

An appeal

- by -

Ali Ismail, a Director and Officer of Malaspina Coach Lines Ltd.
(“Mr. Ismail”)

- 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.: 2016A/44

DATE OF DECISION: May 4, 2016

DECISION

SUBMISSIONS

Stanley Chiu

counsel for Ali Ismail, a Director and Officer of Malaspina Coach Lines Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Ali Ismail, a Director and Officer of Malaspina Coach Lines Ltd., (“Mr. Ismail”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 8, 2016 (the “Determination”).
2. The Determination concluded that Mr. Ismail was a director and officer of Malaspina Coach Lines Ltd. (“Malaspina”) at the time wages owed were earned or should have been paid to Dorothy Jane Corbett, Karen Kimball, Douglas McLeod (“Mr. McLeod”), James Walsh (“Mr. Walsh”) and Gladys Wray (collectively, the “Complainants”) and, as such, was personally liable under section 96 of the *Act* for an amount of \$14,291.31, inclusive of accrued interest pursuant to section 88 of the *Act*.
3. In his appeal, Mr. Ismail submits that the Director erred in law in making the Determination and seeks the Employment Standards Tribunal (the “Tribunal”) to vary or cancel the Determination as it relates to the awards of overtime pay to Mr. McLeod and Mr. Walsh.
4. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I will assess the appeal based solely on the Determination, the Reasons for the Determination (the “Reasons”), the appeal and written submissions made by counsel on behalf of Mr. Ismail, and my review of the section 112(5) “record” (the “Record”) that was before the Director when the Determination was being made.
5. Under section 114 of the *Act*, 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). If satisfied the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, Mr. McLeod and Mr. Walsh will, and the Director may, be invited to file further submissions. On the other hand, if it is found that the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

ISSUE

6. 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

7. The Complainants filed their complaints under section 74 of the *Act*, alleging variously that Malaspina contravened the *Act* by failing to pay them regular wages, statutory holiday pay and annual vacation pay, and compensation for length of service (the “Complaints”).
8. The delegate of the Director investigated the Complaints and attempted to contact Malaspina, and particularly the latter’s directors and officers, Mr. Ismail and Rita Colleen Ismail (“Ms. Ismail”), by email, by telephone,

and by registered mail, but to no avail. The delegate also issued a Demand for Employer Records to Malaspina which went unanswered. As a result, the delegate relied upon the Complainants' unchallenged evidence to make a determination against Malaspina (the "corporate determination") which found the latter liable for wages to the Complainants in the total amount of \$16,340.81 inclusive of interest. The Director also imposed administrative penalties on Malaspina in the amount of \$1,500.00.

9. The corporate determination, which included a notice to directors and officers explaining their personal liability under the *Act*, was sent to Malaspina with copies to the registered and records office and to the directors and officers of Malaspina individually. The appeal period for the corporate determination expired on March 7, 2016, and Malaspina did not pay the corporate determination amount. However, Malaspina filed a late appeal of the corporate determination on March 17, 2016, and sought an extension of time to file its appeal.
10. On May 4, 2016, Malaspina's appeal of the corporate determination was dismissed pursuant to section 114(1)(f) of the *Act* as having no reasonable prospect of any success (see *Malaspina*, BC EST # D074/16).
11. On September 23, 2015, the delegate conducted a BC Online: Registrar of Companies – Corporation Search of Malaspina which showed that Malaspina was incorporated on January 2, 1997, and Mr. Ismail was listed as a director and officer.
12. On March 3, 2016, the delegate conducted a further BC Online: Registrar of Companies - Corporation Search of Malaspina which confirmed that Mr. Ismail was still listed as a director and officer. The searches confirmed that Mr. Ismail was a director between March 4, 1998, and September 13, 2015, when the Complainants' wages were earned or should have been paid.
13. As a result, the delegate issued the Determination against Mr. Ismail, holding the latter personally liable for up to two (2) months' unpaid wages for each of the Complainants.
14. As there was insufficient evidence to indicate that Mr. Ismail authorized, permitted or acquiesced in contravention of the *Act*, he was not found liable for the administrative penalties levied against Malaspina.
15. As indicated previously, Mr. Ismail appeals the Determination based on the "error of law" ground of appeal, and is seeking the Tribunal to cancel or vary the Determination in relation to the overtime awards made to Mr. McLeod and to Mr. Walsh.

SUBMISSIONS OF MR. ISMAIL

16. Counsel for Mr. Ismail, in his brief written submissions dated March 29, 2016, attaches the same written submissions, dated March 16, 2016, that he made in the appeal of the corporate determination and asks the Tribunal to vary or cancel the Determination "as appropriate based on the findings of the appeal of the [corporate determination]."
17. As indicated previously, Mr. Ismail's appeal is based on the "error of law" ground of appeal. In support of this ground of appeal, counsel states in his written submissions:

Malaspina operated a road transportation service that involved crossing provincial and international borders, in specific, between British Columbia and Alberta, and between British Columbia and the United States. As such, Malaspina rightfully falls within federal jurisdiction under the *Canada Labour Code* (the 'code') and the *Canada Labour Standards Regulations* ('Regulations'), as opposed to provincial jurisdiction.

We note that the determination with respect to overtime was made pursuant to section 40 of the *Employment Standards Act*.

18. In addition to the challenge to the jurisdiction of the Director to award overtime pay to Mr. McLeod and to Mr. Walsh, counsel submits that both these individuals “did not claim overtime pay in their complaints” and reiterates that “overtime is not applicable where transportation companies fall under federal jurisdiction”.
19. Counsel also submits that Mr. Ismail informs him that he had discussed the matter of the jurisdiction with the delegate responsible for making the corporate determination after the corporate determination was made.
20. In these circumstances, counsel requests that the Determination be varied or cancelled as it relates to the overtime awards made to Mr. McLeod and to Mr. Walsh.

ANALYSIS

21. Section 96 of the *Act* provides as follows:

Corporate officer’s liability for unpaid wages

- 96 (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 an 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 individual or group terminations, if the corporation is in receivership,
 - (b) any liability to an employee for wages, if the corporation is subject to action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act,
- ...

22. It is settled law in the Tribunal’s decisions relating to the appeal of a determination made under section 96 of the *Act*, that the appellant is limited to arguing only those issues that arise under section 96 of the *Act*, namely:

- Whether the person was a director when the wages were earned or should have been paid;
- Whether the amount of liability imposed is within the limit for which a director may be found personally liable;
- Whether circumstances exist that would relieve the director from personal liability under subsection 96(2).

23. It is also settled law that the director/officer is precluded from arguing the corporate liability in the appeal of a section 96 determination (see *Kerry Steinemann, Director/Officer of Pacific Western Vinyl Windows & Doors Ltd.*, BC EST # D180/96). Therefore, Mr. Ismail may not make any submissions questioning or raising the matter of the correctness of the corporate determination in this appeal. However, that is precisely what Mr. Ismail does with his counsel submitting identical submissions in the appeal of the Determination as in the corporate determination. More specifically, counsel, in the appeal of the Determination, relies upon the challenge made in the appeal of the corporate determination to the jurisdiction of the Director to award overtime to

Mr. McLeod and to Mr. Walsh, which challenge, as indicated previously, failed, as the appeal of the corporate determination was dismissed pursuant to section 114(1)(f) of the *Act*.

24. Having said this, with respect to the issues that do arise under an appeal of a section 96 determination, neither Mr. Ismail, nor his counsel, are disputing that Mr. Ismail was a director or officer of Malaspina, and so listed in the corporate searches of Malaspina at the time the wages (overtime) of Mr. McLeod and Mr. Walsh were earned and should have been paid by Malaspina. Mr. Ismail, and his counsel, also do not dispute the amount of personal liability imposed on Mr. Ismail, which amount is within the limit of his personal liability set out in section 96 of the *Act*. Also, no issue is raised, nor is any evidence adduced, that indicates circumstances that might exempt Mr. Ismail from personal liability under section 96(2) of the *Act*. Therefore, I find that Mr. Ismail has failed to establish any relevant basis for me to cancel the Determination.
25. In the result, I find that Mr. Ismail's appeal of the Determination has no reasonable prospect of any success, and I dismiss it pursuant to section 114(1)(f) of the *Act*.

ORDER

26. Pursuant to section 115 of the *Act*, I order the Determination, dated March 8, 2016, be confirmed together with any interest that has accrued under section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal