

An appeal

- by -

Khedor Ibrahim a Director of Espana Contractors Group Inc.
("Espana")

– 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)

and

An application for suspension

- by -

Khedor Ibrahim a Director of Espana Contractors Group Inc.
("Espana")

– of a Determination issued by –

The Director of Employment Standards
(the "Director")

Pursuant to section 113 of the
Employment Standards Act R.S.B.C. 1996, C. 113 (as amended)

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2011A/125 & 2011A/126

DATE OF DECISION: November 3, 2011

DECISION

SUBMISSIONS

Khedor Ibrahim	on his own behalf, a Director of Espana Contractors Group Inc.
J. R. Dunne	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Khedor Ibrahim, a Director of Espana Contractors Group Inc. (“Espana”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued August 15, 2011. Mr. Ibrahim also made an application pursuant to Section 113 of the *Employment Standards Act* (the “*Act*”), to suspend the effect of the Determination.
2. Rock G. Chouinard filed a complaint with the Director alleging that Espana failed to pay regular wages, overtime wages, vacation pay and business costs. The Director issued a Determination on February 15, 2011, finding that Espana had contravened Section 18 of the *Act* in failing to pay Mr. Chouinard wages. The Director determined that Mr. Chouinard was entitled to wages and interest in the total amount of \$3,257.12. The Director also imposed a \$1,000 penalty on Espana for the contraventions of the *Act*, pursuant to section 29(1) of the *Employment Standards Regulation*.
3. This Determination (the “Corporate Determination”), which included a Notice to Directors and Officers explaining their personal liability under the *Act* was sent to Espana, with copies to the registered and records office and to Mr. Ibrahim, Espana’s sole director. The time in which to appeal the Determination expired March 25, 2011. Espana did not appeal the Determination nor satisfy the Order. On August 15, 2011, a delegate of the Director issued a second Determination (the “Director/Officer Determination”) finding Mr. Ibrahim, the sole Director of Espana during the time the wages were earned, liable for two months unpaid wages for Mr. Chouinard. The Director also found Mr. Ibrahim to have authorized, permitted or acquiesced in the contraventions and, as such, personally responsible for the administrative penalties.
4. Mr. Ibrahim contends that new evidence has become available that was not available at the time the Determination was issued. Mr. Ibrahim also sought a suspension of the Director Determination and submitted \$500 to the Director in trust pending a decision on the merits of the appeal.
5. This application is decided on the s. 112(5) “record”, the submissions of the parties and the Reasons for the Determination.

ISSUES

6. Is there new evidence that would lead the delegate to conclude that Mr. Ibrahim was not personally liable for Mr. Chouinard’s wages?
7. Should the effect of the Determination be suspended?

FACTS AND ARGUMENT

8. Following a two day hearing, the Director determined that Espana owed Mr. Chouinard unpaid wages. On July 14, 2011, after noting that the February 15, 2011, Determination had not been appealed or satisfied, the Director's delegate sent Mr. Ibrahim a preliminary findings letter. In that letter, the delegate indicated that it appeared that Mr. Ibrahim was the sole director of Espana and liable for the outstanding wages. The director also noted that it appeared Mr. Ibrahim was involved in the business and management of the corporation and did not either pay the wages or provide the Director with the payroll records requested. The delegate indicated that it appeared Mr. Ibrahim was liable for the two administrative penalties.
9. On July 25, 2011, Mr. Ibrahim emailed a response to the delegate arguing that "Mr. Chouinard never worked for Pita King".
10. The Director determined that Mr. Ibrahim was a Director and Officer of Espana at the time the wages were earned. The delegate reviewed Mr. Ibrahim's response and did not find it compelling. The delegate noted that the initial Director's delegate found that Mr. Chouinard was an employee and, had Mr. Ibrahim disagreed with that conclusion, he ought to have appealed the corporate Determination. The Director determined that, as a Director and Officer, Mr. Ibrahim was personally liable for two month's wages, pursuant to Section 96 of the *Act*.
11. In both his appeal and his application for a suspension of the Determination, Mr. Ibrahim contends that Mr. Chouinard made false statements and contends that he does not owe him any money. Mr. Ibrahim states that he wishes the Tribunal to "reinvestigate" the case.
12. The Director objected to the suspension request given that the amount submitted by Mr. Ibrahim was considerably less than the full amount of the Determination. The Director indicated that he would continue the collection proceedings and hold any funds collected in trust pending the appeal decision.
13. The Director noted that there were only three grounds on which a Determination made against a director/officer could be appealed, and contended that Mr. Ibrahim had not filed an appeal under any of those grounds. The Director argued that the appeal should be dismissed.
14. The Director also noted that Mr. Ibrahim was seeking to submit evidence that should properly have been submitted during the hearing regarding the corporate determination and that his appeal is without merit.

ANALYSIS

15. Section 112(1) of the *Act* 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; or
 - evidence has become available that was not available at the time the determination was being made
16. Section 113 of the *Act* provides as follows:
 - 113 (1) *A person who appeals a determination may request the tribunal to suspend the effect of the determination.*
 - (2) *The tribunal may suspend the determination for the period and subject to the conditions it thinks appropriate, but only if the person who requests the suspension deposits with the director either*

- (a) *the total amount, if any, required to be paid under the determination, or*
- (b) *a smaller amount that the tribunal considers adequate in the circumstances of the appeal.*

17. The burden of establishing that the Determination is incorrect rests with an Appellant. Having reviewed the submissions of the parties, I am unable to find that the appellant has discharged that burden.
18. Mr. Ibrahim's appeal raises an issue that relates only to the February 15, 2011, Determination against Espana, which was never appealed.
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). Given that Espana neither disputed Mr. Chouinard's initial claim nor appealed the corporate determination, Mr. Ibrahim cannot now re-argue the issue of Espana's liability for wages.
20. The August 15, 2011, Determination relates to the personal liability of Mr. Ibrahim, as a Director and Officer of Espana.
21. 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*
22. Mr. Ibrahim does not deny that he is, or continues to be a Director or Officer of Espana. He also does not deny that the wages found to be owed are for a two month period in which he was a Director or Officer. Furthermore, Mr. Ibrahim does not argue, or present any evidence to suggest that subsection 96(2) applies.
23. In his appeal submission, Mr. Ibrahim contends that Mr. Chouinard was not employed by Espana, the same argument that was considered, and dismissed, by the Director.
24. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03, the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:
 - 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;
 - the evidence must be relevant to a material issue arising from the complaint;
 - the evidence must be credible in the sense that it is reasonably capable of belief; and
 - 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.

25. The arguments made by Mr. Ibrahim ought to have been raised by Espana at the time the delegate was investigating the complaint against Espana. As this evidence was available at the time the investigation was being decided, it does not constitute new evidence on appeal. In any event, the time for appealing the Corporate Determination expired March 25, 2011.
26. In the circumstances, it is not necessary for me to make a decision on the suspension application.

ORDER

27. I Order, pursuant to Section 115 of the *Act*, that the Determination dated August 15, 2011, be confirmed in the amount of \$4,257.12 plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal