



An appeal

- by -

Austen Chyzyk, a Director of Precision Surveys Ltd.  
(“Mr. Chyzyk”)

- 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/70

**DATE OF DECISION:** November 20, 2013

## DECISION

### SUBMISSIONS

Austen Chzyk on his own behalf as a Director of Precision Surveys Ltd.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) Austen Chzyk, a Director of Precision Surveys Ltd., has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on August 16, 2013.
2. On June 18, 2013, the Director issued a Determination (the corporate Determination) finding David Flavin carrying on business as Precision Surveys (“Precision”) and Precision Surveys Ltd. to be associated companies. In that Determination, the Director also found Precision and Precision Surveys Ltd. (jointly, the Employer) to be in contravention of Section 18 of the *Act* in failing to pay wages to its former employees, Michael Foster and Michael O’Neal. The Director ordered the Employer to pay \$30,263.46 in wages and accrued interest. The Director also imposed a \$2,500 administrative penalty on the Employer for the contraventions, pursuant to section 98 of the *Act*.
3. The corporate Determination, which included a notice to directors explaining their personal liability under the *Act*, was sent to David Flavin carrying on business as Precision Surveys and Precision Surveys Ltd. as well as to the registered and records office and to the directors of Precision Surveys Ltd. The date for appealing the Determination was July 26, 2013.
4. On August 16, 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. Chzyk was a Director and Officer of Precision Surveys Ltd. at the time the complainants’ wages were earned and payable, he was personally liable to pay \$23,614.06, representing not more than two months’ unpaid wages for Mr. Foster and Mr. O’Neal, pursuant to section 96 of the *Act* (the director Determination). The delegate concluded that there was insufficient evidence that Mr. Chzyk authorized, permitted or acquiesced in Precision’s contraventions, and found him not personally liable for the administrative penalties.
5. Mr. Chzyk filed an appeal of the director Determination on September 20, 2013, on the grounds that the Director failed to observe the principles of natural justice in making the Determination.
6. 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 from the Director if it decides that the appeal does not meet certain criteria.
7. 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.

### FACTS AND ARGUMENT

8. The director 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:

- 1) That the person appealing was not a director/officer of the company at the time wages were earned or should have been paid;
- 2) That the calculation of the director/officer's personal liability is incorrect; and/or,
- 3) 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. A February 19, 2013, Ontario "Corporation Profile Report" indicated that Precision Surveys Ltd. was incorporated in Ontario on November 14, 2011, with David Flavin and Austen Chzyk as the directors. Mr. Flavin and Mr. Chzyk were still listed as directors as of February 19, 2013. Mr. Chzyk was a director on June 5, 2012, when Mr. Foster's wages were earned or should have been paid, and on May 9, 2012, when Mr. O'Neal's wages were earned or should have been paid.
10. Mr. Chzyk says that he was "completely unaware of any part of Precision Surveys":  
  
*Dave Flavin and I started a new company in Toronto which was supposed to be clearly separate from his BC Company and therefore I had no knowledge of any transactions or employee situations in BC.*
11. Mr. Chzyk also states as follows:
  - all the employees who worked for him were paid in full;
  - Mr. Flavin has not been communicating with him or "cooperating with paying any company remissions", and that Mr. Flavin has no interest in resolving this issue;
  - any mail sent to the registered office address was not forwarded to him, so he has recently changed the company address.
12. Mr. Chzyk argues that "since there was a failure by David Flavin to share any relevant documentation or information relating to any joint relationship with his BC company, I believe this is a breach of natural justice."
13. The corporate Determination shows that David Flavin operated Precision Surveys, a sole proprietorship in British Columbia. Mr. Flavin was also the President of Precision Surveys Ltd., a corporation registered in Ontario. Mr. Flavin and Mr. Chzyk were directors of Precision Surveys Ltd. The registered office address was the same for the company and the directors. In all his correspondence with the Director, Mr. Flavin identified himself as "President, Precision Surveys Ltd."
14. Correspondence to Mr. Flavin was successfully delivered to the Ontario corporate office.
15. Mr. Flavin argued that the corporation (Precision Surveys Ltd.) was separate from his proprietorship, and that his proprietorship paid the wages to Mr. O'Neal and Mr. Foster.
16. Section 95 of the *Act* grants the Director the discretion to associate more than one legal entity as one employer for the purposes of the *Act*. After concluding that Mr. Flavin had direction or control of both the

proprietorship (Precision Surveys) as well as the corporate entity (Precision Surveys Ltd.), the Director determined that the two legal entities were associated.

## ANALYSIS

17. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- the director erred in law;
  - the director failed to observe the principles of natural justice in making the determination;
  - evidence has become available that was not available at the time the determination was being made.
18. 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.

### Natural Justice

19. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker.
20. While I accept that Mr. Chzyk is unhappy with the decision, I am not persuaded that the Director has failed to comply with the principles of natural justice in making the Determination.
21. 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*,
- ...
22. 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).

23. Mr. Chzyk does not assert, nor is there any evidence, that the corporate records are inaccurate. I find no evidence that the Director failed to observe the principles of natural justice in making the Determination. The Director sent information regarding the complaint to the corporate registered and records office. That information, which was confirmed received by Canada Post, also contained information regarding the corporation's opportunity to respond.
24. As with the Tribunal in *Michalkovic*, I sympathize with Mr. Chzyk's circumstances. It appears that he entered into an arrangement with an individual who may be less than honourable. Mr. Chzyk says that Mr. Flavin failed to share any information with him. I accept this statement. However, Mr. Flavin's failure to communicate with his fellow director does not establish a breach of natural justice by the Director.
25. Although Mr. Chzyk does not expressly say so, it appears that he is concerned about enforcement efforts being directed to him rather than to Mr. Flavin, who appears to have, as the Tribunal stated in *Michalkovic*, greater "moral" culpability. While I understand those concerns, the Tribunal is obliged to interpret the legislation, regardless of the consequences to Mr. Chzyk.

#### **ORDER**

26. Pursuant to Section 115 (1)(a) of the *Act*, I Order that the Determination, dated August 16, 2013, be confirmed in the amount of \$23,614.064 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**