

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Kevin McKinney, Director/Officer of MKM Manufacturing Ltd.
("McKinney")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE N_{O.}: 1999/114

DATE OF **H**EARING: June 4, 1999

DATE OF **D**ECISION: June 14, 1999

DECISION

APPEARANCES

for the appellant	no one appearing
for the individual	in person
for the Director	Ken MacLean

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "Act") by Kevin McKinney, Director/Officer of MKM Manufacturing Ltd. ("McKinney") of a Determination which was issued on February 2, 1999 by a delegate of the Director of Employment Standards (the "Director"). That Determination concluded McKinney was a Director/Officer of MKM Manufacturing Ltd. ("MKM") and, under Section 96 of the Act, was personally liable for length of service compensation for a former employee of MKM, Michael White in an amount of \$5,036.60.

McKinney has appealed that conclusion, raising three reasons for challenging the correctness of the Determination: first, he says the investigating officer was bias and failed to comply with the principles of natural justice in respect of an earlier Determination issued against MKM on December 23, 1998 (the "corporate Determination"); second, he alleges there is significant new evidence relating to the complaint; and third, he argues the claim for length of service compensation was unfounded as White had not been laid off for longer than 13 weeks and had, in fact, quit his employment.

The appeal by McKinney raises several factual allegations, including accusing the Director of intentionally misdirecting correspondence relating to the complaint. The essential character of the appeal is, however, an attempt by McKinney to relitigate the corporate Determination. He does not dispute he had received the corporate Determination by December 31, 1998, 15 days before the time limited for appeal and did not file an appeal of it.

FACTS

The hearing was scheduled for June 4, 1999 commencing at 9:30 am. I am satisfied notice of the time, date and place of the hearing was communicated to McKinney. At the scheduled start time McKinney had not appeared. No communication with the Tribunal had been received from McKinney prior to the hearing requesting an adjournment or indicating he was unable to attend for good reason. The commencement of the hearing was delayed for 30 minutes, following which the hearing was commenced in his absence.

ANALYSIS

The Tribunal has stated in *Kerry Steinemann, Director/Officer of Pacific Western Vinyl Windows & Doors Ltd.*, BC EST #D180/96 that a director/officer who has failed to appeal the corporate Determination is, except in limited circumstances, precluded from rearguing the merits of the corporate Determination. Those circumstances are identified in the following comment:

A director may reargue the merits on liability where there has been 1) fraud, or 2) fresh evidence which is decisive and which was not previously available.

While McKinney suggests fraud and asserts there is fresh evidence going to the merits of the corporate Determination in his appeal, the burden of establishing the evidentiary foundation for such allegations rests on him. He has not met that burden.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated January 22, 1999 be confirmed, together with whatever interest has accrued since the date of issuance pursuant to Section 88 of the *Act*

David Stevenson
Adjudicator
Employment Standards Tribunal