

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Kyle Adams-Brown

- of a Determination issued by -

The Director of Employment Standards

PANEL: Ryan Goldvine
SUBMISSIONS: Robert T. Vangenne, legal counsel for Kyle Adams-Brown
FILE NUMBER: 2024/039
DATE OF DECISION: August 13, 2024

DECISION

OVERVIEW

1. Kyle Adams-Brown (“Appellant”), a former director of Island Motorsports Ltd. (IML), appeals a determination made by John Dafoe, delegate (“Delegate”) of the Director of Employment Standards (“Director”), on February 27, 2024 (“Section 96 Determination”), pursuant to section 112 of the *Employment Standards Act (ESA)*.
2. The Section 96 Determination follows from a determination against IML awarding wages and interest to a former employee of IML (“Corporate Determination”). The Section 96 Determination concluded that the Appellant was a director of IML at the time the wages were earned or should have been paid to that former employee. Accordingly, although the Director did not find that the Appellant was personally liable for the administrative penalties imposed, he was nevertheless liable for two months’ wages, which was less than the full amount owing.
3. The Appellant says although he was registered as a director of IML, he had no effective control over the finances or financial records of IML.
4. I have concluded that this case is appropriate to consider under section 114(1) of the *ESA*. Accordingly, at this stage, I am assessing the appeal based solely on the Determination and Reasons, the written submission filed with the appeal, and my review of the material that was before the Director when the Determination was being made (“Record”).
5. For the reasons that follow, I dismiss the appeal under section 114(1)(f) of the *ESA* as having no reasonable prospect of success.

ISSUE

6. The issue is whether the appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE DETERMINATION

7. The issue before the Director was whether the Appellant was personally liable for some or all of the unpaid wages and interest, and/or administrative penalties, found to be owing in the Corporate Determination.
8. The Delegate confirmed through a BC Registry Services search that the Appellant was a director at the material times.
9. The Delegate acknowledged the Appellant’s arguments that he was not given the powers of a director and did not have access to or control over financial records or bank accounts, but did not accept this as a basis for interfering with the conclusion that the Appellant had agreed to act as a director and was registered as such with BC Registry Services.

10. As the wages owing were more than two months' wages, the Appellant's liability was reduced to that amount as limited by section 96(1) of the *ESA*.
11. The Delegate concluded that there was insufficient evidence that the Appellant authorized, permitted, or acquiesced in the contraventions of IML, and, accordingly, did not impose liability on him for the administrative penalties.

ARGUMENTS

12. The Appellant says the Director failed to observe the principles of natural justice in making the Section 96 Determination, and seeks to advance new evidence that was not available at the time the Determination was made that would have led the Director to a different conclusion.
13. The Appellant says the Director failed to observe the principles of natural justice by failing or refusing to require sufficient supporting evidence from the other owner/director of IML to support a finding that the Appellant in fact had the authority and/or ability to access, control, or otherwise administer the affairs of IML such that he could have effected payment of the wages owing by IML.
14. The Appellant rejects the rebuttable presumption relied on in the Determination and says this presumption is impossible to rebut without access to the bank accounts and financial records of IML. The Appellant submits that in the absence of evidence of actual control over IML, an inference should be drawn that he did not have such authority.
15. The Appellant points to the *Business Corporations Act (BCA)*, which provides at section 136(1) that "[t]he directors of a company must, subject to this Act, the regulations and the memorandum and articles of the company, manage or supervise the management of the business and affairs of the company." In addition, the *BCA* goes on to indicate "[w]ithout limiting section 146, a limitation or restriction on the powers or functions of the directors is not effective against a person who does not have knowledge of the limitation or restriction.
16. The Appellant says his inability to control the finances or financial records of IML was conveyed to the Director, and, accordingly, the Director is not permitted to rely on any authority beyond this limitation. The Appellant further submits that, had he been aware that he could have been found liable for acts not under his control he would have applied under the *BCA* to remove himself as a director.
17. In addition, the Appellant attaches to his appeal the Share Repurchase Agreement between the Appellant and the other director/owner of IML, and his accompanying resignation as a director. The Appellant says this demonstrates the reason for his exit from IML's ownership was the failure of the other director/owner to provide the Appellant with the opportunity to participate fully in the ownership and direction of IML.
18. The Appellant also says the documents advanced raise questions about whether a share of ownership was, in fact, issued to the Appellant from the outset.

19. The Appellant further seeks to undermine the evidence of his directorship by relying on the waiver of independent legal advice signed by himself. The waiver is witnessed by the complainant to whom wages were found owing in the Corporate Determination indicating his title as “Office Manager.” The Appellant says that to the extent the Section 96 Determination relied on a finding that “significant control over the day-to-day operations of the business” led to a finding of director liability, the same finding should be made against the complainant as office manager.
20. I note that the Share Repurchase Agreement and resignation as director are dated May 20, 2022, and the original share purchase documents, including the waiver of independent legal advice, proffered as “new evidence” are dated in March 2021.

ANALYSIS

21. 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 an 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 individual or group terminations, if the corporation
 - (i) is in receivership, or
 - (ii) is subject to an action under section 427 of the *Bank Act* (Canada) or to a proceeding under an insolvency Act,
22. Applying the doctrine of *issue estoppel*, the Appellant is limited to the following three issues in this appeal:
- 1) That the person appealing was not a director/officer of the company at the time wages were earned or should have been paid;
 - 2) That the calculation of the director/officer’s personal liability is incorrect; and/or,
 - 3) That the director/officer should not be liable for the penalty, where a penalty has been assessed, on the grounds that he or she did not authorize, permit or acquiesce in the company’s contravention.
23. The focus of the Appellant’s submissions is on the first of these.
24. A party alleging a failure by the Director to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

25. The Tribunal has summarized the natural justice principles that typically operate in the complaint process, in *Imperial Limousine Service Ltd.*, BC EST # D014/05:
- Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated* BC EST #D050/96)
26. As long as the appropriate process elements have been followed, it is unlikely the Director will be found to have failed to observe principles of natural justice in making the Determination.
27. The Appellant has not disputed that he was registered as a director of the Employer at the time the Complainant's wages were earned or should have been paid, but says he did not have the powers of a director. He also says the Director's knowledge of his limited authority should have precluded a finding against him. As noted above, the Appellant says the Delegate should have required evidence from the other director/owner to demonstrate that the Appellant, in fact, had the requisite authority of a director.
28. With respect to the rebuttable presumption referred to in the Appellant's submissions, I note the Tribunal has dealt with determining who is a director under section 96 of the *ESA*. In *Michalkovic*, BC EST # RD047/01, reconsideration of BC EST # D056/00, the Panel summarized the following propositions (at page 10):
1. The corporate records, primarily those available through the Registrar of Companies or available at a corporation's registered and records office, raise a rebuttable presumption that a person is a director or officer. In other words, the Director of Employment Standards may presumptively rely on those corporate records to establish director or officer status.
 2. It is then open to the person, who, according to the corporate records, is a director or officer, to prove on the balance of probabilities that the company records are **inaccurate**, for example, because the person resigned and the documents were not properly processed, a person is not properly appointed etc.
 3. There may well be circumstances where it would be inappropriate to find that a person is a director or officer despite being recorded as such. However, **it will be the rare and exceptional case to be decided on all the circumstances of the particular case and not simply by showing that he or she did not actually perform the functions, duties or tasks of a director or officer.**
 4. The determination of director-officer status should be narrowly construed, at least with respect to Section 96. (**emphasis added**)

29. While the Appellant says the Delegate should have insisted on further evidence from the other director/owner to prove the Appellant had the authority of a director, such a proposition is not consistent with this Tribunal's jurisprudence, which places the onus on the individual seeking to deny their status as director.
30. This is further underscored in *Wilnofsky*, BC EST # D106/99, on which the panel in *Michalkovic, supra*, relied, wherein the Tribunal confirmed that "the burden of proving that one is not a corporate director or officer lies with the individual who denies such status."
31. On the materials before me, it can't be disputed either that the Appellant agreed to become a director of IML, or that he was aware that certain obligations flow from that status. I note, first, that the documents appended to the appeal are dated long before the date of the Determination and the Appellant has not advanced any reasons why they were not available, or could not have been provided, prior to the Determination being issued.
32. This notwithstanding, the documents advanced do not support the Appellant's contentions underlying the appeal. One of the documents provided, signed by the Appellant, is his consent to act as a director. This document was signed March 16, 2021, and it does not appear to be disputed that he became a director on that date and was registered thereafter.
33. In fact, the document clearly indicated to the Appellant in all-caps: "directors have substantial duties and obligations and may be subject to significant liabilities. As [seller's representative] acts for the company only, the person signing this consent should obtain independent legal advice." As referenced above, instead of seeking legal advice, the Appellant signed a waiver of independent legal advice.
34. Also included is a letter from the other owner/director's legal counsel dated March 22, 2021, indicating "I confirm that a Notice of Change of Directors has been filed with the Registrar of Companies to advise you that you have been appointed as a director."
35. It is also not disputed that the Appellant resigned as a director on May 20, 2022, which was after the wages at issue in the present matter were earned or should have been paid. The Appellant has included his letter of resignation of that date.
36. While I appreciate that, in hindsight, the Appellant may not have agreed to become a director had he known he might be liable for unpaid wages incurred by IML, or would have sought to remove himself earlier than May 2022, it was incumbent on him to familiarize himself with and understand the obligations that go along with one's status as a director, and he was given more than one opportunity to do so when he agreed to invest in IML.
37. While the Appellant relies on the *BCA*, which provides that a director "must...manage or supervise the management of the business and affairs of the Company," this is an obligation imposed on directors. I have been provided no basis on which to conclude it has the inverse effect that someone who does not manage or supervise the business and affairs, is, by definition, not a director.

38. With respect to the new evidence ground advanced, the appropriate test for an appeal under section 112(1)(c) is as set out in *Davies et al.*, (BC EST # D171/03). 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.
39. As noted above, the documents attached to the appeal all predate the investigation and Determination. Further to this, the Appellant has provided no evidence or argument to suggest these documents could not have been presented during the investigation and adjudication of the complaint, and in fact most are versions of the same documents that were before the Director.
40. This notwithstanding, I am nevertheless not persuaded any of the documents provided could have led the Director to a different conclusion on a material issue.
41. In response to the argument advanced that the same findings that led to the conclusion that the Appellant was a director could have led to a similar conclusion with respect to the complainant to whom wages are owed, I am not able to agree that this supports his contentions, even if true.
42. While the Director may find someone to be a director based on a functional assessment of their role in an organization, that is not what occurred here. The Appellant was found to be a director because he consented to become one, and was registered as such with the Registrar of Companies.
43. Further, the Appellant's status as a director, or the liability that flows from it, is not affected by whether or not another individual is also found to be a director.
44. In addition, while I understand the Appellant to be asking that an inference be drawn from the reasons the business partnership dissolved, that this in some fashion should have a retroactive effect on the Appellant's status as a director, I am not persuaded the evidence has the legal effect advanced.
45. For all of these reasons, I am not persuaded the Appellant has advanced any basis on which his legal status as a director of IML could be impugned.
46. Accordingly, I dismiss the appeal under section 114(1)(f) of the *ESA* as having no reasonable prospect of success.

ORDER

47. Pursuant to section 115(1)(a) of the *ESA*, I confirm the Section 96 Determination dated February 27, 2024, together with any further interest that has accrued since the date of issuance.

Ryan Goldvine
Member
Employment Standards Tribunal