

An appeal

- by -

Sukha Singh Gill, an Officer of Vidao Messenger Inc.

- 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.: 2017A/117

DATE OF DECISION: November 7, 2017

DECISION

SUBMISSIONS

Sukha Singh Gill

on his own behalf as an officer of Vidao Messenger Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Sukha Singh Gill (Mr. Gill) has filed an appeal of a Determination issued by Michael Thompson, a delegate (the “delegate”) of the Director of Employment Standards (the “Director”), on August 8, 2017. In that Determination, the Director found that Mr. Gill was an officer of Vidao Messenger Inc. (“Vidao”) at the time wages were owed by Vidao to nine of its former employees. Accordingly, pursuant to section 79 of the *ESA*, the delegate found Mr. Gill to be personally responsible for \$64,027.23, representing not more than two months’ unpaid wages, plus interest.
2. Mr. Gill appeals the Determination on the grounds that the Director’s delegate erred in law. Mr. Gill also argues that evidence has become available that was not available at the time the Determination was made.
3. Section 114 of the *ESA* 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 the Director if it decides that the appeal does not meet certain criteria.
4. This decision is based on Mr. Gill’s written submissions, the section 112 (5) record, and the Reasons for the Determination.

FACTS AND ARGUMENT

5. Vidao, a company incorporated in British Columbia, operates a software development business. It is a high technology company as defined in section 38.8(1) of the *Employment Standards Regulation* (the “*Regulation*”). Mr. Gill is an officer of Vidao.
6. The delegate conducted an investigation into the complaints of several Video employees regarding unpaid wages. On July 18, 2017, the delegate sent Vidao a letter outlining the complaints and a Demand for Employer Records by registered mail. Copies of the letter and Demand were sent by registered mail to the director and officers and registered and records office, with copies by email to the email addresses used by the director and officers. The Demand included information about the personal liability of the directors and officers for unpaid wages.
7. On July 18, 2017, the delegate sent a registered letter notifying Vidao of the complaints and the investigation to Vidao’s business address and a letter by regular mail to Vidao’s Registered and Records office. The correspondence included a Demand for Employer Records including payroll records and documentation regarding the termination of any employee between January 1, 2017, and the date of the Demand. The delegate also sent the correspondence, including the Demand, to email addresses of Kamaljeet Gill and Mr. Gill.

8. On August 8, 2017, after receiving no response to the complaints from Vidao or its officers or director, the delegate issued a Determination (the Corporate Determination) finding wages and interest owed to the employees. The delegate also imposed administrative penalties in the amount of \$2,500. The Corporate Determination, including a notice to directors and officers explaining their personal liability under the *ESA*, was sent to Vidao, with copies to the directors and officers and to the Registered and Records office. Although the appeal deadline for the Corporate Determination was September 15, 2017, the delegate issued Determinations against Vidao's director and officers on the same date based on information from the employees that Vidao was approaching insolvency.
9. The delegate determined that Mr. Gill became a director of Vidao effective July 15, 2015, and an officer as of September 29, 2015. Although Mr. Gill ceased being a director as of January 30, 2017, he remained an officer as of August 5, 2017. The delegate found that Mr. Gill was an officer of Vidao between February 1 and July 19, 2017, when the employees' wages were earned or should have been paid, and concluded he was personally liable for up to two months' unpaid wages for each employee.
10. The delegate determined that there was insufficient evidence that Mr. Gill authorized, permitted or acquiesced in Vidao's contraventions and found he was not personally liable for the administrative penalties.

Argument

11. Mr. Gill argues that the amounts due to the employees are much less than what was calculated by the delegate. Attached to the appeal is a spreadsheet setting out the net wages and statutory deductions for eight of the nine employees. Also attached to the appeal submission is a document that "indicates vacation paid owed".
12. With respect to the ninth employee, Mr. Gill states that this employee was only able to work 20 hours per week, that he was not entitled to vacation pay since he took his vacation between April 24 and May 12, 2016, and that this employee was not entitled to compensation for length of service because he was terminated for cause.
13. Finally, Mr. Gill argues that he should not be held personally responsible for two months wages for all of the employees when none of them worked for that long.

ANALYSIS

14. Section 112(1) of the *ESA* 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.

15. Acknowledging that most appellants do not have any formal legal training and, in essence, act as their own counsel, the Tribunal has taken a liberal view of the grounds of appeal. As the Tribunal held in *Triple S Transmission*, (BC EST # D141/03), while

most lawyers generally understand the fundamental principles underlying the “rules of natural justice” or what sort of error amounts to an “error of law”, these latter terms are often an opaque mystery to someone who is untrained in the law. In my view, the Tribunal must not mechanically adjudicate an appeal based solely on the particular “box” that an appellant has--often without a full, or even any, understanding--simply checked off.

The purposes of the *Act* remain untouched, including the establishment of fair and efficient dispute resolution procedures and, more generally, to ensure that all parties receive “fair treatment” [see subsections 2(b) and (d)]. When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, *prima facie*, invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant’s explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

16. I have considered whether there is any basis for the Tribunal to interfere with the decision.
17. 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 potential 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.
18. The evidence is that Vidao was aware of the complaints and investigation and given the opportunity to respond. The Director’s delegate issued a Demand for Employer Records and included a Notice to directors and officers regarding their personal liability for wages under the *ESA*. Canada Post tracking information confirms that the Demand and Notice were received on July 20, 2017. In the absence of any explanation why the records were not provided by the deadline of August 2, 2017, I dismissed Vidao’s appeal of the Corporate Determination (*Vidao Messenger Inc.*, BC EST # D115/17).
19. Once corporate liability has been established, directors cannot, through an appeal of a determination of director liability, reargue the issue of a company’s liability for wages unless they can establish fraud or fresh evidence that is decisive to the merits of the issue. (*Steinemann*, BC EST # D180/96)

20. Through his appeal of the director Determination, Mr. Gill is advancing arguments that ought to have been made either before the delegate during the investigation of the wage complaints. As outlined in the Notice to Directors/Officers which accompanied the delegate's correspondence, Mr. Gill cannot argue the merits of the corporate Determination through an appeal of the director Determination.
21. Mr. Gill does not dispute that he was a corporate officer during the time all of the employees' wages were earned and should have been paid. He argues only that the employees were not employed during that time, an argument that is unsupported by any evidence.
22. Section 96 of the *ESA* 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 an 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,
- ...
23. There is no evidence that the delegate erred in determining the employees' wage entitlements or Mr. Gill's personal liability for wages.
24. The appeal is dismissed.

ORDER

25. Pursuant to section 115 of the *Act*, I Order that the Determination, dated August 8, 2017, be confirmed in the amount of \$64,027.23 together with whatever further interest that has accrued under section 88 of the *ESA* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal