

EMPLOYMENT STANDARDS TRIBUNAL

An appeal
pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

Walter Schredl

- of a Determination issued by -

The Director of Employment Standards

PANEL: Ryan Goldvine

FILE NO.: 2024/025

DATE OF DECISION: June 18, 2024

DECISION

SUBMISSIONS

Walter Schredl	on his own behalf
Charity Tonkin	on her own behalf
Mathew Osborn	delegate of the Director of Employment Standards

OVERVIEW

1. Walter Schredl (“Appellant”), a former director of Canada Pet Health Technology Inc. (“CPHT”), appeals a determination made by Mathew Osborn, delegate (“Delegate”) of the Director of Employment Standards (“Director”), on January 16, 2024 (“Section 96 Determination”), pursuant to section 112 of the *Employment Standards Act* (“ESA”).
2. The Section 96 Determination follows from a determination (“Corporate Determination”) against CPHT awarding compensation for length of service (“CLOS”) to Charity Tonkin (“Complainant”). The Corporate Determination also awarded interest and imposed a mandatory administrative penalty of \$500. The Section 96 determination concluded that the Appellant was a director at the time CLOS was payable, and that he authorized, permitted, or acquiesced in the contravention, and determined he was personally liable for the CLOS and the administrative penalty.
3. Unable to decide the appeal on the basis of the materials submitted by the Appellant, I sought submissions from the parties, including with respect to the specific issue of whether, or to what extent, the bankruptcy/insolvency of CPHT may be relevant to the imposition of liability on the Appellant.
4. I am assessing the appeal based on the Determination and Reasons, the written submission filed with the appeal, my review of the material that was before the Director when the Section 96 Determination was being made (“Record”), and the further submissions received from the parties.
5. For the reasons that follow, I dismiss the appeal.

ISSUES

6. The issues in this appeal are whether the Director erred in law and whether there is new and relevant evidence that was not available at the time the Determination was being made that would have led the Delegate to a different conclusion.

THE DETERMINATION

7. The Delegate conducted BC Registry Services searches that confirmed as of September 20, 2022, the Appellant was the sole director of CPHT, although a filing on March 21, 2023, retroactively changed the

registry records to indicate the Appellant ceased to be a director on September 11, 2020. A further search on December 21, 2023, indicated CPHT had voluntarily dissolved on August 28, 2023.

8. The Delegate noted that the retroactive change of directors was filed shortly after the Employment Standards Branch had reached out to the Appellant in respect of the Complaint and found it implausible that the Appellant ceased being a director prior to the Complainant commencing her employment. Accordingly, the Delegate concluded the March 2023 filing did not accurately reflect the date on which the Appellant may have ceased to be a director and concluded he was, in fact, a director at least until December 21, 2022, the date CLOS became payable.
9. The Delegate reviewed the evidence before him and concluded the Appellant was in charge of the operations of CPHT and continued to have the capacity to influence the direction of CPHT, including with respect to paying the Complainant's final wages.
10. As a result, the Delegate confirmed the Appellant was personally liable for the full amount of the Corporate Determination, including the administrative penalty.

ARGUMENTS

11. The Appellant appeals on the bases that the Director erred in law, and that new evidence has become available that was not available at the time the Section 96 Determination was being made.
12. The Appellant's initial arguments mirror those made in respect of the appeal of the Corporate Determination and focus on his inability to work as a result of a motor vehicle accident, his direction that any inquiries should go to the law office involved in the dissolution of CPHT, and by the Director failing to properly verify the insolvency of CPHT.
13. In addition, the Appellant provides the same documents provided under that appeal as follows, which he says should lead to a different conclusion on the merits:
 - a. Desk Memo, December 17, 2022
 - i. Demonstrating the effective date of receivership
 - b. Canada Receivership Requirements
 - i. Supporting the fact that receivership as defined by the Canada Revenue Agency took effect December 17, 2022
 - c. RCMW Memo June 3, 2022, WS Leave
 - i. Demonstrating the fact that Mr. Schredl was on leave as of that date
 - d. TJ Jesky Law Memorandum December 21, 2022 Cease Operations
 - i. Demonstrates that the receiver made the sole decision to terminate all employees, including the Complainant
14. The Appellant further relies on section 96(2)(a)(i) of the *ESA* which indicates that where a corporation is in receivership, a director or officer will not be personally liable for monies payable under section 63.

15. In response, the Delegate indicates that parties are expected to participate in complaint investigations in good faith and present all relevant evidence during the investigation, and before a determination is issued. He notes all of the documents presented by the Appellant are dated prior to the Section 96 Determination, and no reasons have been provided to support the proposition that these documents were not available or could not have been provided prior to the Section 96 Determination being issued.
16. Further, while the Appellant's submissions indicate he resigned as a director on December 17, 2022, this is inconsistent with the documents provided, and with the retroactive filing made with BC Registry Services.
17. The Delegate notes that while the Director was aware of the claims that CPHT was either bankrupt or in receivership at the time the Section 96 Determination was made, there was no reliable, probative evidence before the Director to support such a conclusion. The Delegate notes that the *Bankruptcy and Insolvency Act* requires a receiver to notify the Superintendent of Bankruptcy of their appointment as a receiver within 10 days of that occurring. This notwithstanding, a search of the records of the Superintendent of Bankruptcy was conducted on July 27, 2023, and no records in relation to CPHT were found.
18. Further to this, even in the face of the documents provided by the Appellant with the appeal, there remains no evidence that the requirements of section 96(2)(a)(i) of the *ESA* have been met. Specifically, neither the Desk Memo, nor the TJ Jesky Law Memorandum, are reliable or probative evidence that CPHT, a Canadian Corporation, was, in fact, in receivership, or subject to an action under section 427 of the *Bank Act*, at the relevant time.
19. With respect to the Delegate's finding with respect to personal liability for the administrative penalty, the Delegate submits that even if I accept that the Appellant was only a messenger forwarding the termination notice to the Complainant, this nevertheless supports the finding that he "authorized, permitted or acquiesced in" CPHT's contravention of the *ESA*. Further to this, the Appellant has provided no basis upon which a conclusion can be reached that this finding could constitute an error of law.
20. The Complainant also made submissions and provided numerous documents in response to the appeal. In general, the Complainant's submissions seek to support the Delegate's findings that the Appellant was a director at all relevant times, and in fact continued to have responsibilities in relation to CPHT after the Complainant was terminated.
21. Consistent with the submissions of the Delegate, the Complainant also contends that the Appellant has not demonstrated that CPHT was in receivership at the relevant time sufficient to meet the requirements of the *ESA* to absolve the Appellant of personal liability.
22. In reply, the Appellant provided further submissions disputing the finding that he was or continued to be in control of CPHT, indicating that he was not authorized to make decisions in relation to the Complainant's claims, and relying on his assertion that an accident led to a brain injury that prevented him from continuing in the role.
23. The Appellant also relies on the Canada Revenue Agency website excerpt to support his assertion that the other documents presented demonstrate that CPHT was in receivership at the relevant time. He indicates

“A US parent company that wholly owns/controls a Canadian company can initiate insolvency/receivership.”

ANALYSIS

24. Section 96 of the *ESA* provides as follows:
- (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.
 - (2) Despite subsection (1), a person who was a director or officer of a corporation is not personally liable for
 - (a) any liability to an employee under section 63, termination pay or money payable in respect of an individual or group terminations, if the corporation
 - (i) is in receivership, or
 - (ii) subject to an action under section 427 of the *Bank Act* (Canada) or to a proceeding under an insolvency Act
25. I note in relation to the present appeal, the Appellant disputes both that he was a director/officer at the time wages were earned, and that even if he was a director at the time, he should not be personally liable because CPHT was in receivership.
26. In addition, while not explicitly argued by the Appellant, I infer from his submissions, as did the Delegate, that the Appellant should not be liable for the administrative penalty because he did not authorize, permit, or acquiesce in the contravention.
27. The grounds of appeal are statutorily limited under section 112(1) of the *ESA*, which reads:
- 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 being made.
28. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the determination under one of the statutory grounds.
29. I begin by noting that section 112(1) does not provide for an appeal based on errors of fact, nor does the Tribunal have the authority to consider appeals seeking to have different factual conclusions reached unless the findings raise an error of law: *Britco Structures Ltd.*, BC EST # D260/03.

30. The appropriate test for an appeal under section 112(1)(c) is as set out in *Davies et al., supra*. The test requires that:
- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - (b) the evidence must be relevant to a material issue arising from the complaint;
 - (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
 - (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
31. I note that in the matter before me, the Investigating Delegate conducted the investigation into the Complaint and issued the Investigation Report to the parties. The Investigation Report was issued on August 28, 2023, and the parties were given an opportunity to respond to any of the information set out therein.
32. As noted above, the Appellant provided a number of documents with the appeal as “new evidence.” While I accept that these documents were not before the Delegate when the Section 96 Determination was issued, I am not persuaded that these documents could not have been presented during the investigation, or in any event prior to the Section 96 Determination being issued.
33. The documents provided are dated June 3, December 17, and 21, 2022, along with an undated excerpt from the website of the Canada Revenue Agency. While the Appellant appears to suggest that more specific requests by the Investigating Delegate would have resulted in the disclosure of these documents earlier, it is incumbent on a party responding to a complaint to provide any documents relevant to that complaint, or their defence to it.
34. Further, while the Appellant suggests that these documents would have “definitively led the director to a different conclusion,” I agree with the Delegate’s submissions, that, first, these documents in fact lend more, not less, confusion as to when the Appellant was or was not a director. Based on the evidence before him, the Delegate reached the factual conclusion that the Appellant was a director at the material time, and I am not persuaded there is any basis before me to interfere with that finding.
35. In addition, while the Appellant maintains that CPHT was in receivership at the relevant time, the Corporate Determination demonstrates that this issue was canvassed, and that a search of the records of the Superintendent of Bankruptcy revealed no results in relation to CPHT. In addition, the Section 96 Determination confirms that CPHT was dissolved voluntarily on August 28, 2023.
36. Even if I were to accept that, for some reason, these “new documents” were not available or could not have been provided prior to the Section 96 Determination being issued, to the extent the Appellant submits that these new documents demonstrate that CPHT was in receivership at the relevant time, I am not persuaded this is the case.
37. The documents consist of a desk memo and a legal memo prepared by T.J. Jesky, which, on their face describe the financial viability of the entity the Appellant contends is the parent company of CPHT;

however, while they make reference to a Pet Health Technology division, I agree with the Delegate's contention that they are not sufficiently probative of the issue of whether CPHT was in receivership to be considered under this ground of appeal. While the Appellant makes assertions with respect to ownership and control of a Canadian Corporation, the Delegate was not, nor am I, persuaded that the materials before the Director, or included with the appeal, support such a finding.

38. Another of the documents, as noted, is a memo indicating that the Appellant was on a leave of absence as a result of a motor vehicle accident in June 2022. While it indicates he would be vacating his operational position until he is deemed fit by his doctor to return, it makes no reference to his status as a director. Further, while I infer that the Appellant may be asserting in his submissions that he did not have legal capacity to be a director or officer of CPHT, I am not persuaded, in the absence of medical evidence, that such a conclusion was available to the Director.
39. For these reasons, I am not prepared to admit the documents presented as new evidence, but in any event would not have been persuaded that they would have changed the outcome of the Section 96 Determination.
40. The Tribunal has adopted the following definition of "error of law" set out by the BC Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 Coquitlam)*, 1998 CanLII 6466 (BCCA)(*Gemex*):
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.
41. While the Appellant asserts that the Investigating Delegate did not specify or request any evidence related to or supporting the company being in receivership, it is clear on the Record that the Investigating Delegate did, in fact, speak to, and request any relevant documents from, the law firm identified as responsible for the dissolution of the companies.
42. Further, it is evident on the face of the Record that both Mr. Schredl and the law firm were provided with the Investigation Report and given an opportunity to respond. Neither provided any response to the Investigation Report.
43. This notwithstanding, I am not persuaded that the Delegate acted without evidence. The Determination was issued based on all of the information available, which included the absence of any records related to CPHT held by the Superintendent of Bankruptcy, and the Registry record of voluntary dissolution dated in August 2023.
44. With respect to the finding of liability for the administrative penalty, I find this too was a factual finding based on the evidence before the Director at the time the Section 96 Determination was made, and I am

not persuaded this was a finding made without any evidence, or on a view of the facts that could not reasonably be entertained.

45. For these reasons, I am also not persuaded that the Director erred in law in reaching the Section 96 Determination.

ORDER

46. The appeal is dismissed.
47. Pursuant to section 115(1)(a) of the *ESA*, the Section 96 Determination dated January 16, 2024, is confirmed.

Ryan Goldvine
Member
Employment Standards Tribunal