

An appeal

- by -

Inderjeet Tiwana, a Director and Officer of
Empire Consulting Group of Companies Inc.
("Mr. Tiwana")

- 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.: 2016A/122

DATE OF DECISION: October 19, 2016

DECISION

SUBMISSIONS

Inderjeet Tiwana

on his own behalf as a Director and Officer of Empire Consulting Group of Companies Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Inderjeet Tiwana (“Mr. Tiwana”), the Director and Officer of Empire Consulting Group of Companies Inc. (“Empire”), has filed an appeal of a section 96 determination that was issued on July 21, 2016 (the “S. 96 Determination”).
2. By way of background, Ryan Cooper, Kimberley Langton, Raymond Lau, Nicholas Man, Nimrat Narula, and Danny Ngo (together, the “Complainants”) filed complaints under the *Act*, between July 13 and 28, 2015, alleging that Empire contravened the *Act* by making false representations about the terms of their employment and their rate of pay; by failing to pay commissions, regular wages, overtime wages, statutory holiday pay and compensation for length of service; by making improper deductions from wages; and by causing them to pay for some of Empire’s costs of doing business (the “Complaints”). The delegate of the Director of Employment Standards (the “Director”) conducted an investigation into the Complaints, and issued a Determination (the “Corporate Determination”) against Empire on July 21, 2016, finding wages and interest were owed to the Complainants in the total amount of \$38,076.34, inclusive of interest. The Corporate Determination also levied administration penalties in the amount of \$4,500.00 against Empire.
3. The Corporate Determination, which included a notice to directors and officers explaining their personal liability under the *Act* was sent to Empire by registered and regular mail to its registered and records office and also to its sole director and officer, Mr. Tiwana, at the address provided for him in the B.C. Online Corporate Registry searches of Empire the delegate conducted on July 29, 2015, and May 19, 2016.
4. The Director also issued the S. 96 Determination against Mr. Tiwana on the same date as the Corporate Determination. The S. 96 Determination held Mr. Tiwana personally liable for up to two (2) months’ wages for each of the Complainants, totalling \$29,941.20, inclusive of interest. The delegate also found sufficient evidence to conclude that Mr. Tiwana authorized, permitted or acquiesced in the contraventions of the *Act* specified in the Corporate Determination and held him responsible for all administrative penalties issued against Empire in the Corporate Determination totalling \$4,500.00.
5. The S. 96 Determination was sent to Mr. Tiwana by registered mail and by regular mail at the address provided for him in the B.C. Online Corporate Registry searches of Empire previously mentioned.
6. The S. 96 Determination, as with the Corporate Determination, contained “Appeal Information” setting out expressly the appeal deadline of 4:30 p.m. on August 29, 2016. Mr. Tiwana filed his incomplete appeal on August 29, 2016. More particularly, Mr. Tiwana submitted, by email, his Appeal Form without a copy of the Determination, without a copy of the written reasons for the Determination, and without any argument supporting the grounds of appeal he checked off in the Appeal Form.
7. However, in his August 29 email to the Tribunal, he asked the Tribunal for “an extension to submit documents and evidence” in his appeal. He explains “this is all new to me and the first time I have ever dealt with this matter”. He further states that it was his understanding that in the appeal he was simply required to

submit the Appeal Form and that he would then be contacted in the future to be interviewed in person or to set up a date to submit his appeal information or to speak with someone at the Tribunal.

8. In the Appeal Form, Mr. Tiwana invokes all three grounds of appeal available under section 112(1) of the *Act*, namely, the Director breached the principles of natural justice and erred in law in making the S. 96 Determination and new evidence has become available that was not available at the time the S. 96 Determination was being made.
9. Mr. Tiwana is seeking the Tribunal to change or vary the Determination or cancel it or to refer it back to the Director.
10. Section 114(1) of the *Act* permits the Tribunal to dismiss all or part of an appeal without seeking submissions from the other parties. I have decided that this appeal is appropriate to consider under section 114(1). Accordingly, I will assess the appeal solely on the basis of the S. 96 Determination, the Reasons for the S. 96 Determination, Mr. Tiwana's submissions, and my review of the section 112(5) "record" ("record") that was before the Director when the Corporate Determination and the S. 96 Determination were being made. If I am satisfied that Mr. Tiwana's appeal or part of it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Tribunal will invite the Complainants and the Director to file reply submissions and Mr. Tiwana will be afforded an opportunity to make a final reply to those submissions, if any.

ISSUE

11. The issue of this appeal is whether Mr. Tiwana has shown any basis for this Tribunal to cancel the S. 96 Determination.

SUBMISSIONS OF MR. TIWANA

12. As indicated previously, Mr. Tiwana did not file a copy of the S. 96 Determination or the Reasons for the S. 96 Determination or his arguments in support of his grounds for appeal within the appeal period. It was not until September 6, 2016, that the Tribunal received Mr. Tiwana's written submissions, documents, a copy of the S. 96 Determination and a copy of the Reasons for the S. 96 Determination.
13. As indicated previously, in his August 29, 2016, the final day for filing his appeal, Mr. Tiwana did request an extension of time to present his "documents and evidence" in the appeal.
14. With respect to Mr. Tiwana's late "documents and evidence", I note that he makes identical submissions in this appeal as in the Appeal of the Corporate Determination. The appeal of the Corporate Determination, which is the subject of a separate decision, was dismissed.
15. Mr. Tiwana's written submissions are contained in his three (3) email of September 5, 2016, which the Tribunal received on September 6, 2016. In these emails, he primarily disputes the delegate's findings of fact in the Corporate Determination with respect to wages determined to be owed to various Complainants; cancellation fees charged to or deducted from paychecks of some Complainants; finding that one of the Complainants was terminated without cause and without notice or pay in lieu of notice; and finding that one of the Complainants was still owed vacation pay. I do not find it necessary, here, to set out in any greater detail, Mr. Tiwana's submissions for the reasons delineated under the heading, Analysis, below.

ANALYSIS

16. Section 112(3) of the *Act* sets out appeal deadlines to ensure that appeals are dealt with promptly. In the case of determinations served on a person by registered mail, subsection 112(3)(a) of the *Act* provides that the appeal period is “30 days after the date of service of the determination”. In this case, Mr. Tiwana was sent the S. 96 Determination by registered mail, the S. 96 Determination, at page 2, states “(s)hould you wish to appeal this Determination, your Appeal must be delivered to the Employment Standards Tribunal by 4:30 p.m. on August 29, 2016”. While Mr. Tiwana submitted his Appeal Form within the appeal period, on August 29, 2016, he submitted his argument supporting his grounds of appeal and the written Reasons for the S. 96 Determination after the expiry of the appeal period and contrary to section 112(2)(a)(i) and (i.1) of the *Act*. Therefore, Mr. Tiwana’s appeal of the S. 96 Determination was not perfected within the appeal period. Having said this, pursuant to section 114(1)(h) of the *Act*, the Tribunal has discretion to dismiss all or part of Mr. Tiwana’s appeal if one or more of the requirements of section 112(2) have not been met. Here the requirements were only met after the expiry of the appeal period. While there may be sufficient basis to dismiss Mr. Tiwana’s appeal of the S. 96 Determination under section 114(1)(h) without going any further and reviewing the merits of his appeal, I decided to consider the merits of his appeal and I have concluded that the appeal has no reasonable prospect of success pursuant to section 114(1)(f). I will explain my reasons below.
17. In a challenge of a determination issued under section 96 of the *Act*, the appellant is limited to arguing those issues that arise under section 96, namely:
- (i) whether the person was a director when the wages were earned or should have been paid;
 - (ii) whether the amount of the liability imposed is within the limit for which a director may be found personally liable; and
 - (iii) whether circumstances exist that would relieve the director from personal liability under subsection 96(2).
18. The Director may issue a section 96 determination without holding a hearing based on the corporate records filed with, and maintained by, the Registrar of Companies. When an individual is recorded as a director of a company in the records maintained by the Registrar of Companies, a rebuttable presumption of fact arises that the individual actually is a director of the company in question. In *David Wilinofsky and Ron J. Wilinofsky* (BC EST # D106/99), the Tribunal indicated that this presumption is rebuttable by credible and cogent evidence that the Registrar’s record are inaccurate. However, the evidentiary burden of proving that one is not a corporate director lies with the individual who denies such status.
19. In this case, the delegate properly relied on the corporate records of Empire filed with, and maintained by, the Registrar of Companies, to make the S. 96 Determination against Mr. Tiwana. Mr. Tiwana has not disputed that he was a director of Empire during the material time the Complainants were employed by Empire and should have been paid their wages. He has also not disputed the amount of the liability imposed on him, or presented evidence of any circumstances that would relieve him of personal liability under subsection 96(2) of the *Act*.
20. While Mr. Tiwana has invoked all available grounds of appeal under section 112(1) of the *Act*, I do not find there to be any evidence to be found on any of the grounds of appeal in section 112(1) of the *Act*. I find that Mr. Tiwana’s submissions in this appeal are more in the nature of a challenge to the findings of fact in the Corporate Determination which challenge is not appropriate to make in the appeal of the S. 96 Determination. An appeal of a section 96 determination is not a proper venue for challenging findings and

conclusions reached in the corporate determination. In the circumstances, I do not find there is any presumptive merit in Mr. Tiwana's appeal and I dismiss it under section 114(1)(f) of the *Act*.

ORDER

21. Pursuant to section 115 of *Act*, I confirm the S. 96 Determination made on July 21, 2016, against Inderjeet Tiwana, a Director and Officer of Empire Consulting Group of Companies Inc.

Shafik Bhalloo
Member
Employment Standards Tribunal