

An appeal

- by -

Felice Claudette Young,
Director of Demara (2012) Society and Demara Safeguard Shield Association
("Ms. Young")

- 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: Shafik Bhalloo

FILE No.: 2015A/131

DATE OF DECISION: December 10, 2015

DECISION

SUBMISSIONS

Cherity Smith

counsel for Felice Claudette Young, Director of Demara
(2012) Society and Demara Safeguard Shield Association

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Felice Claudette Young (“Ms. Young”), Director of Demara (2012) Society (“DCS”) and Demara Safeguard Shield Association (“DSSA”), has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on September 4, 2015 (the “Section 96 Determination”).
2. The expiry of the appeal period for the Section 96 Determination was October 9, 2015. On October 8, 2015, the Employment Standards Tribunal (the “Tribunal”) received an email from Ms. Young’s counsel advising that she had faxed a copy of the Appeal Form, without submissions, and was seeking an extension of the appeal period on behalf of Ms. Young who had “recently requested that [her] firm provide her with legal advice with respect to this matter”.
3. The Section 96 Determination concluded that Ms. Young was a director of DCS and DSSA, two (2) companies in the group of companies being treated by the Director as one employer for the purposes of the *Act* in the Corporate Determination dated August 29, 2014, at the time wages owed to Sabine Delveaux, Elaina Hanchar, Lynette Kleefeld, Alison Murray, Kimberley Mann, Kenneth Poole, Lisa Smilowski, Tracey Wahl, Lori Von Siemens, Rikki Bassett and Donna Metlowski (the “Complainants”) were earned or should have been paid and, as such, was personally liable under section 96 of the *Act* for an amount of \$23,115.84.
4. On October 13, 2015, the Tribunal sent the incomplete appeal of Ms. Young, together with counsel’s request for an extension of time to file the appeal, to the Complainants and to the Director for informational purposes only. The Tribunal also requested the Director to provide the section 112(5) “record” (the “Record”) by October 27, 2015.
5. Further, in the same letter dated October 13, 2015, which was also addressed to Ms. Young, the Tribunal requested Ms. Young to provide her written reasons and argument for the appeal and any supporting documents, no later than October 27, 2015. The Tribunal clarified that the latter deadline was not to be viewed as an extension to the appeal deadline but only as a deadline to provide the requested documents.
6. On October 27, 2015, counsel for Ms. Young emailed a copy of the appeal submissions of Ms. Young to the Tribunal, which the Tribunal then forwarded to the Complainants and to the Director for informational purposes only. The Tribunal expressly advised to both the Complainants and the Director that no submissions were being sought from them at this time.
7. On October 28, 2015, the delegate of the Director sought an extension of two (2) days to the previously-imposed deadline of October 27, 2015, to produce the Record as she had just returned from vacation and was involved in previously scheduled mediations. By letter of same date, the Tribunal granted the delegate an extension to October 29, 2015, to deliver the Record.

8. On October 29, 2015, counsel for Ms. Young objected to the time extension granted to the delegate for the delivery of the Record, arguing that the delegate knew the deadline for the delivery of the Record “but *elected* to work on other matters instead of requesting an extension or submitting the Record prior to the deadline” (*italics* in original).
9. On November 3, 2015, the Tribunal informed counsel for Ms. Young that its decision to grant the two-day extension to the delegate to deliver the Record would stand as counsel’s submissions did not indicate any prejudice Ms. Young would suffer as a result of the two-day time extension.
10. On October 29, 2015, the Tribunal received the Record from the Director. On November 3, 2015, the Tribunal disclosed the Record to Ms. Young, and afforded her an opportunity to object to its completeness. However, no objection as to the completeness of the Record was received from Ms. Young or her counsel. In the circumstances, the Tribunal accepts the Record as complete.
11. On November 23, 2015, the Tribunal notified the parties that the matter would be reviewed by a Tribunal Member who, without seeking submissions from the parties, may dismiss all of, or part of, the appeal and/or confirm all of, or part of, the Section 96 Determination.
12. On December 2, 2015, the Tribunal requested a copy of the Corporate Determination from the Director as it was not included in the Record. The Director submitted a copy of the Corporate Determination to the Tribunal on December 3, 2015.
13. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. Therefore, at this stage, I will assess the appeal based solely on the Reasons for the Section 96 Determination (the “Section 96 Reasons”), the Appeal Form and written submissions of Ms. Young’s counsel, and my review of the Record that was before the Director when the Section 96 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 of any kind for any of the reasons listed in that subsection. If satisfied the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1), the Tribunal will invite the Complainants and the Director to file a reply to the question of whether to extend the deadline to file the appeal, and may request submissions on the merits of the appeal. Ms. Young will then be given an opportunity to make a final reply to the submissions, if any.

ISSUE

14. The issue at this stage of the appeal is whether there is any reasonable prospect the appeal will succeed.

THE FACTS

15. The Complainants filed their complaints under section 74 of the *Act*, alleging that Demara Consulting Inc., DCS and DSSA (“Demara” or the “Demara Group of Companies” or the “Companies”) contravened the *Act* by failing to pay them regular wages, overtime, annual vacation pay and compensation for length of service (the “Complaints”).
16. According to the Section 96 Reasons, on February 6, 2014, the delegate sent correspondence by registered mail to the registered offices of the Demara Group of Companies outlining the Complaints and the requirements of the *Act*. The same correspondence was also sent to the directors and officers of the Demara Group of Companies at the addresses noted on the corporate searches. However, all letters were returned marked “moved”. Subsequently, the letters were redirected to an office in Winfield, British Columbia, where

one of the directors, Irene Beilstein (“Ms. Beilstein”), was located. Ms. Beilstein accepted and signed for all the registered letters.

17. On August 29, 2014, after completing her investigation, the delegate issued a Corporate Determination finding that the Demara Group of Companies were to be treated as one employer for the purposes of the *Act*. The Corporate Determination also held that the Demara Group of Companies were jointly and separately liable for \$22,487.36 (including accrued interest) in unpaid wages and levied administrative penalties in the amount of \$1,000 against the Companies.
18. The Corporate Determination, which included a Notice to Directors and Officers explaining their personal liability under the *Act*, was sent to the Demara Group of Companies, with copies to the registered and records office and to the directors and officers of Demara.
19. The deadline for the appeal of the Corporate Determination was October 6, 2014. To date, no appeal has been pursued by the Demara Group of Companies.
20. On September 20, 2013, during the investigation of the Complaints and prior to the Corporate Determination being made, the delegate conducted a BC On-line: Registrar of Companies – Corporate Search of DCS which was current to July 22, 2013. It shows that DCS was incorporated on December 19, 2012, and Ms. Young was one of its directors. A subsequent corporate search of DCS by the delegate on February 4, 2014, which was current to November 28, 2013, also shows Ms. Young continued being a director of DCS. Both these searches form part of the Record adduced by the Director in this appeal.
21. The Record also includes a corporate search of DSSA by the delegate on February 4, 2014, which was current to November 28, 2013. It shows DSSA was incorporated on December 19, 2012, and Ms. Young listed as one of its directors.
22. The Record also includes a Form 4 document for DSSA filed and registered on December 19, 2012, showing Ms. Young as a director of DSSA as of January 16, 2012.
23. The Record also contains two Society Notices of Changes in Directors for DSSA filed and registered on June 10, 2013, and August 21, 2014, respectively, both of which delineate names of directors that ceased to be directors of DSSA and not Ms. Young.
24. Based on the corporate searches of the Demara Group of Companies referred to above, the delegate found that Ms. Young was a director of DCS and DSSA at all material times when wages owed to the Complainants were earned and should have been paid. As a result, on September 4, 2015, the delegate issued the Section 96 Determination against Ms. Young, holding the latter personally liable for the entire amount of wages owed to the Complainants in the Corporate Determination, \$23,115.84 (inclusive of interest), as the amount awarded in the Corporate Determination was less than two (2) months’ wages.
25. As there was insufficient evidence to indicate that Ms. Young authorized, permitted or acquiesced in contraventions of the *Act* by Demara, she was not liable for any administrative penalties levied against Demara.
26. On October 27, 2015, Ms. Young, through counsel, delivered written submissions in her appeal of the Section 96 Determination. Ms. Young appeals the Section 96 determination based on the “error of law” and “new evidence” grounds of appeal in section 112(1)(a) and (c) of the *Act*. She is seeking the Tribunal to

either cancel the Section 96 Determination or vary it by decreasing the amount of the Section 96 Determination.

SUBMISSIONS OF MS. YOUNG

27. In her written submissions, counsel states that Ms. Young submitted her resignation as a director of DCS on September 27, 2013, and of DSSA on November 30, 2013. Counsel has submitted copies of the two resignations. The first resignation document, dated September 27, 2013, relating to DCS appears to be executed by Ms. Young in Vernon, British Columbia. The document also shows that it was “accepted and approved by” two other directors of DCS, namely, Donna Marie Stancer (“Ms. Stancer”) and Ms. Beilstein. The second resignation document, dated November 30, 2013, relating to DSSA, appears to be executed by Ms. Young in Spruce Grove, Alberta. Unlike the first resignation, this resignation document does not contain any notation showing who received it and when. Of course, a director can resign at any time as a director by simply giving notice to that effect. Unless there is a provision to the contrary in the corporation’s By-Laws, a director’s resignation can be oral, although a written resignation is preferable for purposes of proof. In this case, while there is a written resignation document produced for Ms. Young’s resignation of her directorship in DSSA, there is no evidence when it was submitted to DSSA or its Board. While in this case nothing turns on this for the reasons set out in the next section of this decision, the onus is on Ms. Young to show with cogent evidence when she resigned as a director of DSSA. In this regard, a signed and dated resignation such as the one counsel has submitted for Ms. Young should have accompanied some evidence of when it was submitted by Ms. Young to DSSA or its Board.
28. I also note that counsel submits that Ms. Stancer was the “organizing mind” behind the Demara Group of Companies, and that she “was found guilty of various fraud and tax offences, including counselling others to defraud the government”. Counsel submits copies of news stories regarding Ms. Stancer’s alleged conviction, and submits that Ms. Young was “a victim of Ms. Stancer’s fraud and criminal activities” and lacks the “specific education, training or experience related to tax preparation, accounting or finance, and was misled as to the legality of the business operations of the Demara entities and the activities of Ms. Stancer”. She submits that Ms. Young was “enticed” by Ms. Stancer to be involved in DCS and DSSA as a director “by such fraud and criminal activities [of Ms. Stancer]”.
29. Counsel also submits that Ms. Young was not aware that the Complainants, who were employees of one of the Demara Group of Companies for which she did not act as a director and had no entitlement to financial records, had not been paid until she started “receiving emails from the employees on or about September 17, 2013.” Counsel states Ms. Young is willing to provide an affidavit to this effect upon request.
30. Lastly, counsel submits that Ms. Young is sixty years of age, and has not been in the workforce for approximately 2.5 years, and she was not compensated for acting as a director of DSSA or DCS. She has limited ability to pay the wages payable under the Section 96 Determination, and limited opportunities for recovery of the amounts owing under the Section 96 Determination from the Demara Group of Companies or the other directors of Demara. Therefore, counsel submits that Ms. Young should not be required to pay the amounts ordered payable under the Section 96 Determination or, alternatively, the Section 96 Determination should be “changed or varied to reduce the amount she owes to \$4,875.00” which is approximately the amount Ms. Young “received in commissions in relation to her promotion of DSSA and DCS”.

ANALYSIS

31. Section 96(1) of the *Act* states:

Corporate officer's liability for unpaid wages

96 (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.

32. The Tribunal has consistently indicated that in an appeal of a determination issued under section 96 of the *Act*, the appellant is limited to arguing only those issues that arise under section 96 of the *Act*, namely:

- (i) Whether the person was a director or officer when the wages were earned or should have been paid;
- (ii) Whether the amount of liability imposed is within the limit for which a director or officer may be found to be personally liable;
- (iii) Whether circumstances exist that would relieve the director or officer from personal liability under subsection 96(2).

33. The governing process for determining who is a director or officer under section 96 of the *Act* is set out in the Tribunal's decision in *The Director of Employment Standards (Re: Michalkovic)* (BC EST # RD047/01) (Reconsideration of BC EST # D056/00) as follows:

1. The corporate records, primarily those available through the Registrar of Companies or available at a corporation's registered and records office, raise a rebuttable presumption that a person is a director or officer. In other words, the Director of Employment Standards may presumptively rely on those corporate records to establish director or officer status.
2. It is then open to the person who, according to the corporate records, is a director or officer, to prove on the balance of probabilities that the company records are *inaccurate*, for example, because the person resigned and the documents were not properly processed, a person is not properly appointed, etc...

34. Having reviewed the submissions of counsel for Ms. Young, the Section 96 Reasons and the Record, I do not find there is any basis for the appeal. More particularly, while counsel has included the resignations of Ms. Young in DCS and DSSA on September 27, 2013, and November 30, 2013, respectively, these documents do not rebut the presumption arising from the corporate searches conducted by the delegate that show Ms. Young was a director of DSSA and DCS at the time the Complainants' wages were earned and should have been paid. Ms. Young appears to have resigned from her directorships of DCS and DSSA after the Complainants' wages were earned or should have been paid. More particularly, as concerns entitlement of the Complainants to compensation for length of service, all Complainants were terminated from their employment between July 24 and September 11, 2013, when Ms. Young was a director of DCS and DSSA. Further, the unpaid wage claims of the Complainants covered their period of employment between September 1 to 11, 2013, and their claims for banked hours, vacation pay and statutory holiday pay also pertain to the period Ms. Young was a director of both DCS and DSSA.

35. I also note that Ms. Young has not challenged the Director's calculation of her personal liability, nor set out any circumstances that would relieve her from personal liability under subsection 96(2) of the *Act*. Therefore, I find that there are no grounds to interfere with the Section 96 Determination.

36. Having said this, I wish to convey that while I sympathize with Ms. Young's unenviable situation as described by her counsel very passionately, regretfully counsel's submissions, to a large extent, do not form material considerations in an appeal of a determination issued under section 96 of the *Act*.

ORDER

37. Pursuant to section 115(1)(a) of the *Act*, I order that the Section 96 Determination, dated September 4, 2015, be confirmed in the amount of \$23,115.84, together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Shafik Bhalloo
Member
Employment Standards Tribunal