

An appeal

- by -

Joanne Meissner, Officer of Demara Consulting Inc.
(“Ms. Meissner”)

- 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/122

DATE OF DECISION: October 22, 2015

DECISION

SUBMISSIONS

Joanne Meissner on her own behalf as an Officer of Demara Consulting Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Joanne Meissner (“Ms. Meissner”), Officer of Demara Consulting Inc., has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on September 4, 2015 (the “Section 96 Determination”).
2. The Section 96 Determination concluded that Ms. Meissner was an officer of Demara Consulting Inc. (“Demara Consulting”), one company in the group of companies being treated by the Director as one employer for the purposes of the *Act* in the Corporate Determination dated August 29, 2014, at the time wages owed to Sabine Delveaux, Elaina Hanchar, Lynette Kleefeld, Alison Murray, Kimberley Mann, Kenneth Poole, Lisa Smilowski, Tracey Wahl, Lori Von Siemens, Rikki Bassett and Donna Metlowski (the “Complainants”) were earned or should have been paid, and, as such, was personally liable, under section 96 of the *Act*, for an amount of \$23,115.84.
3. On September 18, 2015, the Employment Standards Tribunal (the “Tribunal”) sent a copy of the appeal submissions to the Complainants and to the Director for informational purposes only. The Tribunal advised the Complainants 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.
4. On September 23, 2015, the Director sent the Tribunal the Record.
5. On September 24, 2015, the Tribunal disclosed the Record to Ms. Meissner, and afforded her an opportunity to object to its completeness. However, no objection was received from Ms. Meissner.
6. On October 15, 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 part of, the appeal and/or confirm all, or part of, the Section 96 Determination. If the Tribunal Member did not dismiss all of the appeal or does not confirm all of the Section 96 Determination, the Tribunal would invite the Director and the Complainants to file a reply submission on the appeal. Ms. Meissner would subsequently be given an opportunity to make a final reply to those submissions, if any.
7. I will assess the appeal based on the Reasons for the Section 96 Determination (the “Section 96 Reasons”), the Appeal Form, the written submissions of Ms. Meissner and my review of the Record that was before the Director when the Section 96 Determination was being made.

ISSUE

8. Is there 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

9. The Complainants filed complaints under section 74 of the *Act*, alleging that Demara Consulting, Demara Consulting (2012) Society and Demara Safeguard Shield Association (“Demara” or the “Demara Group of Companies”) contravened the *Act* by failing to pay regular wages, overtime, annual vacation pay and compensation for length of service (the “Complaints”).
10. A delegate of the Director conducted an investigation into the Complaints, and the Director issued the Corporate Determination on August 29, 2014, finding that the Demara Group of Companies were to be treated as one employer for the purposes of the *Act*. The Corporate Determination further held that the Demara Group of Companies were jointly and separately liable for \$22,487.36 (including accrued interest) in unpaid wages. The Corporate Determination also levied administrative penalties against the Demara Group of Companies in the amount of \$1,000.00.
11. The Corporate Determination, which included a Notice to Directors and Officers explaining their personal liability under the *Act*, was sent to the Demara Group of Companies, with copies to the registered and records office and to the directors and officers of Demara.
12. The appeal period for the Corporate Determination expired on October 6, 2014.
13. On September 20, 2013, the delegate of the Director conducted a BC On-line: Registrar of Companies – Corporate Search on the Demara Group of Companies, and discovered that Ms. Meissner was listed as an officer of Demara Consulting, which was incorporated on April 27, 2006.
14. In subsequent corporate searches, conducted by the delegate on November 14, 2013, and February 4, 2014, the delegate found that Ms. Meissner was still listed as an officer for Demara Consulting.
15. According to the Section 96 Reasons, on February 6, 2014, the delegate sent correspondence by registered mail to the registered offices of the Demara Group of Companies outlining the Complaints and requirements of the *Act*. The same correspondence was also sent to the directors and officers at the addresses noted for each on the corporate searches. However, all letters were returned, marked “moved”.
16. As indicated, in the Section 96 Reasons, one of the Complainants received notification by email that Demara had moved to a new location where it was continuing business. As a result, the delegate redirected correspondence to the new location where one of the directors, Irene Beilstein (“Ms. Beilstein”), accepted and signed for all of the registered letters.
17. The Section 96 Reasons also indicate that Ms. Meissner was notified of the Complaints and was “provided with an opportunity to respond to personal liability as a director of one of the companies associated as one employer”. The Section 96 Reasons do not set out how Ms. Meissner was provided the said opportunity in advance of the Section 96 Determination and what, if any, response she gave.
18. Based on all of the corporate searches of Demara Consulting, the delegate found Ms. Meissner was an officer at all material times when wages owed to the Complainants were earned and should have been paid.
19. As a result, the delegate issued the Section 96 Determination against Ms. Meissner, holding the latter personally liable for the entire amount of wages owed to the Complainants in the Corporate Determination, as the amount awarded in the latter determination was less than two (2) months’ wages.

20. Since there was insufficient evidence to indicate that Ms. Meissner authorized, permitted or acquiesced in contravention of the *Act* by Demara, she was not found liable for any administrative penalties levied against Demara.
21. Ms. Meissner appeals the Section 96 Determination based on the “new evidence” ground of appeal, and is seeking the Tribunal to refer the matter back to the Director.

SUBMISSIONS OF MS. MEISSNER

22. In her very short appeal submissions, Ms. Meissner states that she resigned as a “director in 2012”. Therefore, she states that she is “not liable for any of the amounts determined by the determination”. She includes with her appeal what appears to be a resignation letter. While she states that the letter is dated October 2, 2012, the letter is, in fact, undated, and it is addressed to “Demara Consulting Inc.”, and reads as follows:

This is to give notification that effective Oct 2, 2012, I am resigning from the Directorship of the Corporation. I wish to be removed from any and all contracts, bank accounts or any other account that I may have signed for the company.

This is to be effective immediately.

Sincerely

[with signature of Joanne Meissner]
Joanne Meissner

[signature undecipherable]
Director Demara Consulting

23. Ms. Meissner has also attached a Notice of Change of Directors for Demara Consulting, time stamped April 29, 2013, showing herself as one of the directors who “ceased to be Directors”. She has also attached a Notice of Articles of Demara Consulting from the BC Registry issued on April 29, 2013, showing names of two (2) other directors appear under the heading “Director Information”.

ANALYSIS

24. Section 96(1) of the *Act* states:

Corporate officer's liability for unpaid wages

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. *[Emphasis added]*

25. This Tribunal has consistently stated in appeals of a determination made under section 96 of the *Act* that 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 or officer 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 or officer may be found to be personally liable;
 - (iii) Whether circumstances exist that would relieve the director or officer from personal liability under subsection 96(2).

26. The governing approach for determining who is a director or officer under section 96 of the *Act* was set out by the Tribunal in *The Director of Employment Standards (Re: Michalkovic)* (BC EST # RD047/01) (Reconsideration of BC EST # D056/00) 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...
27. In *Re: Wilinofsky* (BC EST #D106/99), the Tribunal stated:
- ...[W]here 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]*
28. In this appeal, Ms. Meissner has submitted as “new evidence”, *inter alia*, a signed copy of her resignation as a director of Demara Consulting as of October 2, 2012. She has also provided a Notice of Change of Directors and a Notice of Articles of Demara Consulting, issued by the BC Registrar of Companies on April 29, 2013. The first document indicates that Ms. Meissner ceased to be a director and the second one shows directors other than Ms. Meissner under the heading “Director Information”. While all these documents, including the resignation of Ms. Meissner as a director of Demara Consulting, existed prior to the Section 96 Determination, I am not certain she would have had the opportunity or reason to present such evidence before the Section 96 Determination was issued. Unlike in the corporate determinations 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 or officer in question was a director or officer during the material time when wages were earned and should have been paid by the corporation and issues the determination. Although, I note that, in the Section 96 Reasons, the delegate notes that “[t]he record indicates Ms. Meissner was notified of the complaints and provided with an opportunity to respond to personal liability as a director of one of the companies associated as one employer”, there does not appear to be anything in the Record that is adduced by the Director in the appeal proceedings that explains what opportunity, if any, she was provided to respond.
29. Having said this, I do not find it necessary for me to delve into the question of whether the corporate records and the resignation of Ms. Meissner as a director of Demara Consulting qualify as new evidence under the test laid out by the Tribunal for admitting new evidence on appeal in *Merilus Technologies Inc.* (BC EST # D171/03). I find the documents presented as “new evidence”, even if accepted as new evidence on appeal, do not contain information that would persuade me to interfere with the decision of the Director in the Section 96 Determination. The Section 96 Determination against Ms. Meissner is in her capacity as an *officer* of Demara Consulting and not a director. While Ms. Meissner may have produced evidence that she resigned as a director of Demara Consulting, there is ample evidence in the Record in the form of corporate searches of Demara Consulting (conducted on September 20, 2013, November 14, 2013 and February 7, 2014) indicating that Ms. Meissner continued to be listed as an officer of Demara Consulting. She has not adduced any evidence to the contrary.

30. In the result, I find that Ms. Meissner's appeal of the Section 96 Determination has no reasonable prospect of any success, and I dismiss it pursuant to section 114(1)(f) of the *Act*.

ORDER

31. Pursuant to section 115 of the *Act*, I order the Section 96 Determination, dated September 4, 2015, be confirmed in the amount of \$23,115.84, together with any interest that has accrued under section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal