

An appeal

- by -

Pankaj Sareen, a Director of Officer of Glassy Junctions Grill & Restaurant Ltd.

- 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: Carol Ann Hart

FILE No.: 2006A/55

DATE OF DECISION: July 13, 2006

DECISION

SUBMISSIONS

Pankaj Sareen	on his own behalf
Christie Macdonald	on behalf of the Director

OVERVIEW

1. This is an appeal by Pankaj Sareen, a Director of Glassy Junctions Grill & Restaurant pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) of a Determination issued on March 24, 2006 (the “Determination”) by a delegate of the Director of Employment Standards (the “Delegate”).
2. The appeal is brought on the grounds that there was new evidence which was not available at the time the Determination was made.
3. The appellant did not request an oral hearing, and the Delegate agreed that an oral hearing was not required. The Tribunal has concluded that the appeal can be properly addressed through written submissions.

ISSUE

4. The issue in this case is whether the Determination should be referred back to the Director on the basis that there is new evidence which was not available at the time the Determination was being made.

BACKGROUND

5. In a Determination dated December 5, 2005, the Delegate decided that Glassy Junctions Grill & Restaurant Ltd. (“Glassy Junctions”) had contravened the *Act* by failing to pay wages and accrued interest in the total amount of \$28 819.90 owing to the three employees who had filed the original complaints: Jaspal Grewal, Iqbal Grewal and Gurdev Grewal. The Delegate also ordered that Glassy Junctions pay six administrative penalties in the total amount of \$3000.00. That Determination dated December 5, 2005 was not appealed.
6. After attempting unsuccessfully to collect the above amounts from Glassy Junctions, the Director issued Determinations under section 96 of the *Act* against each of the three directors or officers who were listed on the B.C. On-line Registrar of Companies Corporation Search. The Determinations were made against Ravinder Grewal (director and officer), Avtar Judge (director and officer), and Pankaj Sareen (director).

ARGUMENT

Appellant's Submissions

7. The appellant submitted that he should not be personally liable under section 96 of the *Act* for the wages owing to the three employees in question. He provided a copy of a Share Purchase Agreement dated October 7, 2005 in which Surinder Singh Brar agreed to purchase the shares of Glassy Junctions from the three vendors: Pankaj Sareen, Avtar S. Judge and Ravinder Grewal. The appellant maintained that based on article 7 of the Share Purchase Agreement, the liability for the amounts he had been ordered to pay under section 96 of the *Act* had been assumed by Mr. Brar.

Director's Submissions

8. The Delegate contended that the appellant had failed to establish that his appeal should succeed on the basis of any of the grounds for appeal of a Determination under section 96 of the *Act*, as set out by the Tribunal in *Michael Mitton, a Director or Officer of Allegro Cafe Ltd.*, BC EST D025/06.
9. Based on the information obtained during the investigation, Mr. Sareen was listed as a director with the Registrar of Companies, and also exercised the typical functions of a director, at the time the wages were earned by the three employees. It was noted by the Delegate that Mr. Sareen had participated as the representative for Glassy Junctions in the investigation of the complaints originally filed by the three former employees, and had provided evidence concerning the daily operations of the business.
10. The Delegate argued that, on appeal, Mr. Sareen had provided no evidence to challenge the finding that he was a director of Glassy Junctions at the time the wages were earned or should have been paid. Furthermore, none of the statutory defences in section 96(2) of the *Act* applied to Mr. Sareen's situation. Finally, the Delegate noted that Mr. Sareen had not argued that the amount of his personal liability had been miscalculated.
11. The Delegate maintained that the Share Purchase Agreement which was submitted with the appeal filed by Mr. Sareen should not be considered by the Tribunal as it did not meet the conditions set out by the Tribunal in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST D171/03. In particular, Mr. Sareen had not demonstrated that the Share Purchase Agreement could not have been discovered and presented to the Director during the investigation and prior to the Determination being made. The Delegate contended that Mr. Sareen would have had the ability to submit the Share Purchase Agreement dated October 7, 2005 for the investigation, as it was issued before the Determination made under section 96 of the *Act* (March 24, 2006) and the Determination made against Glassy Junctions (December 5, 2005).
12. In any event, the Share Purchase Agreement would have no effect on the personal liability of Mr. Sareen under section 96 of the *Act*. The sale of the shares of the business occurred well after the wages owing to the three employees were earned or became payable.

ANALYSIS

13. Subsection 112(1) of the *Act* sets out the grounds upon which an appeal may be made to the Tribunal from a Determination of the Director. That provision reads as follows:

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.*

14. Mr. Sareen has appealed the Determination on the basis that evidence had become available that was not available at the time the Determination was made. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D171/03, the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

- 1) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- 2) the evidence must be relevant to a material issue arising from the complaint;
- 3) the evidence must be credible in the sense that it is reasonably capable of belief; and
- 4) the evidence must have high potential probative value, in the sense that, if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

15. I will first address the matter of whether the new evidence could have been discovered during the investigation with the exercise of due diligence. The Share Purchase Agreement is dated October 7, 2005. The Delegate sent a letter dated October 3, 2005 by registered mail to the attention of Pankaj Sareen, Ravinder Grewal and Avtar Judge, and by regular mail to Mr. Sareen to advise them of the preliminary investigation findings into the complaints filed by Jaspal Grewal, Iqbal Grewal and Gurdev Grewal. The Determination against Glassy Junctions was issued on December 5, 2005; and the Determination was made against Mr. Sareen under section 96 of the *Act* on March 24, 2006.

16. Mr. Sareen was actively involved during the investigation of the complaints which resulted in the Determination issued against Glassy Junctions, and he would have had the Share Purchase Agreement in his possession or control on or about October 7, 2005. Nonetheless, Mr. Sareen did not provide a copy of the Share Purchase Agreement to the Delegate during the course of the investigation into the complaints filed by the three employees against Glassy Junctions, or prior to the issuance of the Determination made against Mr. Sareen under section 96 of the *Act*. Mr. Sareen did not provide any reasons as to why he had not submitted a copy of the Share Purchase Agreement to the Delegate. Based on the evidence before me, I cannot find that the first requirement in the *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.* case has been met by the appellant.

17. I turn now to a review of the remaining three factors set out by the Tribunal in that case. Section 96 of the *Act* concerns the liability of a corporate director or officer for unpaid wages, and provides as follows:

- 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,
 - (c) vacation pay that becomes payable after the director or officer ceases to hold office, or
 - (d) money that remains in an employee's time bank after the director or officer ceases to hold office.

18. The Tribunal has held that on appeal of a determination issued under section 96 of the *Act*, the only issues which are properly before the Tribunal are the following: i) the status of the individual as a director or officer; ii) the 2-month limit on wages payable for each employee; and iii) whether one of the defences set out in section 96(2) is applicable (See *Petriniotis*, BC EST D 251/97 and *Leon Hotel Ltd.*, BC EST D 201/99).

19. The *Act* does not define the term “director” contained in section 96. That term is, however, defined in section 1 of the *Business Corporations Act*, S.B.C. 2002, c. 57:

1(1)...“director” means,

- (a) in relation to a company, an individual who is a member of the board of directors of the company as a result of having been elected or appointed to that position, or
- (b) in relation to a corporation other than a company, a person who is a member of the board of directors or other governing body of the corporation regardless of the title by which that person is designated;

20. Section 122 of the *Business Corporations Act* provides as follows:

122. (1) Directors, other than the first directors of a company who are in their first term of office, must be elected or appointed in accordance with this Act and with the memorandum and articles of the company.
- (2) If the memorandum or articles so provide, the directors may, subject to subsection (3), appoint one or more additional directors.
- (3) Despite any provision to the contrary in the memorandum or articles, the number of additional directors appointed under subsection (2) must not at any time exceed
- (a) 1/3 of the number of first directors, if, at the time of the appointments under subsection (2), one or more of the first directors have not yet completed their first term of office, or
 - (b) in any other case, 1/3 of the number of the current directors who were elected or appointed as directors other than under subsection (2).

- (4) No election or appointment of an individual as a director under this section is valid unless
- (a) the individual consents in accordance with section 123 to be a director of the company, or
 - (b) the election or appointment is made at a meeting at which the individual is present and the individual does not refuse, at the meeting, to be a director.
21. Mr. Sareen has provided no evidence that he was not a director of Glassy Junctions at the time wages were earned or should have been paid to Jaspal Grewal, Iqbal Grewal and Gurdev Grewal. The evidence before the Delegate indicates that Pankaj Sareen was a director of Glassy Junctions as required by section 96 of the *Act*.
22. Mr. Sareen has also provided no evidence or arguments to challenge the conclusion of the Delegate that the wages payable under the Determination are within the two-month limit on wages for which a director is liable under the *Act*. Furthermore, the exceptions set out in Section 96 (2) of the *Act* do not apply in this case.
23. The liability of directors is determined according to legislation, the *Employment Standards Act*. The Director is not required to pursue a remedy which a vendor may have against a purchaser under the terms of a private share purchase agreement. The provisions in the *Employment Standards Act* do not include any discretion to relieve against the liability of a director of a corporation based on an agreement that director may have entered into with another individual. If Mr. Sareen seeks to have another person indemnify him, or otherwise assume his statutory liability, it would be his responsibility to pursue such a remedy.
24. For all of the above reasons, I cannot find that the new evidence Mr. Sareen has submitted is relevant to a material issue in this matter, or that it could have lead the Director to a different conclusion on a material issue. The requirements for new evidence to be considered by the Tribunal are not met in the circumstances of this case.
25. I have decided that the Determination issued against Pankaj Sareen is not in error.

ORDER

26. I Order, pursuant to Section 115 of the *Act*, that the Determination dated March 24, 2006 be confirmed in the amount of \$11 492.08, plus whatever interest might have accrued since the date the Determination was issued.

Carol Ann Hart
Member
Employment Standards Tribunal