

An appeal

- by -

Nitai Chand Goswami, a Director and Officer of Fraser Valley Community
College Inc.

(“Mr. Goswami”)

- 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.: 2014A/119

DATE OF DECISION: November 28, 2014

DECISION

SUBMISSIONS

Sunanda Dinesh Kikla

on behalf of Nitai Chand Goswami a Director and Officer
of Fraser Valley Community College Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Nitai Chand Goswami (“Mr. Goswami”), a Director and Officer of Fraser Valley Community College Inc. (“FVCC”), has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on July 29, 2014.
2. In a Determination issued July 29, 2014 (the Corporate Determination), the Director found FVCC in contravention of sections 18, 40, 45 and 58 of the *Act* in failing to pay its former employee Harpreet Thind \$5,913.77 in wages and interest. The Director also imposed two administrative penalties in the total amount of \$1,000 for FVCC’s contravention of sections 17 and 18 of the *Act*, for a total amount payable of \$6,913.77.
3. In a separate Determination also issued July 29, 2014 (the Director Determination), the Director found that because Mr. Goswami was an officer and director of FVCC at the time Ms. Thind’s wages were earned and payable, he was personally liable to pay \$4,267.02, representing not more than two months’ unpaid wages for Ms. Thind, plus interest, pursuant to section 96 of the *Act* (the Director Determination). The delegate concluded that there was insufficient evidence that Mr. Goswami authorized, permitted or acquiesced in FVCC’s contraventions, and found him not personally liable for the administrative penalties.
4. Mr. Goswami appeals the Determination contending that the delegate erred in law and failed to observe the principles of natural justice in making the Determination. Mr. Goswami also says that evidence has become available that was not available at the time the determination was being made. Mr. Goswami seeks to have the matter referred back to the Director for a new investigation.
5. The appeal was filed late as a copy of the Director’s written reasons for the Director Determination was delivered to the Tribunal outside of the statutory period for filing the appeal. Mr. Goswami has requested an extension of time for filing his appeal. Any delay would allow the Tribunal to dismiss the appeal under section 114(1)(b) of the *Act*, but I choose to address the appeal under section 114(1)(f).
6. These reasons are based on Mr. Goswami’s written submissions, the section 112(5) “record” that was before the delegate at the time the decision was made and the Reasons for the Determination. If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Respondent and the delegate may be invited to file further submissions. If the appeal is not meritorious, it will be dismissed.

FACTS AND ARGUMENT

7. The Corporate Determination, which included a notice to directors and officers explaining their personal liability under the *Act*, was sent to FVCC with copies to the registered and records office and to FVCC’s directors and officers.
8. The Corporate Determination contained the following “Notice to Directors/Officers”:

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

- 1) That the personal 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. Mr. Goswami argues that the Determination was issued without giving the employer the opportunity to present the facts. His submission constitutes, in essence, an appeal of the Corporate Determination. Mr. Goswami does not dispute that he was an FVCC director or officer at the time Ms. Thind's wages were earned or should have been paid.

ANALYSIS

10. Section 114 of the *Act* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the 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 that 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.
11. Having reviewed the section 112 record and Mr. Goswami's submissions, I dismiss the appeal.
12. 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.
13. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.
14. I find that Mr. Goswami has not met that burden.
15. 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,

...

16. Sunanda Dinesh Kikla filed an appeal of the Corporate Determination on FVCC's behalf at the same time as she filed an appeal of the Director Determination on Mr. Goswami's behalf. In a separate decision, I dismissed FVCC's appeal, concluding that FVCC had ample opportunity to respond to the complaint and, having failed to do so, was prevented from making submissions on the merits for the first time on appeal.
17. I would dismiss Mr. Goswami's appeal of his personal liability for the same reasons. FVCC was provided with a number of opportunities to respond to the complaint and failed to do so, despite being warned on several occasions that a failure to do so carried the risk of directors and officers being found personally liable for unpaid wages. The record suggests that Ms. Kikla, acting on behalf of FVCC, felt the complaint was frivolous and that she did not feel it was either important enough to respond to personally or to delegate the responsibility of responding to another individual or director.
18. The grounds for the appeal are that the delegate failed to observe the principles of natural justice and erred in law. Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker. There is nothing in the appeal submission that suggests, or establishes, that Mr. Goswami was denied natural justice.
19. The record discloses that FVCC was invited to participate in a mediation of the complaint. Although Ms. Kikla was offered a number of opportunities to attend, she was unable to do so. There is nothing in the record or the appeal submissions that indicates that Mr. Goswami was asked to participate on FVCC's behalf.
20. The record confirms that on June 6, 2014, the delegate sent Ms. Kikla an email, attaching Ms. Thind's allegations and documentation in support of the allegation. Ms. Kikla was invited to respond to the complaint by June 16, 2014, on FVCC's behalf. As Ms. Kikla attached the email to her own appeal submission, there is no question that she received a copy of the complaint and supporting allegations and was offered an opportunity to respond on FVCC's behalf. The June 6, 2014, email further notified Ms. Kikla that a failure to provide a response would result in a determination being made and, as directors of FVCC, both Mr. Goswami and Ms. Kikla were potentially facing personal liability for unpaid wages and monetary penalties for any contraventions of the *Act*. The documentation was also sent to FVCC on July 3, 2014, with the preliminary findings letter, which again cautioned Ms. Kikla and Mr. Goswami about their potential liability. Ms. Kikla was given until July 21, 2014, to make a response to the preliminary findings letter. That letter was sent by Registered mail and successfully delivered. The delegate did not receive any response from Ms. Kikla or anyone else on behalf of FVCC.
21. The Tribunal has often said that an appeal is not an opportunity to fail or refuse to respond to the investigation of a complaint and present arguments on appeal that ought to have been presented to the delegate during the investigation. (see *Tri West Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*,

BC EST # D058/97) Having failed to participate in the investigation in any meaningful way despite having knowledge of the opportunity to do so, it is not now open to Mr. Goswami to present his case, in essence, for the first time on appeal.

22. I am not persuaded the Director failed to comply with natural justice.

Error of Law

23. The Tribunal as adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

24. Mr. Goswami argues that the documents Ms. Thind submitted in support of her complaint are “highly questionable” and that FVCC was not provided an opportunity to “cross examine the evidence presented by the claimant.” I find that the Corporate Determination was one that could rationally be arrived at in light of the documentary evidence. There is no basis for concluding that the delegate erred in law.

New Evidence

25. 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.

26. Mr. Goswami has submitted a 2-page document dated September 14, 2014, delineating his reasons and argument for appeal. Although Mr. Goswami has stated on his Appeal Form that evidence has become available that was not available at the time the determination was being made, there is nothing in his 2-page appeal submission that speaks to any “new evidence”.

27. I find no grounds for the appeal.

ORDER

28. Pursuant to section 114(1)(f) of the *Act*, I dismiss the appeal. Accordingly, pursuant to section 115(1)(a) of the *Act*, the Determination, dated July 29, 2014, is confirmed in the amount of \$4,267.02, together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal