view of the facts which could not reasonably be entertained.
37. I also note the delegate in the reasons for the Corporate Determination notes that in his phone communications with Mr. Koka, the latter advised him, *inter alia*, that Tisho was sold to Mr. Bessler who operated the company and employed the employees. The delegate also notes that Mr. Koka indicated to him that since his resignation in May 2012, he has had no involvement with Tisho. The delegate then goes on to conclude that Mr. Koka did not provide any proof of his resignation as an officer and did not further participate in this matter. However, I note again, the delegate in the Corporate Determination, like the delegate in the Section 96 Determination, failed to consider the clear language of the Notice of Resignation which includes Mr. Koka's resignation as an *employee* of Tisho and therefore as an officer too. I note that

there is no requirement for a shareholders resolution in terms of the resignation of an officer; a simple letter of resignation suffices and, in my view, the Notice of Resignation in this case fulfils that requirement.

38. I now turn to the delegate's argument in this appeal that the Share Purchase Agreement and Counsel's Email, which Mr. Koka has submitted in support of his appeal, were never received by the Branch and do not qualify as new evidence since they were available. The delegate, as previously indicated, argues that both these documents were "clearly available during the course of the Branch's investigation as indicated by the dates of the documents" and Mr. Koka was provided "the opportunity to provide [the said] evidence to the Branch but failed to do so". Therefore, they should be rejected as new evidence in this appeal. I note, the Tribunal has consistently taken the position that, absent any extenuating circumstances, evidence available but not provided during the investigation or before the determination is made will not be considered during the appeal (see *Tri-West Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97). However, I find the circumstances in this appeal to be distinguishable from those where the Tribunal has rejected evidence that existed during the investigation or before the determination was made. In this case, while I agree with the delegate that both the Share Purchase Agreement and Counsel's Email existed prior to both determinations - the Corporate Determination as well as the Section 96 Determination, the Corporate Determination did not deal with Mr. Koka's personal liability as an officer of Tisho. Only when the Section 96 Determination was made, the issue of Mr. Koka's personal liability as an officer of Tisho arose. Therefore, I find that Mr. Koka is not precluded by the governing test for allowing new evidence on appeal delineated in *Re: Merilus Technologies Inc.* (BC EST # D171/03), from adducing the Share Purchase Agreement and Counsel's Email and I am prepared to consider both in my deliberations in this appeal.
39. Having said this, I note that Article 6.2(f), (h) and (i) of the Share Purchase Agreement requires resignation of all the officers and directors of Tisho, and production of any documents necessary to appoint the purchaser, Mr. Bessler, as a director and president of Tisho. These provisions in the Share Purchase Agreement are consistent with the accompanying "Resignation of Director *and Employee*" and Shareholder's Resolution Mr. Koka submitted in the Appeal (and previously provided to the delegate), and serve not only to support Mr. Koka's assertion that he was no longer an officer or director of Tisho as of May 2012, but also as credible and cogent evidence to rebut the presumption arising from the Registrar of Companies' Records that he was an officer of Tisho after May 15, 2012.
40. I am also persuaded by the submissions in Counsel's Email that after the completion of the share purchase transaction, "Tisho failed to make its corporate records filing with the registry and so it was not updated" when the delegate conducted both corporate searches of Tisho. Tisho's failure to update its corporate records was not within Mr. Koka's control and it does not change the fact that he resigned both as a director and an officer ("*employee*") of Tisho before the wages were earned by the Complainants and should have been paid by Tisho.
41. For the reasons delineated above, I find this is a proper case to cancel the Section 96 Determination.

ORDER

42. Pursuant to section 115 of the *Act*, the Determination, dated March 28, 2014, is cancelled.

Shafik Bhalloo
Member
Employment Standards Tribunal