

An appeal

- by -

Fern Fragoso, a Director and Officer of Copycorp Document Systems Inc.
(“Appellant”)

- 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: Rajiv K. Gandhi

FILE No.: 2016A/102

DATE OF DECISION: October 12, 2016

DECISION

SUBMISSIONS

Fern Fragoso

on her own behalf, as a Director and Officer of Copycorp Document Systems Inc.

OVERVIEW

1. On June 23, 2016, a delegate of the Director of Employment Standards (the “Director”) issued a determination (the “Corporate Determination”) in which Copycorp Document Systems Inc. (“CDS”), a British Columbia company, was found liable to pay regular wages, annual vacation pay, and compensation for length of service to three former employees, according to sections 18, 58, and 63 of the *Employment Standards Act* (the “*Act*”). The Director also required CDS to repay, to those employees, monies deducted from wages contrary to section 21 of the *Act*, and interest according to section 88.
2. As at the date of the Corporate Determination, the aggregate liability of the Company to all three employees was \$30,023.28.
3. Concurrently with the Corporate Determination, the Director issued a second determination (the “Personal Determination”) confirming the personal liability of the Appellant, Fern Fragoso, to pay wages in the aggregate amount of \$23,279.50, plus interest, both according to section 96(1) of the *Act*.
4. The Appellant seeks to cancel the Personal Determination on the basis that evidence has become available that was not available at the time the Determination was made, a permitted ground of appeal, under section 112(1)(c) of the *Act*.
5. No appeal has been filed with respect to the Corporate Determination, and there is no dispute with respect to the amounts calculated to be due and owing.
6. At this stage, I must consider whether or not it is appropriate to summarily dismiss all or part of this appeal, according to section 114(1) of the *Act*.
7. To that end, I have reviewed submissions from the Appellant, received on August 2, 2016, and the materials included in the Director’s Record, received on August 9, 2016.

THE FACTS AND ANALYSIS

8. Section 96(1) of the *Act* provides that 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.”
9. The Director may presumptively rely on corporate records filed with the Registrar of Companies when establishing the status of an individual for the purposes of assessing liability under section 96(1) (see *Michalkovic*, BC EST # RD047/01 at page 10).
10. The Appellant does not dispute that she was listed as a director and officer of CDS between January 1 and May 12, 2016, when the complainants’ wages were earned or should have been paid. Rather, she asks not to

be found personally liable under section 96(1) of the *Act*, “due to the lack of power in [her] role as director of [CDS]” and her lack of ability to pay due to financial hardship. The bulk of her appeal sets out information about these matters which she seeks to have treated as “new evidence” for the purposes of appeal.

11. In *Davies et. al.*, BC EST # D171/03, the Tribunal held that the onus rests with an appellant to meet a strict, four part test before any exercise of discretion to accept and consider fresh evidence:
 - (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.
12. Without meaning to trivialize her narrative, which is both compelling and troubling, the Appellant says that she did not exercise the functions of a CDS director or officer but was instead controlled by her former husband, from whom she separated sometime in May 2016.
13. Although I have no reason to disbelieve the Appellant, I do not think that her evidence satisfies the first part of the *Davies* test:
 - (a) on May 18, 2016, CDS received a letter from the Director in which there is a clear statement confirming that “... directors and officers of corporations are personally liable to pay up to two months’ wages for each employee...”
 - (b) on June 8, 2016, the Appellant was provided with a letter outlining the Director’s preliminary investigative findings and confirming that, in the absence of contrary evidence, a determination finding her liable to pay would follow;
 - (c) in her same day response to the Director, the Appellant refers to significant financial hardship but does not raise the additional issues now raised in this appeal.
14. In my view, the facts alleged in this appeal could have been addressed in the Appellant’s response to the Director’s second letter. For that reason alone, I find that this appeal has no reasonable prospect of success and must therefore be dismissed.
15. I am sympathetic to the situation in which the Appellant finds herself. I am mindful of the fact that the financial liability imposed by the Personal Determination may never be satisfied, given the Appellant’s personal circumstances. Unfortunately, my mandate is to consider appeals in the context of the *Act*, and my authority as a member of the Employment Standards Tribunal is limited. Impecuniosity is not a defence to section 96 of the *Act* and I do not believe that I have any authority to deal directly with inequities between the Appellant and her former husband.
16. In light of information provided in this appeal, the Director may wish to investigate the liability of other parties under section 96(1), but I leave that to the Director.

ORDER

17. This appeal is dismissed, pursuant to section 114(1)(f) of the *Act*, and the Determination issued by the Director on June 23, 2016, against Fern Fragoso is confirmed pursuant to section 115.

Rajiv K. Gandhi
Member
Employment Standards Tribunal