

An appeal

- by -

Gerald Knodel a Director of 0772646 B.C. Ltd.
carrying on business as Home Delivery
("Knodel")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2011A/73

DATE OF DECISION: August 10, 2011

DECISION

SUBMISSIONS

Gerald Knodel	on his own behalf, a Director of 0772646 B.C. Ltd. carrying on business as Home Delivery
Laurent Jubinville	on his own behalf
Joe LeBlanc	on behalf of the Director of Employment Standards

INTRODUCTION

1. This is an application filed by Gerald Knodel pursuant to section 109(1)(b) of the *Employment Standards Act* (the “*Act*”) to extend the time for filing an appeal. The application concerns a determination that was issued by a delegate of the Director of Employment Standards on July 14, 2010, under section 96(1) of the *Act* (the “Section 96 Determination”) ordering Mr. Knodel to pay \$59,336.16 on account of unpaid wages (compensation for length of service and vacation pay) and section 88 interest owed to 32 former employees of 0772646 B.C. Ltd. carrying on business as “Home Delivery” (the “Employer”).
2. The Section 96 Determination was issued against Mr. Knodel on the basis that he was a director of the Employer when the employees’ unpaid wage claims crystallized. I understand that Mr. Knodel is also a minority shareholder in the Employer.
3. I am adjudicating this application based solely on the parties’ written submissions. Mr. Knodel, the delegate and one of the former employees filed submissions with the Tribunal regarding this application. I have also reviewed the section 112(5) record that was before the delegate when he issued the Section 96 Determination.

BACKGROUND FACTS

4. The Employer operated a modular home construction business in Okanagan Falls. The business closed on October 28, 2008, and this closure subsequently motivated two former employees to file unpaid wage complaints. During the delegate’s investigation it became apparent that many more former employees were owed various amounts on account of unpaid wages (including compensation for length of service). On July 27, 2009, the delegate issued a determination against the Employer (the “Corporate Determination”) in the amount of \$58,703.95 representing unpaid wages (\$58,203.95) and a single \$500 monetary penalty (see section 98).
5. During his investigation, the delegate met with two of the Employer’s directors (neither of whom was Mr. Knodel). The delegate’s reasons appended to the Corporate Determination include the following acknowledgement (at page R3): “[The Employer] acknowledges the indebtedness to the Employees but states simply there are no funds to pay them due to the closure of the business...the Employer provided information setting out the amounts owed to each employee for vacation pay, and compensation for length of service”.
6. The Corporate Determination was delivered to the Employer’s registered and records office (the Kelowna office of the long established law firm Farris Vaughan Wills & Murphy LLP) and to each of its directors and officers (five individuals including Mr. Knodel). The Employer did not appeal the Corporate Determination.

7. The Director of Employment Standards unsuccessfully attempted to enforce the Determination. The principal problem appears to have been that the Canada Revenue Agency claimed the full value of the Employer's assets leaving a shortfall for all other creditors including the former employees. This failure to secure payment of the employees' unpaid wages from the Employer ultimately lead to various determinations being issued under section 96 of the *Act* including the Section 96 Determination now before me.
8. The Corporate Determination was mailed to Mr. Knodel at his Taiwan address recorded in the British Columbia Corporate Registry, however, the envelope containing the Corporate Determination was returned marked "Unknown". Although the Corporate Determination was probably validly served on Mr. Knodel (see section 122), the delegate nonetheless attempted to obtain a mailing address for Mr. Knodel through one of the other directors and eventually learned that Mr. Knodel was living in Spain. The delegate contacted Mr. Knodel by telephone in July 2010 at which time the Corporate Determination was sent by electronic mail to Mr. Knodel and it was also mailed, at Mr. Knodel's request, to a residential address in Oliver, British Columbia.
9. During a July 12, 2010, telephone conversation the delegate advised Mr. Knodel that section 96 determinations would be issued against the Employer's directors and officers and on July 14, 2010, the Section 96 Determination now before me in this application was issued against Mr. Knodel. On July 14, 2010, the Section 96 Determination was delivered to Mr. Knodel by regular and electronic mail.
10. The delegate wrote to Mr. Knodel on August 24, 2010, advising that if the monies due under the Section 96 Determination were not paid by September 1, 2010, the delegate would file it with the B.C. Supreme Court (see section 91) and that execution proceedings would then be commenced. The Section 96 Determination was filed with the B.C. Supreme Court Kelowna Registry on September 14, 2010, and was registered against two properties held by Mr. Knodel on September 21, 2010. In and around this time period, Mr. Knodel apparently retained legal counsel and also had some discussions with the delegate about the legal effect of assigning the Employer into bankruptcy. The Employer was assigned into bankruptcy on December 7, 2010.
11. On March 31, 2011, Mr. Knodel's legal counsel contacted the delegate and requested that the judgments be removed from Mr. Knodel's two properties – this request was refused and nothing further appears to have transpired in that regard. In June of this year Mr. Knodel contacted the delegate to advise that he intended to appeal the Section 96 Determination. Mr. Knodel filed his appeal of the Section 96 Determination on July 13, 2011 (almost exactly one year after he had it in hand).

THE APPLICATION TO EXTEND THE APPEAL PERIOD

12. The appeal of the Section 96 Determination was filed well beyond the 21-day statutory appeal period set out in section 112(3)(b) of the *Act*. The grounds of appeal are that the delegate failed to observe the principles of natural justice in making the appeal (see subsection 112(1)(b)) and that there is now new evidence that would materially have affected the outcome of the Section 96 Determination had it been available to be considered by the delegate (see subsection 112(1)(c); see also *Davies et al.*, BC EST # D171/03). Mr. Knodel asks the Tribunal to cancel the Section 96 Determination.
13. I wish to briefly comment on the grounds of appeal. First, there is absolutely nothing in Mr. Knodel's material that even remotely suggests that the delegate failed to observe the principles of natural justice. Mr. Knodel complains that as a minority shareholder and a director whose advice and guidance appears to have been wholly ignored by his fellow directors, he should not have been held liable under section 96. That may be so, however, it has no bearing on the delegate's conduct in this matter. If Mr. Knodel wished to

avoid potential liability under section 96 he should not have agreed to become a corporate director in the first place or he should have resigned his directorship before the employees' unpaid wage claims crystallized.

14. Second, there is no "new evidence" that would have affected the outcome of this matter. Mr. Knodel appears to concede that the employees are owed the monies itemized in both the Corporate Determination and in the Section 96 Determination. He concedes he was a director (albeit one with not much "clout" in the organizational affairs of the Employer) when the employees' unpaid wage crystallized. None of the section 96 defences seemingly apply here. He says that he did not personally authorize the non-payment of the employees' wages but, again, that is wholly irrelevant since his liability is not predicated on his own personal malfeasance or other misconduct but on his *status* as a corporate director.
15. Mr. Knodel acknowledges that he had the Section 96 Determination in hand for nearly a year before filing his appeal. The delay in this case is considerable. Mr. Knodel also acknowledged in a July 13, 2010, e-mail to the delegate that "I have read through the Guide to the Appeal Process on [the Employment Standards Branch's] website." I might parenthetically note that this guide clearly explains how appeals to the Tribunal may be filed and also highlights that appeals must be filed within strict time frames (21 or 30 days depending on the method of service).
16. It would appear that, at least in part, he chose not to file a timely appeal since the delegate advised him that he (the delegate) would strenuously oppose any appeal effort. Mr. Knodel appears to have followed a somewhat misguided path of pursuing bankruptcy proceedings against the Employer and now says that he does not feel that he received appropriate legal advice from his legal counsel. If that is so, Mr. Knodel's remedy lies in an action against his legal counsel; it does not provide any proper basis for his late appeal.
17. The Tribunal, in *Niemisto* (BC EST # D099/96), identified the criteria that should be examined when considering a section 109(1)(b) application and that decision has been consistently applied in the years since it was first issued. Although there are a number of factors to be considered, in essence, there are two fundamental considerations. First, why was the appeal not filed within the statutory appeal period? Second, if the appeal were allowed to proceed, is there any presumptive merit to it? The first inquiry looks for a compelling explanation for the default and evidence of an ongoing intention to appeal (for example, if someone has simply ignored the matter altogether and only appealed in the face of execution proceedings, the Tribunal has been consistently unreceptive to the application). The second inquiry flows from the section 2 purposes of the *Act* and, in particular, the need for fair treatment of the parties and fair and efficient dispute resolution procedures. Simply put, it is neither fair nor efficient to put parties through the delay and expense of an appeal process where the appeal is doomed to fail.
18. In the instant case, in my view, this appeal has absolutely no merit. The employees have waited long enough for a final verdict in this matter and any further delay would be highly prejudicial to their interests. Finally, the applicant has not satisfied me that he has a reasonable explanation for his failure to file a timely appeal. That being the case, I am not prepared to issue an order extending the appeal period.

ORDER

- ¹⁹. Mr. Knodel's application to extend the time period for appealing the Section 96 Determination is refused. Pursuant to subsections 114(1)(b) and (f) of the *Act*, the appeal is dismissed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal