



An appeal

- by -

Gurbaksh Toor, a Director and Officer of Chanel Foods Ltd. carrying on business
as Subway
("Mr. Toor")

– 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 –

Gurbaksh Toor, a Director and Officer of Chanel Foods Ltd. carrying on business
as Subway
("Mr. Toor")

– 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: David B. Stevenson

FILE No.: 2010A/137 & 2010A/140

DATE OF DECISION: December 20, 2010

DECISION

SUBMISSIONS

Harjinder Singh (Harry) Toor	on behalf of Gurbaksh Toor, a Director and Officer of Chanel Foods Ltd. carrying on business as Subway
Mandeep Kaur Jaswal	on her own behalf
J. Paul Harvey	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Gurbaksh Toor of a Determination that was issued on August 26, 2010, by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Gurbaksh Toor was a Director/Officer of Chanel Foods Ltd. carrying on business as Subway (“Chanel Foods”), an employer found to have contravened provisions of the *Act* by failing to pay regular wages, overtime wages, annual vacation pay and statutory holiday pay to Mandeep Kaur Jaswal (“Jaswal”). Gurbaksh Toor was held to be personally liable under Section 96 of the *Act* for an amount of \$3,722.59.
2. Gurbaksh Toor has appealed the Determination on the grounds the Director erred in law, failed to observe principles of natural justice in making the Determination and that evidence has come available that was not available when the Determination was issued. The evidence submitted relates to a challenge to the result of the Determination made against Chanel Foods on October 13, 2009 (the “corporate Determination”). Gurbaksh Toor seeks to have the Determination under appeal here referred back to the Director.
3. Gurbaksh Toor has also requested a suspension of the effect of the Determination under section 113 of the *Act*.
4. The Tribunal has discretion whether to hold an oral hearing on an appeal, but has decided an oral hearing is not necessary in this case. The issues involved in this appeal can be decided from the submissions and the material on the section 112(5) Record.

ISSUE

5. The issue in this case is whether there is any basis for concluding the Director erred in making the Determination.

THE FACTS

6. The Director issued a Determination against Chanel Foods on October 13, 2009, in favour of Jaswal, a former employee of Chanel Foods, in the amount of \$3,658.55. The unpaid wages of the complainant were earned between June 3 and July 18, 2009. There was an appeal of the corporate Determination which was dismissed because it was filed outside of the time limits for filing an appeal set out in section 112 of the *Act* and Chanel Foods did not demonstrate any reason to extend the time limit.

7. A letter was received by the Tribunal from Harry Toor, on behalf of Gurbaksh Toor on September 27, 2010, requesting the Determination be set aside and Jaswal's claim be reviewed. On October 6, 2010, the Tribunal notified Gurbaksh Toor the appeal did not comply with the requirements for filing an appeal to the Tribunal and gave until October 12, 2010, to comply with such requirements. This appeal was delivered to the Tribunal on that date.
8. The Determination under appeal indicates a search of the BC On-line Registrar of Companies showed that Chanel Foods was incorporated on April 12, 1996, and that Gurbaksh Toor was listed as a Director/Officer of the company during the period the wages were earned or should have been paid.
9. Based on the above information, the Director found Gurbaksh Toor was personally liable under section 96 of the *Act*, which states in part:

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.
10. As I have inferred above, this appeal primarily challenges the result of the corporate Determination, a result that was confirmed in Tribunal decision BC EST # D131/10. Gurbaksh Toor also submits that she has not been a director of Chanel Foods since 2008. No evidence has been submitted in this appeal to support that assertion.

ARGUMENT

11. There is little argument in this appeal relating to the decision of the Director to find Gurbaksh Toor to be personally liable under section 96 of the *Act* for the wages which were found to be owed to Jaswal in the corporate Determination. The section 96 issue is limited to an assertion by Gurbaksh Toor that she has not been a director of Chanel Foods since 2008. Rather, Gurbaksh Toor's appeal primarily challenges the corporate Determination, in respect of which ten reasons have been submitted why it should be reviewed. For reasons that follow in this analysis, I do not need to either set out those reasons or address them.
12. The Tribunal has accepted the appeal includes a request to suspend the effect of the Determination under section 113 of the *Act*.
13. Jaswal and the Director have filed responses to the appeal and the suspension request.
14. Jaswal says the appeal has no merit; that it is simply a stalling tactic and a waste of time for all involved that should not be allowed. Jaswal opposes any suspension of the effect of the Determination.
15. The Director submits the appeal was filed outside of the time limits in section 112 for filing an appeal and should be dismissed on that basis. The Director also submits that the Record shows the corporate Determination was received by Gurbaksh Toor. The Director says the search of the corporate records of Chanel Foods shows Gurbaksh Toor was a Director/Officer of that company during the relevant claim period and the appeal contains no evidence showing those records are in error or that the conclusion in the Determination of her Director/Officer status was wrong. The Director also says there is no indication that Jaswal has received the wages found owing to her in the corporate Determination. The Director opposes any suspension of the effect of the Determination, but adds that if the Tribunal considers granting such request it should only do so if the full amount of the Determination is deposited with the Director.

ANALYSIS

16. The Tribunal has decided the time limits for filing an appeal should be extended in this case. There was a clear intention expressed in the September 27, 2010, correspondence to the Tribunal to appeal the Determination.
17. In respect of the merits of the appeal, as a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:
112. (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of 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 made.
18. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds. A party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
19. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law (see *Britco Structures Ltd.*, BC EST # D260/03). The Tribunal has 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.
20. As a matter of law, there are four main principles that operate in this appeal.
21. The first two are expressed above: a party alleging failure by the Director to observe principles of natural justice must provide some objective evidence supporting that allegation; and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings are shown by the appealing party to raise an error of law. There is no evidence in this appeal to support the alleged failure to observe principles of natural justice and nothing to show the Director committed an error of law in making any of the findings of fact in the Determination.
22. The third is that expressed in the Tribunal’s decision, *David Wilinofsky and Ron J. Wilinofsky*, BC EST # D106/99: the Director may issue a section 96 Determination relying on the corporate records filed with and maintained by the Registrar of Companies; where an individual is recorded as a director or officer of a

company in the records maintained by the Registrar, a presumption arises that the individual actually is a director and/or officer of the company in question. This presumption may be rebutted by credible and cogent evidence that the Registrar's records are inaccurate; the evidentiary burden of proving that one is not a corporate director or officer lies with the individual who denies such status.

23. In respect of this principle, Gurbaksh Toor has challenged the finding, which was based on the result of the on-line corporate search of the Registrar of Companies, that she was a director/officer of Chanel Foods during the relevant period. She has not, however, provided any evidence in support of that assertion that would rebut the presumption which operates in this appeal as a result of her being listed as a director/officer of the company in Registrar's records.
24. The fourth principle is that a person challenging a director/officer determination is limited to arguing those issues which arise under section 96: whether the person was a director/officer when the wages were earned or should have been paid; and whether circumstances exist that would relieve the director/officer from personal liability under subsection 96(2). The director/officer is precluded from arguing the corporate liability: see *Kerry Steineman, Director/Officer of Pacific Western Vinyl Windows & Doors Ltd.*, BC EST # D180/96. In this appeal, to reiterate, Gurbaksh Toor has failed to provide any persuasive evidence or argument on any issue arising under section 96.
25. Applying those principles to this appeal, I find the Director did not commit any error of law and did not fail to observe principles of natural justice in making the Determination. I do not need to address the matter of new evidence as none of it goes to the section 96 issue. The appeal is dismissed.
26. Based on this conclusion, I also find it unnecessary to address the request for a suspension of the effect of the Determination under section 113 of the *Act*.

ORDER

27. Pursuant to Section 115 of the *Act*, I order the Determination dated August 26, 2010, be confirmed in the total amount of \$3,722.59.

David B. Stevenson
Member
Employment Standards Tribunal