

An appeal

- by -

Dustin Harrison a Director or Officer of DNT Enterprises Ltd.
(“Mr. Harrison”)

- 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.: 2015A/93

DATE OF DECISION: September 10, 2015

DECISION

SUBMISSIONS

Dustin Harrison on his own behalf as a Director or Officer of DNT Enterprises Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Dustin Harrison (“Mr. Harrison”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on April 15, 2015 (the “Section 96 Determination”).
2. The Section 96 Determination concluded that Mr. Harrison was a director of DNT Enterprises Ltd. (“DNT”), an employer found to have contravened provisions of the *Act*, at the time wages owed were earned or should have been paid to John S. Harris (“Mr. Harris”), and, as such, was personally liable, under section 96 of the *Act*, for an amount of \$4,574.51.
3. The deadline for filing an appeal of the Section 96 Determination was May 25, 2015. On July 7, 2015, the Employment Standards Tribunal (the “Tribunal”) received Mr. Harrison’s late appeal, together with written submissions and other documents, including a copy of the Writ of Seizure and Sale (the “Writ”) issued against Mr. Harrison on May 28, 2015, after the Director filed the Section 96 Determination in the Supreme Court of British Columbia registry and obtained a judgment against him (the “Judgment”).
4. On July 10, 2015, the Tribunal sent a copy of the appeal submissions to Mr. Harris and to the Director for information purposes only. The Tribunal advised Mr. Harris and the Director that no submissions from them were being requested at this time. In the same letter, the Tribunal requested the Director to provide the section 112(5) “record” (the “Record”) to the Tribunal.
5. On July 22, 2015, the Director sent the Tribunal the Record.
6. On July 23, 2015, the Tribunal disclosed the Record to Mr. Harrison, and afforded him an opportunity to object to its completeness. However, no objection was received from Mr. Harrison.
7. On August 19, 2015, the Tribunal notified the parties that the matter would now be reviewed by a Tribunal Member who may, without seeking submissions from the parties, dismiss all, or a part of, the appeal and/or confirm all, or a part of, the Section 96 Determination. If the Member did not dismiss all of the appeal or did not confirm all of the Section 96 Determination, the Tribunal would invite the Director and Mr. Harris to file a reply to the question of whether to extend the deadline to file the appeal, as well to provide a submission on the merits of the appeal.
8. After assessing the appeal, on August 21, 2015, the Tribunal invited the Director and Mr. Harris to make a reply submission on the question of whether to extend the deadline to file the appeal, as well as provide a submission on the merits of the appeal.
9. On August 25, 2015 the Tribunal received the Director’s submission. On September 8, 2015, I advised the parties that there was no call for further submissions or correspondence, and accordingly, a final reply was not requested from the Appellant.

10. I will assess the appeal based on the Reasons for the Section 96 Determination (the “Reasons”), the Appeal Form, written submissions of all the parties and my review of the Record that was before the Director when the Section 96 Determination was being made.

ISSUE

11. The issue in this appeal is whether there is new evidence that has become available that was not available at the time the Section 96 Determination was made and does this new evidence warrant a change or variation of the Section 96 Determination or its cancellation or a referral back to the Director?

THE FACTS

12. Mr. Harris worked as a long-haul truck driver for DNT from April 29, 2013, to November 8, 2013, and filed a complaint under section 74 of the *Act*, alleging that DNT contravened the *Act* by failing to pay him regular wages, overtime wages and statutory holiday pay, and by making unauthorized deductions from wages (the “Complaint”).
13. The Director conducted a hearing of the Complaint on August 21, 2014, and, on September 4, 2014, issued a determination against DNT (the “corporate determination”), which found DNT liable for wages owed to Mr. Harris in the total amount of \$4,522.11, inclusive of accrued interest. The Director also imposed administrative penalties on DNT in the amount of \$3,000.00 for six (6) separate contraventions of the *Act* and the *Employment Standards Regulation* (the “*Regulation*”). The corporate determination included notice to directors and officers of DNT of their personal liability under the *Act*. The corporate determination was sent to DNT with copies to its registered and records office.
14. The appeal period for the corporate determination expired on October 14, 2014, and no appeal was filed by DNT, and the latter did not pay the corporate determination amount.
15. On December 13, 2013, a delegate of the Director conducted a BC On-line corporate search of DNT which indicated that DNT was incorporated on July 14, 2009, and Mr. Harrison was its sole director.
16. On July 16, 2014, the delegate conducted a further BC On-line corporate search of DNT that showed that Mr. Harrison was still listed as its sole director. The searches confirmed that Mr. Harrison was a director between April 29, 2013, and November 8, 2013, when Mr. Harris’ wages were earned and should have been paid.
17. As a result, the delegate issued the Section 96 Determination against Mr. Harrison, holding the latter personally liable for the entire amount of wages owed to Mr. Harris in the corporate determination, as that amount was less than two (2) months’ wages.
18. As there was insufficient evidence to indicate that Mr. Harrison authorized, permitted or acquiesced in contravention of the *Act* by DNT, he was not found liable for any administrative penalties levied against DNT.
19. Mr. Harrison appeals the Section 96 Determination based on the “new evidence” ground of appeal, and is seeking the Tribunal to change or vary the Determination or cancel it or refer it back to the Director.

SUBMISSIONS OF MR. HARRISON

20. I have reviewed all of Mr. Harrison's submissions, including the documents he has presented in support of those submissions. I will only summarize those submissions I consider relevant.
21. Mr. Harrison states that in July 2009, he started his business as DNT, and acted as its sole director. In 2011, he wanted to "go back to work full time and wanted to sell the business". Subsequently, he spoke with his Dad, Dana Harrison ("Dana"), who agreed to take over DNT.
22. On or about March 14, 2011, Mr. Harrison states that he attended at the office of his counsel, Constance M. Brothers ("Ms. Brothers"), and signed a resolution transferring his shares in DNT to Dana, and signed his resignation as director of DNT. However, Dana did not attend at Ms. Brothers' office to sign the necessary documentation.
23. Mr. Harrison has enclosed several email exchanges between Ms. Brothers with Dana, dated June 25, 2015, in which Ms. Brothers confirms Mr. Harrison's assertion that he signed a resolution transferring shares in DNT to Dana and resigned as director of DNT. She also states in one of the emails to Dana that her office had made numerous attempts to contact Dana to come in and sign documents which had been prepared for his execution and to pay her bill, but to no avail, as Dana failed to attend her office. Therefore, no filings were done in the corporate registry. In the same email to Dana, Ms. Brothers adds "[f]rom our perspective you are the Director and sole shareholder of the company... It is my understanding from Dustin and certainly the impression you have given this office, that you have been operating the company and holding yourself out as the director and owner." In response to this email, Dana states "I will not deny to anyone that I was a director of DNT ENTERPRISES LTD". He then goes on to make allegations of misconduct on Ms. Brothers' part which I do not find necessary to get into in any more detail in this appeal.
24. Mr. Harrison also indicates that he called Ms. Brothers and also had his wife attend Ms. Brothers' office to discuss with her the transfer of DNT's business and why he was still showing as DNT's director in the corporate search. He states that Ms. Brothers advised him that "in her eyes...[he] was no longer the director because [sic] [he] resigned in 2011, and if Dana had paid his bill the paperwork...in her files would have been sent to the registry".
25. Mr. Harrison goes on to add that all DNT mail came to his address because his father, Dana, asked him if he could use Mr. Harrison's address because "[Dana] did not want his common-law wife to know anything about the business". Mr. Harrison allowed his address to be used, and picked up any mail sent to DNT and delivered it to Dana in Salmon Arm, British Columbia, the location from which DNT's business was run. With respect to any mail that was sent to him directly, Mr. Harrison indicates that he opened it and he would then forward it immediately to Dana to deal with it because he was not the director of DNT.
26. Mr. Harrison also attaches account opening documentation for DNT from CIBC dated February 18, 2011, which shows Dana as DNT's director or officer.
27. Mr. Harrison states that he has not been a director of DNT since March 14, 2011, and that Dana has been "running this company". He also submits that he has not made any income from DNT since 2011, nor does he have anything to do with the debts of DNT. He feels that "the government is coming after the wrong person".
28. As for the delay in filing his appeal of the Section 96 Determination, he states that on June 12, 2015, when he went to use his card, he was unable to gain access to his account and his wife attended at the bank to

investigate. He then discovered that the bank account had a hold on it or as he describes it the “government seiz[ed]” it. In or around that time, it appears that he discovered the Writ of Seizure and Sale issued against him and a judgment registered against his property (all of which he has produced in his appeal).

29. He then appears to have commenced his investigation with calling Ms. Brothers. He states he did not receive a response from Ms. Brothers and had his wife attend Ms. Brothers’ office to obtain documents from her. He managed to talk to Ms. Brothers later and states that she required him to obtain an authorization from Dana in order to obtain the documents he was seeking from her relating to DNT because he was not a director of DNT. He then contacted Dana and on June 24, 2015, obtained a notarized letter executed by Dana “as the director of DNT Enterprises Ltd.” allowing Ms. Brothers to release “all paperwork and documents pertaining to DNT Enterprises Ltd. to Dustin Harrison”. This then allowed him to secure the documents he is presenting in this appeal.
30. He states that it has taken him a long time to get the information because “when contacting someone about this issue leads me to dead end because they tell me that I am not the director [sic].”

SUBMISSIONS OF THE DIRECTOR

31. On August 25, 2015, in response to the Tribunal’s invitation to make a reply submission on the question of whether to extend the deadline to file the appeal and on the merits of the appeal, the Director responded simply stating that section 86(2) of the *Act* prohibits the Director from cancelling the Determination as more than 30 days have elapsed after receipt of the appeal documentation.

SUBMISSIONS OF MR HARRIS

32. Although invited to make a reply submission on the question of whether to extend the deadline to file the appeal and on the merits of the appeal, Mr. Harris did not make any submissions.

ANALYSIS

(i) Should the period in which to file the appeal be extended?

33. The *Act*, in section 112(3), imposes an appeal deadline to ensure appeals are dealt with promptly. In this case, the expiry date for the appeal of the Section 96 Determination was May 25, 2015, but Mr. Harrison filed his appeal over a month later, on July 7, 2015. However, the Tribunal has the authority under section 109(1)(b) of the *Act* to extend the time period for requesting an appeal beyond the expiry date. The basic principles governing the Tribunal’s authority under this section are governed by the following non-exclusive criteria delineated in *Re: Niemisto* (BC EST # D099/96):
- i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
 - ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
 - iii) the respondent party (*i.e.*, the employer or employee), as well the Director, must have been made aware of this intention;
 - iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
 - v) there is a strong *prima facie* case in favour of the appellant.

34. It should be noted that the criteria in *Re: Niemisto* are neither exhaustive nor conjunctive; that is, the Tribunal may consider other unique criteria and it is not necessary that all the criteria favour the applicant before granting an extension of time to appeal (see *Re: Patara Holdings Ltd. c.o.b. Best Western Canadian Lodge*, BC EST # D010/08, reconsideration dismissed, BC EST # RD053/08).
35. It is also important to note that the Tribunal will not grant an extension of time to file a late appeal as a matter of course, but will only do so where there are “compelling reasons” (See *Re: Wright*, BC EST # D132/97). The onus is always on the appellant to show that the time period for an appeal should be extended (see *Moen & Sagb Contracting Ltd.*, BC EST # D298/96).
36. Having delineated some of the relevant authorities and principles governing the Tribunal’s decision to exercise its discretion to extend the time for appeal, neither the Director nor Mr. Harris, in this case, take any position on Mr. Harrison’s application for an extension of time to appeal.
37. Based on the criteria in *Re: Niemisto*, *supra*, I find that, on the balance, this is a case where the Tribunal should exercise its discretion to grant Mr. Harrison an extension of time to appeal. I will delineate my reasons below.
38. With respect to the first criterion in *Re: Niemisto*, I find the evidence does not favour Mr. Harrison. That is, I do not find Mr. Harrison’s evidence reasonably and credibly explains the entire delay of slightly over one month. While Mr. Harrison may have had to go through some effort to obtain authorization signed by Dana to obtain relevant documents from Ms. Brothers to include in his appeal, he only initiated the appeal process in June 2015 after he discovered his access to his bank account blocked, and the Writ and Judgment issued against him.
39. With respect to the second and third criteria in *Re: Niemisto*, as with the first criterion, I find the evidence does not favour Mr. Harrison. He appears to have decided to appeal the Section 96 Determination only after execution proceedings commenced against him and when he discovered his access to his bank account blocked. Accordingly, there is no evidence of “on-going *bona fide* intention to appeal” on Mr. Harrison’s part, nor any evidence that either the Director or Mr. Harris were made aware of his intention to appeal the Section 96 Determination before the expiry of the time for appeal.
40. With respect to the fourth criterion in *Re: Niemisto*, while the delay of slightly over one month in filing his appeal is not insignificant and while Mr. Harris may be inconvenienced and somewhat prejudiced by the granting of an extension, I am not persuaded that Mr. Harris will be unduly prejudiced. I also note that neither Mr. Harris nor the Director have taken any position against granting of an extension to Mr. Harrison to file his appeal.
41. With respect to the final criteria in *Re: Niemisto*, I find that Mr. Harrison has established “a strong *prima facie* case” in his favour. He has produced in the appeal, *inter alia*, his resignation as a director of DNT that he signed on March 14, 2011 in Ms. Brothers’ office; a resolution of same date transferring his shares in DNT to Dana; bank account documents, dated February 18, 2011, for opening DNT’s bank account wherein Dana represents himself as an officer and director of DNT; and email exchanges between Dana and Ms. Brothers wherein Dana admits he is the director of DNT and Ms. Brothers confirms that Mr. Harrison attended her office in March 14, 2011, to sign his resignation as a director of DNT.
42. While I do not want to be taken to be minimizing the importance of any of the other criteria in *Re: Niemisto*, in this case, I find the substantive evidence on the determinative issue of Mr. Harrison’s status at the time wages were earned by Mr. Harris and should have been paid by DNT is a very compelling reason to grant Mr. Harrison’s request for an extension of time to appeal.

(ii) Merits of the Appeal

43. Having decided that Mr. Harrison should be granted an extension of time to appeal, I now turn to the question of the merits of the appeal.
44. In an appeal of a determination made under section 96 of the *Act*, the appellant is limited to arguing only those issues that arise under section 96 of the *Act*, namely:
- (i) Whether the person was a director when the wages were earned or should have been paid;
 - (ii) Whether the amount of liability imposed is within the limit for which a director may be found personally liable;
 - (iii) Whether circumstances exist that would relieve the director from personal liability under subsection 96(2).
45. Having said this, I note that the Tribunal, in *The Director of Employment Standards (Re: Michalkovic)* (BC EST # RD047/01) (Reconsideration of BC EST # D056/00), summarized the governing approach for determining who is a director or officer under section 96 of the *Act* as follows:
1. The corporate records, primarily those available through the Registrar of Companies or available at a corporation's registered and records office, raise a rebuttable presumption that a person is a director or officer. In other words, the Director of Employment Standards may presumptively rely on those corporate records to establish director or officer status.
 2. It is then open to the person, who, according to the corporate records, is a director or officer, to prove on the balance of probabilities that the company records are *inaccurate*, for example, because the person resigned and the documents were not properly processed, a person is not properly appointed etc....
46. In *Re: Wilinofsky* (BC EST #D106/99), the Tribunal stated:
- ...Where an individual is recorded as an officer or director of a company in the records maintained by the Registrar, a rebuttable presumption arises that the individual is actually a director or officer...of the company....*This presumption, however, may be rebutted by credible and cogent evidence that the Registrar's records are inaccurate* – the burden of proving that one is not a corporate director or officer lies with the individual who denies such status. (Emphasis added)
47. In this appeal, Mr. Harrison has submitted as “new evidence”, *inter alia*, a signed copy of his resignation as director of DNT, dated March 14, 2011, and a resolution of same date transferring his shares of DNT to Dana. He has also provided email exchanges that occurred between Ms. Brothers and Dana after the Section 96 Determination was made. These exchanges, as previously indicated, show Ms. Brothers confirming that Mr. Harrison did indeed attend at her office and sign his resignation as DNT's director and sign the resolution transferring his shares in DNT to Dana. Furthermore, the email exchanges also contain Dana's admission to Ms. Brothers that he is a director of DNT. They also disclose that the sole reason why the relevant documents to effect change of directors of DNT were not filed in a timely fashion in the Corporate Registry is because Dana did not attend at Ms. Brothers' office to execute the documents and pay Ms. Brothers' legal bill.
48. Mr. Harrison, as indicated previously, also relies on documents of CIBC showing account opening documents for DNT, dated February 18, 2011, with Dana appearing as authorized signatory.

49. Do these documents - the share transfer document, the resignation of director document, email exchanges between Dana and Ms. Brothers and the CIBC account opening document - constitute new evidence under section 112(1)(b) of the *Act*?
50. The test for admitting new evidence on appeal is a strict one. The appellant must demonstrate that: i) exercising all due diligence, the evidence could not reasonably have been expected to be discovered and placed before the delegate; ii) the evidence is relevant and material; iii) the evidence is credible; and iv) the evidence has significant probative value (see *Merilus Technologies Inc.*, BC EST # D171/03).
51. Mr. Harrison's resignation as a director of DNT, the resolution transferring his shares in DNT to Dana and the CIBC account documents all existed prior to the Section 96 Determination. However, Mr. Harrison had no opportunity or reason to present any of this evidence before the Section 96 Determination was issued. Unlike in the corporate determination where investigations and/or hearings usually afford parties an opportunity to participate before the determination is made, in section 96 determinations, the Director simply reviews the corporate search to determine whether the director in question was a director during the material time when wages were earned and should have been paid by the corporation. The director does not have an opportunity to dispute his status as a director until after the section 96 determination is issued. In the circumstances, the said documents or evidence, practically speaking, were not required and would not have been collected and provided to the delegate before the Section 96 Determination was made.
52. In the case of the email exchanges between Ms. Brothers and Dana, these, of course, came to be after the Section 96 Determination and did not exist at the time of the Section 96 Determination and, therefore, could not have been submitted to the delegate before the Section 96 Determination.
53. Having said this, I find all of the evidence - resignation document, share transfer resolution document, CIBC account opening documents and the email exchanges between Ms. Brothers and Dana - credible and material and probative 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, namely, the question of Mr. Harrison's status as a director of DNT during the material time in question. Therefore, I find the said evidence qualifies as "new evidence" and allow it on appeal.
54. Having said this, it is important to note that section 128(2)(a) of the BC *Business Corporations Act*, S.B.C. 2002, c. 57 ("*BCBCA*") provides that "(a) resignation of a director takes effect on the later of ... the time that the director's written resignation is provided to the company or to a lawyer for the company". Mr. Harrison signed, *inter alia*, his resignation as director of DNT with Ms. Brothers who prepared the document and retained it for filing. Based on the email exchanges between Ms. Brothers and Dana that Mr. Harrison produced in his appeal, it appears that Ms. Brother was acting as a lawyer for DNT and would have filed the relevant change of director documents with the Corporate Registry, had she been paid her legal bill by Dana. Her office address also shows as the records office address for DNT in the corporate searches the delegate conducted which form part of the Record. In the circumstances, pursuant to section 128(2)(a) of the *BCBCA*, I find that there is clear evidence that Mr. Harrison resigned from the position of director of DNT on or about March 14, 2011. Unfortunately for Mr. Harrison, the relevant change of director documents were not filed for the reasons indicated earlier. As indicated by the Tribunal in *Wilnofsky*, *supra*, a company's failure to file the resignation does not invalidate the resignation. Further, I find section 128(2)(a) of the *BCBCA* is determinative in this case that Mr. Harrison's resignation was effective on March 14, 2011, when he signed it in Ms. Brothers' office and left it in her possession as counsel for DNT. Therefore, I am satisfied that Mr. Harrison has shown that he was not a director of DNT at the time Mr. Harris' wages were earned and should have been paid by DNT.

ORDER

55. Pursuant to section 115(1)(a) of the *Act*, the Section 96 Determination, dated April 15, 2015, is cancelled.

Shafik Bhalloo
Member
Employment Standards Tribunal