

Citation: Colin Fortes aka Colin Rael Fortes (Re)  
2024 BCEST 102

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Colin Fortes, aka Colin Rael Fortes, a director of Ashton College Ltd. and  
Ashton Education Ltd.  
("Mr. Fortes")

- of a Determination issued by -

The Director of Employment Standards

PANEL: Shafik Bhalloo, K.C.  
SUBMISSIONS: Colin Fortes, on his own behalf  
FILE NUMBER: 2024/084  
DATE OF DECISION: October 23, 2024

## DECISION

### OVERVIEW

1. This is an appeal by Colin Fortes, aka Colin Rael Fortes, of a determination issued by Carrie H. Manarin, a delegate of the Director of Employment Standards (“adjudicating delegate”), on May 27, 2024.
2. The determination found Mr. Fortes was a director of Ashton College Ltd. (“Ashton College”) and Ashton Education Ltd. (“Ashton Education”), associated employers found to have contravened provisions of the *Employment Standards Act (ESA)*, at the time wages were earned or should have been paid to John S. Kurian, and as such was personally liable under section 96 of the *ESA* for wages in the amount of \$2,842.60 (“Determination”).
3. This appeal is grounded in an assertion that the Director of Employment Standards (“Director”) erred in law and failed to observe the principles of natural justice in making the Determination.
4. In correspondence dated July 29, 2024, the Tribunal, among other things, acknowledged having received the appeal, requested the section 112(5) record (“record”) from the Director, and informed Mr. Kurian and the Director that submissions on the merits of the appeal were not being sought at that time.
5. The record has been provided to the Tribunal by the Director and a copy has been delivered to the parties, who have been provided with the opportunity to object to its completeness. No objection to the completeness of the record has been received and, accordingly, the Tribunal accepts it as being complete.
6. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the Reasons for Determination, the appeal, the written submission filed with the appeal, and my review of the material that was before the Director when the Determination was being made. Under subsection 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed:
  - 114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any appeal if the tribunal determines that any of the following apply:
    - (a) the appeal is not within the jurisdiction of the tribunal;
    - (b) the appeal was not filed within the applicable time limit;
    - (c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;
    - (d) the appeal was made in bad faith or filed for an improper purpose or motive;
    - (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;

- (f) there is no reasonable prospect that the appeal will succeed;
- (g) the substance of the appeal has been appropriately dealt with in another proceeding;
- (h) one or more of the requirements of section 112 (2) have not been met.

7. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under subsection 114(1), the Director and Mr. Kurian will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in subsection 114(1), it is liable to be dismissed.

## ISSUE

8. The issue in this appeal is whether it should be allowed to proceed or be dismissed under subsection 114(1) of the *ESA*.

## THE FACTS

9. The facts relating to this appeal, as set out in the Reasons for the Determination, are relatively brief.

10. On February 25, 2023, Mr. Kurian filed a complaint under section 74 of the *ESA*, alleging that Ashton College and Ashton Education failed to pay statutory holiday pay, vacation pay, and compensation for length of service. Following an investigation, the Director of Employment Standards issued a determination (“Corporate Determination”) against Ashton College and Ashton Education as associated employers, finding that wages and interest were owed to Mr. Kurian. The Corporate Determination, dated May 27, 2024, was sent to the companies, their registered and records office, and their directors and officers, including a notice explaining the latter’s potential personal liability under the *ESA*.

11. The Corporate Determination remains unpaid.

12. This Determination against Mr. Fortes was issued at the same time as the Corporate Determination due to concerns over potential dissipation of assets.

13. Two separate appeals of the Corporate Determination were filed on July 4, 2024, one by Ashton College and another by Ashton Education and dismissed: see [2024 Bcest 100 and 2024 Bcest 101].

14. The record shows that BC Registry Services Searches conducted on March 13, 2023, and March 11, 2024, confirm that Ashton College was incorporated in British Columbia on September 14, 1998, and Ashton Education on September 20, 2018. Colin Fortes, also known as Colin Rael Fortes, was listed as the sole director of both companies. The searches also verify that Mr. Fortes was the director of these companies during the period when Mr. Kurian’s wages were earned or should have been paid, between January 18, 2022, and January 18, 2023. As a result, the Determination found Mr. Fortes is personally liable for up to two months’ unpaid wages for each employee.

15. The Corporate Determination found that Mr. Kurian was owed \$5,304.46 in wages. As two months' wages for Mr. Kurian amounts to \$2,604.42, which is less than the total owed, Mr. Fortes was held personally liable for the lesser amount of \$2,604.42, plus interest of \$238.18, for a total of \$2,842.60.
16. The Determination also noted that Ashton College and Ashton Education contravened sections 58 and 63 of the *ESA*, resulting in the issuance of an administrative penalty. Under section 98(2) of the *ESA*, a director or officer who authorizes, permits, or acquiesces in a corporation's contravention may be personally liable for the penalty. However, the adjudicating delegate found insufficient evidence that Mr. Fortes permitted or acquiesced in these contraventions, and he was therefore not held personally liable for the administrative penalty.

## ARGUMENTS

17. In his appeal submissions, Mr. Fortes argues that the adjudicating delegate improperly held him personally liable for up to two months' unpaid wages as a director of Ashton College and Ashton Education at the time Mr. Kurian's wages were earned or should have been paid.
18. Mr. Fortes argues that the adjudicating delegate's calculation of the unpaid wages, as outlined on page 3 of the Reasons for the Determination ("Reasons"), lacks evidentiary support. He claims that the adjudicating delegate made this calculation without any evidence explaining how the unpaid wages were determined and that the reasons do not substantiate the assertion that the amount is "less than the amount found owing to John S. Kurian in the Corporate Determination." He further asserts that he has no means of verifying how this amount was reached.
19. Mr. Fortes further argues that the Director breached the rules of natural justice by denying him an opportunity to be heard and present evidence and arguments. He claims that he was not provided with a fair process, including the right to an independent and impartial decision-maker and to have the dispute decided by the decision-maker who heard the evidence and argument.
20. Additionally, Mr. Fortes challenges the adjudicating delegate's statement on page 2 of the Reasons, where it is noted that the Determination was issued on the same day as the Corporate Determination due to concerns about assets potentially disappearing. He asserts that the adjudicating delegate provided no evidence to support this fear and argues that, in the absence of evidence, one must assume that no basis for such concerns exists.

## ANALYSIS

21. The grounds of appeal are statutorily limited to those found in section 112(1) of the *ESA*, which states:
- 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.

22. Section 96 of the *ESA* provides as follows:

**Corporate officer's liability for unpaid wages**

- 96 (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

23. It is settled law in the Tribunal's decisions that in an appeal of a determination made under section 96 of the *ESA*, the 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 found personally liable;
- Whether circumstances exist that would relieve the director from personal liability under subsection 96(2).

24. 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 Windows & Doors Ltd.*, BC EST # D180/96).

25. It is also settled law in the Tribunal's decisions that corporate records, which the Director can rely on to establish director and officer status, raise a rebuttable presumption that a person is a director/officer. A defence to section 96 liability can be successfully raised if a director/officer can show, on credible and cogent evidence, that the Registrar's records are inaccurate, either because the person resigned or is not properly appointed (see *Wilnofsky*, BC EST # D106/99, and *Michalkovic*, BC EST # D056/00).

26. Mr. Fortes has provided nothing in his appeal that remotely addresses any of those matters that are permitted to be raised by a director in the appeal of a determination made under section 96 of the *ESA*.

27. Mr. Fortes has not satisfactorily shown the adjudicating delegate made any error in the Determination. The record confirms he was a director of Ashton College and Ashton Education during the time wages were earned or should have been paid to Mr. Kurian, that the liability imposed on him is within the limits for which a director may be found personally liable under section 96, and there are no circumstances that would relieve Mr. Fortes of personal liability under the *ESA*.
28. I am also not persuaded that the adjudicating delegate has committed any error of law or breached the principles of natural justice in making the Determination.
29. In the result, I find this appeal has no reasonable prospect of succeeding. The purposes and objects of the *ESA* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1)(f) of the *ESA*.

### **ORDER**

30. Pursuant to section 115(1)(a) of the *ESA*, I order the Determination dated May 27, 2024, be confirmed in the amount of \$2,842.60 together with any interest that has accrued under section 88 of the *ESA*.

*/S/ Shafik Bhalloo*

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**Shafik Bhalloo, K.C.**  
**Member**  
**Employment Standards Tribunal**