

An appeal

- by -

Andrew McNellis, a Director of Shaw Water Works Ltd.
(“Mr. McNellis”)

- 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: David B. Stevenson

FILE No.: 2016A/91

DATE OF DECISION: September 14, 2016

DECISION

SUBMISSIONS

Andrew McNellis on his own behalf as a Director of Shaw Water Works Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Andrew McNellis (“Mr. McNellis”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on June 7, 2016.
2. The Determination found Mr. McNellis was a director of Shaw Water Works Ltd. (“SWWL”), an employer found to have contravened provisions of the *Act*, at the time wages were earned or should have been paid to Andrei Boukarev (“Mr. Boukarev”) and as such was personally liable under section 96 of the *Act* for wages in the amount of \$25,560.16.
3. This appeal is grounded in an assertion the Director erred in law in making the Determination. Mr. McNellis seeks to have the Determination cancelled.
4. In correspondence dated July 20, 2016, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and, following such review, all or part of the appeal might be dismissed.
5. The section 112(5) record (the “record”) has been provided to the Tribunal by the Director and a copy has been delivered to Mr. McNellis, who has been provided with the opportunity to object to its completeness. Mr. McNellis has filed no objection to the completeness of the record and, accordingly, the Tribunal accepts it as being a complete record of the material that was before the Director when the Determination was made.
6. I have decided this appeal is appropriate for consideration under section 114 of the *Act*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal and my review of the material that was before the Director when the Determination was being made. Under section 114(1) of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

114 (1) *At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any appeal if the tribunal determines that any of the following apply:*

- (a) *the appeal is not within the jurisdiction of the tribunal;*
- (b) *the appeal was not filed within the applicable time limit;*
- (c) *the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;*
- (d) *the appeal was made in bad faith or filed for an improper purpose or motive;*
- (e) *the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
- (f) *there is no reasonable prospect the appeal will succeed;*
- (g) *the substance of the appeal has been appropriately dealt with in another proceeding;*
- (h) *one or more of the requirements of section 112(2) have not been met.*

7. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Director and Mr. Boukarev will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal can succeed.

ISSUE

8. The issue at this stage of the proceeding is whether the appeal should be dismissed under section 114 of the *Act*.

THE FACTS

9. The facts relating to this appeal are brief.
10. Mr. Boukarev filed a complaint alleging SWWL had contravened the *Act* by failing to pay him all wages owed. The Director investigated the complaint and, on June 7, 2016, issued a Determination against SWWL (the “corporate determination”) which found SWWL liable for wages to Mr. Boukarev in the amount of \$79,701.47, an amount that included wages and interest under section 88 of the *Act*. The Director also imposed administrative penalties on SWWL in the amount of \$3,500.00.
11. At the same time, the Director issued the Determination against Mr. McNellis. This step was deemed appropriate as SWWL had ceased operating.
12. The Determination and the corporate determination were sent to Mr. McNellis. SWWL was also sent a copy of the Determination to their registered and records office.
13. The corporate determination has not been appealed.
14. A BC On-line: Registrar of Companies corporate search conducted by the Director on April 19, 2016 indicated SWWL was incorporated on January 24, 2014, and Mr. McNellis was listed as the sole director. The search confirmed Mr. McNellis was a director of SWWL during the period Mr. Boukarev’s wages were earned or should have been paid.
15. Based on the information acquired and the findings made, the Director concluded Mr. McNellis was liable under section 96 of the *Act* for the amount set out in the Determination. Mr. McNellis was not found liable for the administrative penalties imposed on SWWL in the corporate determination.

ARGUMENT

16. The appeal does not directly address Mr. McNellis’ personal liability as a director and officer of SWWL under section 96 of the *Act*, but rather argues the correctness of the corporate determination, submitting the Director erred in law by finding Mr. Boukarev was not excluded from the provisions of the *Act* by application of section 31(f) of the *Employment Standards Regulation* (the “*Regulation*”). Mr. McNellis also submits Mr. Boukarev had made false statements concerning, among other things, his professional qualifications and accomplishments. He says the misleading claims made by Mr. Boukarev nullified his employment agreement and it should not have been used by the Director to determine his salary for the purpose of calculating wages under the *Act*. Finally, he says Mr. Boukarev engaged in activities that damaged the reputation of SWWL, destroyed company assets and wrongfully removed SWWL property.

17. For the reasons set out later in this decision, it is unnecessary to fully address those arguments in this appeal.
18. Mr. McNellis does not challenge the Director's finding that he was a director of SWWL when the wages of Mr. Boukarev were earned or should have been paid; nor does he argue the amount found owing to Mr. Boukarev in the Determination exceeds the limit for personal liability of a corporate director or officer under section 96 or that the circumstances described in section 96(2) apply to relive him from personal liability.

ANALYSIS

19. This appeal must be summarily dismissed.
20. A person challenging a determination issued under section 96 of the *Act* is limited to arguing those issues which arise under that provision: whether the person was a director or officer when the wages were earned or should have been paid, whether the amount of the liability imposed is within the limits for which a director or officer may be found personally liable; and whether circumstances exist that would relieve the director or officer from personal liability under section 96(2) of the *Act*.
21. Mr. McNellis has not addressed any of these matters in this appeal.
22. The issue of whether a director or officer of an employer corporation found liable for unpaid wages under section 96 of the *Act* can appeal the issues of the employer corporation's liability has been squarely dealt with by this Tribunal in the case of *Kerry Steinemann, a Director/Officer of Pacific Western Vinyl Windows & Doors Ltd.*, BC EST # D180/96. In that decision, the Tribunal said that, in the absence of fraud, collusion, or decisive fresh evidence not previously available, the doctrine of res judicata, or issue estoppel, precludes individuals like Mr. McNellis from arguing whether the employer, SWWL, was properly found liable in the corporate determination, noting "the enforcement mechanisms of the legislation are meant to be quick and inexpensive and it would be counterproductive to those aims to have constant relitigation of the same issues".
23. In the corporate determination, the Director found Mr. Boukarev was a person covered by the provisions of the *Act* and was owed wages under it. SWWL has not filed an appeal and Mr. McNellis is bound by the result of the corporate determination.
24. As indicated above, Mr. McNellis has not argued any issue that arises under section 96. Consequently, no error in the Determination has been established and there is no basis for altering the Director's finding on Mr. McNellis' personal liability under that provision.
25. Based on the above, this appeal is dismissed under section 114 of the *Act*; it has no reasonable prospect of succeeding and the purposes and objects of the *Act* are not served by requiring the other parties to respond to it.
26. I will add one final comment, although not strictly required to do so. Even if Mr. McNellis were allowed to challenge the corporate determination, the result would be the same. Simply put, based on interpretive principles applied to the provisions of the *Act* and the exclusions laid out in section 31 of *Regulation* applied to the relevant portions of the legislation, the Director did not err in law in finding Mr. Boukarev's employment with SWWL was covered by the *Act* and he was entitled to the protection of its provisions: see *Machtinger v. HOJ Industries Ltd.* (1992), 91 D.L.R. (4th) 491 at 507 and *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27. In *Annabel Webb*, BC EST # D274/00, at page 14, the Tribunal made the following statement, which accurately expresses the approach applied in appeals to issues such as that which arose in the corporate determination:

I start my analysis of the exclusion from the hours of work and overtime provisions under *Regulation* 34(1)(r) from the following propositions: First, an interpretation of the *Act* and *Regulation* that extends the protection is preferable to one that does not. It is well established that the definitions are to be given a broad and liberal interpretation. The basic purpose of the *Act* is the protection of employees through minimum standards of employment and, accordingly, an interpretation which extends that protection is to be preferred over one which does not (*Machtiger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27). Moreover, my interpretation must take into account the purposes of the *Act* (*Interpretation Act*). The Tribunal has on many occasions confirmed the remedial nature of the *Act*. Second, I agree with the principles enunciated in *Anassis Home Society*, BCEST #D019/97, upheld on reconsideration in BCEST #D155/97. In other words, exceptions to the minimum requirements, such as Section 34 of the *Regulation*, “must be interpreted in the most narrow manner in order to preserve the intent and purposes of the *Act*.”

27. Applying the above approach, no appeal of the decision of the Director not to exclude Mr. Boukarev from the protections of the *Act* would succeed. Other arguments raised by Mr. McNellis against the corporate determination are either irrelevant to entitlement under the *Act* or would not support the result sought in the appeal.

ORDER

28. Pursuant to section 115 of the *Act*, I order the Determination dated June 7, 2016, be confirmed in the amount of \$25,560.18, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal