

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Heather Spaven
("Appellant")

- of a Determination issued by -

The Director of Employment Standards

PANEL: John Chesko
SUBMISSIONS: Dale Spaven, on behalf of Heather Spaven
FILE NUMBER: 2024/044
DATE OF DECISION: August 15, 2024

DECISION

OVERVIEW

1. Heather Spaven (“Appellant”) appeals a section 96 determination issued on November 14, 2023 (“Section 96 Determination”), by a delegate (“Delegate”) of the Director of Employment Standards (“Director”).
2. The Section 96 Determination held the Appellant was a director of CWF Global Services Ltd. (“CWF”), which was found to owe wages to its employee, Michael Logan (“Employee”), contrary to the *Employment Standards Act (ESA)*. The Section 96 Determination held the Appellant, as a director of CWF, was personally liable for two months wages and interest totalling \$16,196.34.
3. The Appellant appeals on the ground that new evidence has become available that was not available at the time the Section 96 Determination was being made.

BACKGROUND

4. CWF Global Services Ltd. operates a welding and fabrication business in Ladysmith, B.C., which falls within the jurisdiction of the *ESA*.
5. The Employee worked as a welder with CWF from September 2016 to April 2022. The Employee stopped working on or about April 7, 2022, as CWF had not paid the Employee since October 10, 2021.
6. CWF and the Employee both agreed the Employee was owed wages for the period October 10, 2021, to April 9, 2022. However, they were unable to agree on the exact amount. The Employee subsequently filed a complaint under section 74 of the *ESA* alleging CWF had contravened the *ESA* by failing to pay wages and compensation for length of service.
7. A delegate of the Director (“Investigative Delegate”) followed up with the Employee and the representative of CWF and requested evidence and submissions about their respective positions.
8. The Investigative Delegate prepared a report dated September 29, 2023, summarizing the information provided by the Employee and CWF’s representative which included a list of relevant records and documents (“Investigation Report”).
9. The Investigation Report specifically named the Appellant as a director and/or officer of CWF Global Services Ltd. and provided notice of section 96 personal liability. I highlight the following excerpts from the Investigation Report:

You are being provided with a copy of this investigation report because an online BC Registry Services search indicated you are a director and/or officer of CWF Global Services Ltd...

Section 96 of the *Employment Standards Act*...provides that a person who was a director and/or officer of a corporation at the time wages of an employee of the corporation are earned or should have been paid is personally liable for up to two months' unpaid wages for each employee....

The Employment Standards Branch is entitled to rely on corporate records to determine the identity of a company's directors and officers. If information regarding your status as a director and/or officer of this company is not correct **it is your responsibility** to provide updated information to the Employment Standards Branch. (**emphasis** in original)

[Investigation Report. p IR.3]

10. The parties, including the Appellant, were requested to review the Investigation Report carefully and provide further information and clarification.

11. The Investigation Report specifically noted the following about the Appellant's requirement to respond about their status as director and/or officer:

Opportunity to Respond

If you wish to dispute your status as a director and/or officer of CWF Global Services Ltd. or provide a response regarding whether as a director and/or officer you authorized, permitted or acquiesced in contraventions of the Act and/or Regulation, you must respond to this investigation report as soon as possible, but no later than:

October 13, 2023

If you do not respond by the above noted date, a determination may be issued against you based on the information set out in this investigation report without further notice.

[Investigation Report. p IR.4]

12. I note there was no response within the requested time limit concerning the Appellant's status as director of CWF.

13. The Investigation Report, documents, and any responses were provided to the Delegate.

Corporate Determination

14. On November 14, 2023, the Delegate issued a determination against CWF Global Services Ltd. ("Corporate Determination"). The Corporate Determination held that CWF had contravened the *ESA* and owed the Employee wages, overtime, statutory holiday pay, annual vacation pay, compensation for length of service, and interest totaling \$65,407.21. The Corporate Determination also levied administrative penalties totaling \$1,000 for a total amount payable of \$66,407.21.

Section 96 Determination

15. The Delegate also issued the Section 96 Determination dated November 14, 2023, against the Appellant. The Section 96 Determination held the Appellant, as a director of CWF Global Services Ltd., was personally liable for two months wages and interest totalling \$16,196.34.

Appeal of Section 96 Determination

16. The Appellant appealed the Section 96 Determination.

17. The Appellant's representative submits the appeal documentation was submitted in error to the wrong email address.
18. The Appellant's representative submits they did not realize the error until later when they became concerned that the appeal "was taking a long time."
19. The Appellant requests the Tribunal extend the time to appeal the Section 96 Determination.

ARGUMENTS

20. On the Appeal Form the Appellant submits there is new evidence that has become available since the time the Section 96 Determination was being made.
21. The Appellant sets out submissions and evidence in support of the Appellant's appeal.
22. The Appellant submits they were unaware of the events concerning the Section 96 Determination.
23. The Appellant submits that at the time the issues arose concerning the Employee, the Appellant had separated with Dale Spaven, who was the main operating mind of CWF. The Appellant submits: "As being separated at this time it was very emotional and stressing time and in no way was [the Appellant] aware of anything going on within the Company." The Appellant submitted supporting evidence concerning a different residence.
24. The Appellant also submits CWF found it difficult to pay the Employee after the Employee started working for a client of CWF.
25. In sum, the Appellant submits that they should not be held liable for the wages and interest set out in the Section 96 Determination.

ANALYSIS

26. These reasons are based on the written submissions of the Appellant, the Section 96 Determination, and the section 112(5) record ("Record").
27. On receiving the Appellant's appeal, the Director provided the Tribunal, the Appellant, and the Employee with the Record for purposes of the appeal. The Tribunal then requested submissions on the completeness of the Record from the parties. As the Tribunal did not receive any objections to the completeness of the Record from the parties, the Tribunal accepts the Record as complete.

Appeal of Determination

28. Section 112(1) of the *ESA* provides that a person may appeal a determination on 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.

29. An appeal is limited to the grounds set out in the *ESA* and an appellant has the onus to show that the appeal meets one or more of the specified grounds. An appeal is not another new hearing of the case, nor is it meant to be an opportunity to resubmit an appellant's facts and arguments and 'try again' with another forum.

Application to Extend Time

30. As set out above, the Appellant's representative submits the appeal documentation was submitted in error to the wrong email address.

31. The Appellant's representative submits they did not realize the error until later when they became concerned that the appeal "was taking a long time."

32. The Appellant requests the Tribunal extend the time to appeal the Section 96 Determination.

33. The *ESA* establishes a limit on the time period to appeal a determination. The relevant time periods are set out in section 112(3) of the *ESA*.

34. The Tribunal's authority to extend the time period for an appeal is set out in section 109(1)(b) of the *ESA*. Decisions of the Tribunal make it clear that extensions are not granted as a matter of course, but should only be granted for compelling reasons. The burden is on an appellant to demonstrate that there are compelling reasons that the appeal period should be extended.

35. In determining whether to extend the appeal period, the Tribunal will consider the following main factors:

- a. whether there is a reasonable or credible explanation for the failure to file the completed appeal on time;
- b. whether there has been a genuine and ongoing *bona fide* intention to appeal the determination;
- c. whether the respondent party and the Director have been made aware of the intention to appeal;
- d. whether the respondent party will be unduly prejudiced by granting the extension; and,
- e. whether there is a strong *prima facie* case in favour of the appellant.

(see *Niemisto*, BC EST # D099/96)

36. This is not an exhaustive checklist of factors. In determining whether to extend the statutory time limit, the Tribunal considers and weighs all the relevant factors and evidence together in the circumstances (see *Re Patara Holdings Ltd. (cob Best Western Canadian Lodge)*, BC EST # D010/08, reconsideration dismissed BC EST # RD053/08).

37. In this case, the evidence submitted by the Appellant's representative is that the appeal was mistakenly sent to the wrong email address. The Appellant further submits the error was not

discovered until months later when the Appellant's representative became concerned that the appeal "was taking a long time." The Appellant also submitted supporting evidence showing the incorrect email address.

38. I have reviewed the Record and considered the Appellant's submissions carefully. I find the Appellant's explanation for not meeting the time requirements is credible. I have considered whether the Appellant should have noticed the error - especially whether there would have been a server notification that the email address was undeliverable - but I find the Appellant's explanation credible. I also note the Appellant's Appeal form indicated that there would be further evidence to submit, but the Appellant did not follow up. Overall, I find the Appellant had a reasonable and credible explanation for failing to file the completed appeal and that there was a genuine and ongoing intent to appeal the Section 96 Determination. I note there are decisions of the Tribunal that have held that sending the appeal to the wrong address is but one factor to consider in determining whether to extend the time limit (see *Yang*, 2020 BCEST 39 (extension denied); *Richard Mann*, 2019 BCEST 133 (extension denied where appeal sent to wrong address); *GC's Door Express 2007 Ltd.*, 2018 BCEST 21 (extension denied where appeal sent to wrong address but no *prima facie* case).
39. There is nothing in the materials that indicates the Director or the Employee were made aware of the intent to appeal. On the issue of prejudice to the Respondent party, in this case the Employee, I find there is prejudice in further delay. The payment of wages is considered fundamental to the employment relationship and the withholding of wages has been said to go to the root of the employment contract and is contrary to section 21 of the *ESA* (see *Anodyne Computers 97 Ltd.*, BC EST # D389/98, upheld on reconsideration BC EST # D545/98; *Alpha Neon Ltd.*, BC EST # D105/11, upheld on reconsideration BC EST # RD032/12; *Health Employers Association of B.C. v B.C. Nurses Union*, 2005 BCCA 343). The failure to pay wages and an employer's deteriorating finances has been found to be prejudicial and detrimental to an employee (see *Maria Klippenstein*, BC EST # D144/05).
40. However, even if I were to give the benefit of doubt to the Appellant and find the previous factors weighed in favour of granting the extension, the evidence is clear that the Appellant does not have a strong *prima facie* case to appeal the Section 96 Determination. The absence of a strong *prima facie* case has been held to be an important factor as it is considered contrary to the purposes of the *ESA* towards efficient and timely resolution to prolong appeal cases with little merit (see *0388025 BC Ltd. (cob Edgewater Inn)*, BC EST # D019/12; *U.C. Glass*, BC EST # D107/08; *GC's Door Express 2007 Ltd.*, *supra*).
41. As set out above, the Appellant's argument in the appeal focuses on disagreement with the findings of fact and law made by the Delegate in the Section 96 Determination. Although the Appellant submits there is new evidence that was not available, the Appellant's submissions in this appeal appear to be more of an attempt to re-argue the case that was already decided by the Delegate in the Section 96 Determination. Further, the Appellant does not appear to provide any additional information that was not available at the time of the investigation and the issuance of the Section 96 Determination, which is a requirement for new evidence.
42. The Appellant's argument in this appeal appears more an argument about the findings of fact made in the Section 96 Determination and an attempt to re-argue those findings of fact. The appeal jurisdiction of this Tribunal is circumscribed by the *ESA*, and it is not a 're-trial' to rehear arguments

and make new findings of fact. I find that the Appellant does not have a strong *prima facie* case for this appeal.

43. I find, in all of the circumstances, the Appellant has not met the burden to show that the statutory appeal period should be extended, and the appeal should be dismissed.

Merits of the appeal

44. Even if I had not dismissed the appeal on the basis of untimeliness, I would have dismissed the appeal on the merits.

New Evidence

45. On the Appeal Form the Appellant alleges that new evidence has become available since the time the Section 96 Determination was being made.

46. The test that must be met to introduce new evidence on an appeal is clearly established. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03, the Tribunal set out the following requirements for introducing new evidence on appeal:

- (a) the evidence could not reasonably have been discovered and presented to the Director during the investigation or adjudication of the complaint;
- (b) the evidence must be relevant to a material issue 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 make a difference and lead to a different conclusion in the Determination;

47. Each of the above requirements need to be met by an appellant seeking to submit new evidence. Previous decisions of the Tribunal make it clear that parties are expected to participate in good faith and present all relevant evidence during the initial investigation and determination stage of the complaint. The introduction of new evidence at the appeal stage, that could and should have been introduced previously at the investigation and determination, will generally result in the dismissal of the appeal.

48. The Appellant submits findings of fact and law made in the Section 96 Determination are incorrect and should be amended in accordance with the Appellant's appeal submission. The Appellant submits evidence that existed at the time of the investigation and determination of the complaint. I note the Appellant does not submit that the alleged new evidence could not have been discovered or presented during the investigation or determination stage of the complaint.

49. The evidence and arguments submitted by the Appellant do not meet the requirements for new evidence. The Appellant has not shown the alleged new evidence could not reasonably have been found and presented during the investigation and determination stage. There is no indication the Appellant could not take part in the investigation nor was prevented or limited in discovering or presenting evidence. As noted above, the Investigation Report clearly set out that the Appellant was the legally registered director of CWF and was required to respond and provide evidence to rebut the

corporate record listing them as director and/or officer. The Record also shows the Appellant's representative was involved in the investigation, responded to requests for information, and provided evidence and submissions to the Investigative Delegate, some of which concerned the Appellant.

50. The law is clear that an appellant must meet all the necessary requirements for new evidence. The failure to do so will generally result in dismissal of the appeal (see *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, *supra*; *Can-Pacific Trading Inc.*, BC EST # D082/11; *Anthony McInnis*, 2020 BCEST 9). It is important for the fair and efficient resolution of complaints under the *ESA* that parties participate fully in good faith during the investigation and adjudication of complaints. It would be contrary to the efficient and fair resolution of complaints under the *ESA* for a party to hold out during the investigation and determination stage and then subsequently continue to present information and evidence on appeal that could and should have been presented earlier (see *Kaiser Stables Ltd.*, 1997 Canlii 25445 (BC EST); *Dunning and Bourque*, 1997 Canlii 25835 (BC EST) - limited participation).
51. The Appellant in this case essentially submits arguments that should have been made during the initial investigation and determination stage and does not submit cogent evidence nor explanation how the evidence could not reasonably have been discovered or presented earlier during the investigation. Accordingly, I find the Appellant's submissions do not meet the requirements for new evidence.
52. I find there is no merit in this ground of appeal, and it is dismissed.

Other grounds

53. It is established law that the Tribunal may take a broad view of an appeal (see *Triple S Transmission Inc, dba Superior Transmissions*, BC EST # D141/03).
54. Even though I have found the Appellant has not demonstrated that there was new evidence, I will also consider the Appellant's submissions on other grounds in the alternative.
55. While not specifically noted on the Appeal Form, the Appellant's submission appears to allege that the Director erred in law in finding the Appellant, as a director of CWF, was personally liable for two months wages and interest totalling \$16,196.34.
56. To show an error of law, the Appellant has the burden to show a material legal error in the decision. Examples of errors of law may include the following: i) a misinterpretation of misapplication of a section of the *ESA*; ii) a misapplication of an applicable principle of general law; iii) acting without any evidence at all; iv) acting on a view of the facts which could not be reasonably entertained; and v) exercising discretion in a fashion inconsistent with established principle (see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)*, 1998 CanLII 6466).
57. A disagreement with a finding of fact does not amount to an error of law. In cases where there is some evidence, the Tribunal will generally not re-evaluate the evidence or substitute its own view on the same evidence. The assessment and weighing of evidence is considered a question of fact properly within the purview of the Delegate (see *Britco Structures Ltd.*, BC EST # D260/03; *M.S.I.*

Delivery Services Ltd., BC EST # D051/06, upheld on reconsideration BC EST # RD082/06; *Noor Investments Ltd. (Re)*, 2021 BCEST 50 - calculation of wages owing finding of fact).

Section 96 liability

58. 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 action under section 427 of the *Bank Act (Canada)* or to a proceeding under an insolvency Act . . .
59. It is settled law in the Tribunal's decisions that in an appeal of a determination under section 96 of the *ESA*, an appellant is limited to arguing only those issues that arise under section 96 of the *ESA*, namely:
- Whether the person was a director when the wages were earned or should have been paid;
 - Whether the amount of liability imposed is within the limit for which a director may be personally liable; and
 - Whether circumstances exist that would relieve the director from personal liability under subsection 96(2).
60. It is settled law in the Tribunal's decisions that the official corporate Registrar's records can be relied on to establish director or officer status and create a rebuttable presumption that must be overcome. A defence to section 96 liability can be raised if a director or officer can show on credible and cogent evidence that the Registrar's records are inaccurate, either because the person was not a director at the relevant times or is not properly appointed (see *Michalkovic*, BC EST # D056/00).
61. The Appellant has not provided evidence that would overcome the section 96 liability set out in the Section 96 Determination. The Appellant has presented evidence of separation and estrangement from Dale Spaven, but the evidence does not directly challenge the corporate records nor the validity of the Appellant's appointment as director. The corporate registry evidence is clear that the Appellant was a director of CWF during the time period the Employee was working, which is also the time period the wages were earned and should have been paid. The Appellant does not credibly dispute the amount of liability imposed under section 96 or that they should not be held personally liable because they fall under the circumstances described in section 96(2). I note the Delegate considered and held the Appellant was not personally liable for any administrative penalty. It is not an error of law to rely on evidence and the corporate records indicating that the Appellant was a

director at the relevant time in order to issue a section 96 Determination (see *Re Wright*, BC EST # D010/14). I find no error of law in the Section 96 Determination.

62. In sum, I would find this appeal is without merit and has no reasonable prospect of succeeding.

Summary dismissal

63. Section 114(1)(b) of the *ESA* provides that at any time after an appeal is filed, the Tribunal may dismiss the appeal if the appeal was not filed within the applicable time limit.

64. Section 114(1)(f) of the *ESA* provides that at any time after an appeal is filed, the Tribunal may dismiss the appeal if there is no reasonable prospect the appeal will succeed.

65. I find the appeal was not filed within the applicable time limit and I also find the Appellant's application to extend the time limit must be dismissed.

66. As set out above, even if I had found the appeal was filed within the required time, I have considered the Appellant's grounds of appeal and I also find there is no reasonable prospect the appeal would succeed and dismiss the appeal.

ORDER

67. Pursuant to sections 114(1)(b) and 114(1)(f) of the *ESA*, the appeal is dismissed.

68. Pursuant to section 115(1)(a) of the *ESA*, I confirm the Determination, together with any additional interest that has accrued pursuant to section 88 of the *ESA*.

John Chesko
Member
Employment Standards Tribunal