

An Application for Reconsideration

- by -

Timothy S. Vasko also known as Tim Vasko, a Director and Officer of
Convergent Media Network Ltd., Convergent Media Network Ltd. carrying on
business as CMaeON Connected Market Enterprise on Demand and 1To1Real
Process Technology Ltd.

(“Vasko”)

- of a Decision issued by -

The Employment Standards Tribunal
(the “Tribunal”)

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2017A/47

DATE OF DECISION: April 27, 2017

DECISION

SUBMISSIONS

Timothy S. Vasko also known as Tim Vasko on his own behalf as a director and officer of Convergent Media Network Ltd., Convergent Media Network Ltd. carrying on business as CMaeON Connected Market Enterprise on Demand and 1To1Real Process Technology Ltd.

INTRODUCTION

1. This is an application to have BC EST # D030/17 issued on March 21, 2017, (the “Appeal Decision”) reconsidered. Timothy Vasko (“Vasko”) filed this application pursuant to section 116 of the *Employment Standards Act* (the “*Act*”). At this juncture, I am assessing the application to determine if the arguments raised pass the first stage of the two-stage *Milan Holdings* test (see BC EST # D313/98). In other words, I am assessing this application to determine if it raises an arguable case on the merits in which case the respondent parties will be invited to provide written submissions with respect to the application. If the application fails to pass the first stage of the *Milan Holdings* test, it will be summarily dismissed.
2. In assessing the application I have reviewed the complete record that was before the Tribunal when the Appeal Decision was issued and, in addition, I have reviewed the material filed by Mr. Vasko in support of his application.

PRIOR PROCEEDINGS

3. On May 18, 2016, and following an oral complaint hearing, a delegate of the Director of Employment Standards issued a determination pursuant to which Convergent Media Network Ltd. and 1To1Real Process Technology Ltd. were declared to be “associated employers” under the *Act* and, as such, jointly and severally liable for \$12,283.53 representing unpaid wages and section 88 interest owed to Julius Epman (“Epman”). I shall refer to this determination as the “Corporate Determination”.
4. The Corporate Determination was appealed to the Tribunal; Mr. Vasko represented the appellants in that appeal. The Tribunal, in a decision issued on October 19, 2016 (BC EST # D132/16), largely upheld the Corporate Determination save with respect to the delegate’s vacation pay calculation, which was varied upwards in order to correct a calculation error. No application for reconsideration was ever filed with respect to the Corporate Determination and it now stands as a final order.
5. While some monies were recovered on account of the Corporate Determination, the bulk of the wage payment order remained outstanding and thus, on January 9, 2017, a delegate issued a second determination (and accompanying “Reasons for the Determination” – the “delegate’s reasons”) against Mr. Vasko personally under section 96(1) of the *Act*: “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”. I shall refer to this latter determination as the “Section 96 Determination”. The Section 96 Determination is in the total amount of \$9,672.27 including accrued interest.
6. Mr. Vasko appealed the Section 96 Determination on the grounds that the delegate failed to observe the principles of natural justice and on the basis that he had new and relevant evidence (see subsections 112(1)(b)

and (c) of the *Act*). By way of the Appeal Decision now before me in this application, the appeal was summarily dismissed under subsection 114(1)(f) of the *Act* on the basis that the appeal had no reasonable prospect of succeeding.

7. Mr. Vasko's appeal was predicated, in part, on an assertion that in light of a British Columbia Provincial Court (Small Claims Court) action filed by the two associated corporations against Mr. Epman – which Mr. Vasko presumed would be a successful action – the amount of the Corporate Determination would be fully offset by a judgment rendered against Mr. Epman. Mr. Vasko also claimed that an indemnity agreement wholly insulated him from liability under the *Act* and that, in any event, his liability had been incorrectly calculated.
8. As noted above, Mr. Vasko's appeal was dismissed and the key findings in the Appeal Decision (paras. 24 – 28) are set out below:

It is also settled law that the director/officer is precluded from arguing the corporate liability in an appeal of a section 96 determination (see *Kerry Steinemann, Director/Officer of Pacific Western Vinyl Window & Doors Ltd.*, BC EST # D180/96). Therefore, Mr. Vasko may not make any submissions questioning or raising the matter of the correctness of the corporate determination in this appeal.

In this case, I do not find Mr. Vasko arguing any issues that arise under section 96 of the *Act*. He does not dispute that he was a director and officer of both Employers when the wages were earned or should have been paid to Epman.

I also note that Mr. Vasko does not dispute whether the amount of liability imposed on him is within the limit for which a director may be found personally liable. Instead, he raises the issue of a potential judgment the Employers may get in the Small Claim Action against Mr. Epman that may extinguish the Employers' liability for any wages to Mr. Epman or call for an offset against the amount awarded to Mr. Epman and thus impact his liability, if any, under section 96. In my view, the Employers' Small Claims Action and whether or not the Employers are triumphant in that action and whether or not they are entitled to any contractual indemnity from Mr. Epman are all irrelevant considerations under section 96 or in an appeal of a section 96 determination.

Finally, I note Mr. Vasko also does not adduce any evidence that indicates circumstances that might exempt him from personal liability under section 96(2) of the *Act*.

In the circumstances, I am not persuaded that Mr. Vasko has established any basis for me to interfere with the Determination. I further note that while Mr. Vasko has appealed under the “natural justice” and the “new evidence” grounds of appeal, I do not find there is any support in his submissions for either of these grounds of appeal. In the result, I find that Mr. Vasko's appeal of the Determination has no reasonable prospect of any success, and I dismiss it pursuant to section 114(1)(f) of the *Act*.

THE APPLICATION FOR RECONSIDERATION

9. Mr. Vasko's application consists of the Tribunal's Form 2 “Reconsideration Application Form”, an 8-page memorandum and other attached documents. Mr. Vasko, it would appear, does not have any legal training but he nonetheless infused his submissions with a great deal of “legal” terms (some known; some unknown) and rather grand sounding assertions almost all of which are directed, not at the Appeal Decision but, rather, at the delegate and, most particularly, to certain collection proceedings that have been undertaken in an effort to recover the monies due under the Section 96 Determination.

10. Among other things, Mr. Vasko asserts:
- the delegate “has violated the principles of Due Process under the Employment Standards Act [and] has violated the fundamentals of Due Process, Legitimate Expectation and damaged the rights of and reputation of Timothy Vasko”;
 - “The Director of Employment Standards has failure to properly provide notice, or adhere to the standards of Due Process, and failed to fully and accurately disclose the matters on which the Director of Employment Standards Writs have been filed with the Court for collection” [sic];
 - “The Delegate fails to accurately represent, in her calculations of a Directors potential liability under the act, the calculation and fundamental model created by the Delegate herself, under which she adjudicated as to amounts due to the Complainant” [sic];
 - “The Delegate has taken unilateral steps of enforcement, creating calculations to the Delegates convenience, rather than following the established model of liability adjudication used by the Delegate which she created from her hearing of the case, and resulting determination” [sic];
 - “The Delegate, and Director of Employment Standards disregard for the fundamental justice models of Due Process, Legitimate Expectation and fair representation of facts. This includes, for the purposes of this requested re-examination, the modification of calculations from the original model used, to determine any potential liability of Director Timothy Vasko’s personally, and liability” [sic];
11. In addition, Mr. Vasko appears to be saying that the Director should not have undertaken any enforcement proceedings with respect to the Section 96 Determination until his appeal was finally adjudicated and that “in taking these actions, [the delegate] violated the long standing laws in Canada, of Legitimate Expectation” [sic] and that “the Director of Employment Standards, and it’s Delegate neither afforded Timothy Vasko the Legitimate Expectation rights, that he was entitled to a ruling, the opportunity to responde or to correct, and in presenting all evidence available to Vasko, in accordance with his purported liability” [sic].

FINDINGS AND ANALYSIS

12. As previously noted, the central thrust of Mr. Vasko’s section 116 application is not concerned with the findings in the Appeal Decision. Rather, Mr. Vasko focuses his arguments on the enforcement proceedings that have apparently been undertaken by the Director of Employment Standards and, in particular, a Writ of Seizure and Sale issued out of the Kelowna Registry of the B.C. Supreme Court on February 22, 2017.
13. The Tribunal does not have the statutory authority to issue orders regarding civil enforcement proceedings that the Director might take under Part 11 of the *Act* such as a garnishing order (section 89) or an asset seizure (section 92). If Mr. Vasko believes that the Director’s enforcement proceedings were in some way unlawful, his remedy lies in an appropriate application to the B.C. Supreme Court.
14. The only matter that might properly fall within the Tribunal’s statutory purview concerns the calculation of Mr. Vasko’s section 96 liability. Tribunal Member Gandhi’s October 19, 2016, reasons for decision in the appeal relating to the Corporate Determination (BC EST # D132/16) include the following finding regarding Mr. Epman’s regular wage rate (at para. 37):

The employment agreement between the Complainant and the Appellants provided for the payment of an annual salary of \$90,000, or, \$7,500 per month. In March 2015, the Complainant agreed to a forty percent reduction in his hours of work and wages. In the absence of evidence suggesting a further reduction of wages (either by way of agreement, notice, or pay in lieu of notice, none of which appear to exist), *there is*

nothing unreasonable in the Director's conclusion that the monthly rate of pay for the months of June to October 2015, was \$4,500, being sixty percent of \$7,500. (my italics).

15. As a result of Member Gandhi's decision, Mr. Epman's total unpaid wage liability was fixed at \$12,559.31 plus accrued section 88 interest (see Appeal Decision, para. 10). Section 96(1) of the *Act* fixes a statutory ceiling on a director's/officer's personal unpaid wage liability for "up to 2 months' unpaid wages for each employee". In this case, the 2-month wage calculation is as follows: 2 x \$4,500 per month = \$9,000. By way of the Section 96 Determination the delegate correctly calculated Mr. Vasko's liability at \$9,360.00 being 2 x \$4,500 = 9,000 + 4% vacation pay (\$360; see section 58) = \$9,360.00 plus section 88 interest (\$312.27). So far as I can determine, the delegate correctly calculated Mr. Vasko's section 96(1) liability in accordance with the provisions of the *Act*. This latter amount, namely \$9,360.00 plus section 88 interest, is less than the total amount of wages due to Mr. Epman (see Appeal Decision, para. 11).
16. Finally, Mr. Vasko says that he cannot be held liable under section 96(1) because he was "reasonably covered by [an] indemnification, by the Complainant, and as such, did not permit or acquiesce in the company's contravention as provided by the Act" [*sic*]. Mr. Vasko further says: "Specifically, any payment, potentially due by Vasko, is covered by the indemnification clause entered into by the Complainant, specifically, naming Directors, of which Vasko is the Director, of the Corporate Employer" [*sic*]. Without commenting in a more general way on the possible legality or correct interpretation of an indemnification agreement that Mr. Epman may have executed in favour of his corporate employer and/or Mr. Vasko, I would only observe that to the extent such an agreement purported to insulate Mr. Vasko from any personal liability under section 96(1) of the *Act*, that agreement would be an unlawful (and thus void) waiver of statutory rights proscribed by section 4 of the *Act*.
17. This application, in my view, is wholly misconceived and does not pass the first stage of the *Milan Holdings* test. Accordingly, the application is dismissed.

ORDER

18. Pursuant to section 116(1)(b) of the *Act*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal