

An appeal

- by -

Brent Vernon Miller, a Director of Station Inn Neighbourhood Pub and Eatery  
Ltd. carrying on business as Ray Ray's Beach Pub  
(“Mr. Miller”)

- 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 L. Roberts

**FILE No.:** 2013A/45

**DATE OF DECISION:** November 8, 2013

## DECISION

### SUBMISSIONS

Brent Vernon Miller	on his own behalf, a Director of Station Inn Neighbourhood Pub and Eatery Ltd. carrying on business as Ray Ray's Beach Pub
Liz Pokol	on her own behalf
Jennifer Sencar	on behalf of the Director of Employment Standards

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) Brent Vernon Miller, a Director of Station Inn Neighbourhood Pub and Eatery Ltd. carrying on business as Ray Ray's Beach Pub (“Ray's”), has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on June 21, 2013.
2. On October 15, 2012, the Director issued a Determination (the corporate Determination) finding Ray's to be in contravention of Section 18 of the *Act* in failing to pay wages to its former employees, Liz Pokol and Neil C. Campbell. The Director ordered Ray's to pay \$3,991.30 in wages and accrued interest. The Director also imposed a \$500 administrative penalty on Ray's for the contraventions, pursuant to section 98 of the *Act*. The date for appealing the Determination was November 22, 2012.
3. On June 21, 2013, the Director's delegate found that the corporate Determination had not been satisfied, nor had it been appealed. The delegate determined that as Mr. Miller was a Director and Officer of the company at the time the complainants' wages were earned and payable, he was personally liable to pay \$4,071.88, representing not more than two months' unpaid wages for Ms. Pokol and Mr. Campbell, pursuant to section 96 of the *Act* (the director Determination). The delegate concluded that there was insufficient evidence that Mr. Miller authorized, permitted or acquiesced in Ray's contraventions, and found him not personally liable for the administrative penalties.
4. Mr. Miller filed an appeal of the Determination on July 24, 2013, on the grounds that evidence had become available that was not available at the time the Determination was being made.
5. Section 114 of the *Act* and Rule 22 of the Tribunal's *Rules of Practice and Procedure* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria.
6. I find that this appeal can be decided based on the parties' written submissions, the Section 112(5) “record” that was before the delegate at the time the decision was made, the Determination and the Reasons for the Determination.

## ARGUMENT

7. The October 15, 2012, Determination, which included a notice to directors and officers explaining their personal liability under the *Act*, was sent to Ray's with copies to the registered and records office and to Ray's directors and officers.
8. The Determination contained the following "Notice to Directors/Officers":

If a Determination is issued against a director/officer of a company, the director/officer may not argue the merits of the Determination against the company by appealing the director/officer Determination.

There are only three grounds on which a Determination made against a director/officer may be appealed:

That the person appealing was not a director/officer of the company at the time wages were earned or should have been paid;

That the calculation of the director/officer's personal liability is incorrect; and/or,

That the director/officer should not be liable for the penalty, where a penalty has been assessed, on the grounds that he or she did not authorize, permit or acquiesce in the company's contravention.
9. Mr. Miller says that he was not an "active director or partner" in Ray's at the time Ms. Pokol and Mr. Campbell earned their wages:

*I was involved in a partnership with Ben Reed and Cathi Jakubiz that started in March of 2009. It did not take long to determine that I had entered a poisonous partnership and I had no control over the direction of our business. It all came to a head in late June 2009 and I chose to end my partnership with Ben and Cathi. I submitted my resignation as a director of the company Station Inn Neighbourhood Pub and Eatery as of 3 July 2009. The resignation letter was given to Ben Reed at that time for him to file with the company lawyer Randell K. McRoberts. I had believed that Ben in good faith had followed through with the paperwork for the change of directors. The relationship between Ben, Cathi and myself was nonexistent, and they would not communicate with me. Therefore I had no knowledge of any business practices or wrong doings.*
10. Included with the appeal submission is a copy of a letter addressed to Mr. McRoberts dated July 3, 2009, signed by Mr. Miller in which Mr. Miller states that he is resigning as a director of Station Inn Neighbourhood Inn Pub and Eatery Ltd. as of that date.
11. The delegate submits that Corporate Registry searches for Ray's, completed July 11, 2012, and June 5, 2013, showed Mr. Miller as a Director. On July 12, 2012, the Director sent a preliminary findings letter by registered mail to Ray's and all directors listed on the Corporate Registry search, advising them of their personal liability and inviting them to make submissions. The letter sent to the address listed for Mr. Miller was successfully delivered by Canada Post.
12. On July 17, 2012, the delegate received a letter from the solicitor for Ray's and the registered and records office enclosing a certified true copy of the register of Directors as of that date. It showed that Mr. Miller was still a Director. She says that not only was Mr. Miller's resignation never filed, it was not received by the registered records office as of that date.
13. The October 15, 2012, corporate Determination was sent to all directors and officers by registered mail. The letter to Mr. Miller was successfully delivered to the address listed for him in the Corporate Registry.

14. The Director says that Mr. Miller has not provided any evidence that the Corporate Registry records are inaccurate, and that he has not rebutted the presumption that he was a Director of Ray's at the time wages were earned or should have been paid to Ms. Pokol and Mr. Campbell.
15. The Director says that although Mr. Miller has submitted a letter dated July 2009 stating that he resigned as a director, there is no evidence the letter was actually sent to the company. She further submits that there is no evidence the letter was created contemporaneously or at a later date. In addition, she notes that although Mr. Miller stated that his relationship with the other directors was "non-existent" he nevertheless trusted Mr. Reed to file his resignation. The Director submits that it was unreasonable for Mr. Miller not to take steps to ensure his letter of resignation was sent or received by the Company's lawyer and filed accordingly.
16. The Director submits that the appeal should be dismissed.
17. Ms. Pokol's submissions focus on the unpaid wages. As they are not relevant to the issue before me on this appeal, I have not considered them.

## ANALYSIS

18. Section 112(1) of the *Act* provides that a person may appeal a determination on 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.
19. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four part test for admitting new evidence on appeal:
  - (a) 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;
  - (b) the evidence must be relevant to a material issue arising from the complaint;
  - (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
  - (d) the evidence must have high 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.
20. Section 115 of the *Act* provides that, after considering whether the grounds of appeal have been met, the Tribunal may, by order
  - (a) confirm, vary or cancel the determination under appeal; or
  - (b) refer the matter back to the director.
21. I find that Mr. Miller has met two of the four criteria for admitting new evidence on appeal. I find that the letter of resignation is both relevant and credible. However, given that the letter is dated June 2009, he could have presented it to the Director during the investigation into the employees' wage entitlement and subsequent corporate Determination.

22. I also find that the new evidence would not have led the Director to a different conclusion on Mr. Miller's liability for unpaid wages.
23. Section 96 of the *Act* provides as follows:
- (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 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 an individual or group terminations, if the corporation is in receivership,
    - (b) any liability to an employee for wages, if the corporation is subject to an action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency *Act*,
- ...
24. Corporate records, primarily those available through the Corporate Registry or at the corporation's registered and records office, raise a rebuttable presumption that an individual is an officer or director of a company. That presumption can be rebutted by evidence that the individual has resigned as an officer or director. The Director may rely on those records to determine officer and director status. It is then open for an individual who is recorded as an officer or director to prove that the records are inaccurate (*Michalkovic*, BC EST # RD047/01).
25. Mr. Miller contends that he resigned as a director or officer of Ray's in June 2009. I accept that Mr. Miller demonstrated a genuine intention to resign. Unfortunately, he asked one of his fellow directors, with whom he says he had both a "poisonous partnership" and "no relationship", to deliver the resignation letter to Ray's lawyer. It is difficult to understand why Mr. Miller would rely on an individual whom he had apparently lost all confidence and trust in, to ensure the resignation was properly delivered.
26. There is no evidence the corporate records are inaccurate. There is no evidence Mr. Miller's letter of resignation was delivered to Ray's lawyer. Certainly, the resignation was not registered in the Corporate Registry.
27. As with the Tribunal in *Michalkovic*, I sympathize with Mr. Miller's circumstances. However, he has failed to demonstrate the Director made any errors in the Determination.

**ORDER**

28. Pursuant to Section 115 (1)(a) of the *Act*, I Order that the Determination, dated June 21, 2013, be confirmed in the amount of \$4,071.88 together with whatever further interest that has accrued under Section 88 of the *Act* since the date of issuance.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**