Citation: Stefanie Crosby (Re)
2024 BCEST 94

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Stefanie Crosby

- of a Determination issued by -

The Director of Employment Standards

PANEL:	Kenneth Wm. Thornicroft
SUBMISSIONS:	Stefanie Crosby, on her own behalf
	Justin Frost, on his own behalf
	Carrie H. Manarin, delegate of Director of Employment Standards
FILE NUMBER:	2024/071
DATE OF DECISION:	October 17, 2024

DECISION

OVERVIEW

1. Stefanie Crosby ("appellant") appeals a determination that was issued against her by a delegate of the Director of Employment Standards ("delegate") on May 13, 2024, under section 96(1) of the *Employment Standards Act* (*ESA*). Section 96(1) of the *ESA* states: "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." The delegate's "Reasons for the Determination" ("delegate's reasons"), also dated May 13, 2024, were appended to the determination.

2. I shall refer to the determination issued against the appellant on May 13, 2024, as the "Section 96 Determination." By way of the Section 96 Determination, the appellant was ordered to pay a total sum of $27,053.50 representing two months' wages, plus interest, owed to a former employee of RYU Apparel Inc. ("RYU").

3. The appellant appeals the Section 96 Determination relying on all three statutory grounds, namely, that the delegate erred in law, failed to observe the principles of natural justice, and on the ground that "evidence has become available that was not available at the time the determination was being made" (see sections 112(1)(a), (b), and (c) of the *ESA*).

4. Having reviewed the parties' submissions and the section 112(5) record in this matter, I am satisfied that none of the appellant's asserted grounds of appeal is meritorious. That being the case, I am dismissing this appeal and confirming the Section 96 Determination.

PRIOR PROCEEDINGS

5. On November 10, 2023, a determination was issued against RYU ordering it to pay two former employees ("complainants") the total sum of $40,371.06 on account of unpaid wages, vacation pay, and section 88 interest. The first complainant ("JF") was awarded a total of $33,126.62; the second complainant ("ZB") was awarded a total of $7,244.44. The Section 96 Determination relates *solely* to JF's unpaid wage award.

6. Further, and also by way of this latter determination, RYU was assessed two separate $500 monetary penalties based on its contraventions of sections 17 and 18 of the *ESA*. Accordingly, RYU's total liability under this determination (which I shall refer to as the "Corporate Determination") is $41,371.06.

7. JF's wages were earned or otherwise became payable during the period from February 10, 2021, to July 26, 2022, and ZB's wages from September 18, 2022, to October 7, 2022. According to BC Registry Services records, the appellant was an RYU director from at least February 10, 2021 until July 26, 2022.

8. The Corporate Determination was delivered by regular mail to RYU's Vancouver business office and to its registered and records office (a Vancouver law firm). The Corporate Determination was also sent by regular mail and electronic mail (using two separate email addresses) to one of its directors

who was also an RYU officer. In addition, the Corporate Determination was sent to all other RYU directors, including the present appellant, as listed in RYU's corporate records on file with BC Registry Services. The Corporate Determination was sent to the appellant by regular mail (at her address as listed in the corporate registry) and by electronic mail.

9. RYU never appealed the Corporate Determination and the amounts due under it have never been paid. It appears that neither the appellant, nor anyone else in a position of authority at RYU, ever took any affirmative steps in relation to a possible appeal of the Corporate Determination. As matters now stand, the Corporate Determination is a final order, and the unpaid wages set out in it are no longer subject to review by this Tribunal.

10. The Corporate Determination included a notice to all RYU directors informing them of their possible personal liability under section 96(1) of the *ESA* (see pages D4-D6). "Reasons for the Determination", also dated November 10, 2023, were attached to the Corporate Determination. At page R5 of these latter reasons the appellant's evidence, obtained during the complaint investigation process, was set out as follows:

> Ms. Crosby was a director of RYU from February 10, 2021 to July 26, 2022. In her response to the investigation report, Ms. Crosby made a submission regarding "where the power was held" at RYU. She stated that although she was a director of RYU during the Complainants' employment, she was "frequently left in the dark regarding company proceedings, with important decisions taken without her input or knowledge." "Most of the strategic decisions seemed to be centralized with Cesare [Cesare Fazari, RYU's CEO]."
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> Accordingly, she said she was unfamiliar with the Complainants and their circumstances until she received notice of their complaints. She provided copies of text communications with Mr. Fazari as late as June 2022, around the time of her resignation as a director to show that he was actively involved in the company at that time.

THE SECTION 96 DETERMINATION AND THE REASONS FOR APPEAL

11. As noted above, the Section 96 Determination and the delegate's accompanying reasons were issued on May 13, 2024. The Section 96 Determination concerns only the wages owed to JF, since the appellant was not an RYU director when ZB's wages were earned or became payable. No monetary penalties were levied against the appellant (see section 98(2) of the *ESA*), a fact that essentially confirms the appellant's position that she had a very limited role in RYU's business and financial affairs, at least in relation to JF.

12. As noted above, the Section 96 Determination relates solely to JF's unpaid wages, and this latter award was reduced to $27,053.50 (including interest) to account for the maximum 2-month wage liability "ceiling" set out in section 96(1) of the *ESA*.

13. The delegate's key findings against the appellant were as follows (at page R2):

> A BC Registry Services Search conducted online on July 4, 2022 with a currency date of April 5, 2022, indicates that RYU Apparel Inc. was incorporated on December 4, 2014 (Incorporation number BC1021032). Stefanie Crosby was listed as a director. A Notice of Change of Directors shows Stefanie Crosby was registered as a director of RYU Apparel Inc.

> effective February 10, 2021. A further Notice of Change of Directors shows Stefanie Crosby ceased to be a director effective July 6, 2022. [*sic*, the correct date is July 26, 2022]
>
> The searches confirm that Stefanie Crosby was a director of RYU Apparel Inc. between February 10, 2021 and July 26, 2022, when [JF's] wages were earned and should have been paid. However, Stefanie Crosby ***was not*** a director of RYU Apparel Inc. between September 18, 2022 and October 7, 2022 when [ZB's] unpaid wages were earned and should have been paid.
>
> As a director, Stefanie Crosby is personally liable for up to two months' unpaid wages for [JF].
>
> (***emphasis*** in original text)

14. As noted above, the appellant's appeal is based on all three statutory grounds.

Alleged Errors of Law

15. The appellant says that the delegate erred in law as follows:

- "[ZB] was hired after I had resigned, so it is impossible that I am liable for [ZB's] claim."
- The appellant says that the delegate incorrectly calculated JF's unpaid wage claim, given the two-month liability ceiling, and erred in calculating JF's vacation pay entitlement.
- More fundamentally, the appellant asserts that she was not an RYU director or officer when the complainants' wage claims crystallized. The appellant says that she was an RYU director "from February 21, 2021, until January 4, 2022", but thereafter only held an "advisory board position" from which she resigned on June 26, 2024 "with a one-month transition period ending on July 26, 2024." She says that her contract as a "board advisor" specifically provided "that I was to report directly to the CEO and that I was an advisor, not a director, officer, or employee of the company".
- The appellant maintains that she was induced to become an RYU director as the result of "misrepresentations" made to her by RYU's CEO, was elected to be a director as a "scapegoat", and that she never undertook any duties that are commonly undertaken by a board director or a corporate officer. The appellant says that she never received any compensation for her services to RYU, and that the amount of the Section 96 Determination is "equal to one year of my entire salary" and thus "places an enormous burden on me and on my future."

New Evidence

16. In support of her position that she was only a "board advisor" as and from January 4, 2022, the appellant submitted an "Advisory Board Agreement" with an effective date of January 4, 2022. The parties to the agreement are RYU and the appellant. This agreement provides for compensation in the form of stock options and for reimbursement of pre-approved expenses. Critically, the agreement states: "The Advisor will not be a director, officer or employee of the Company." The appellant says that this document was not provided to the Employment Standards Branch (ESB) because it was "previously inaccessible due to my DocuSign account being locked."

17. In addition to the above, the appellant also submitted a "Consent Resolution of the Audit Committee" (apparently, to demonstrate that she was not a member of this committee), an undated

copy of a lengthy email she sent to the ESB during the investigation, and copies of various electronic communications.

Natural Justice

18. The appellant alleges that the Director of Employment Standards failed to abide by the principles of natural justice as follows:

- "I submitted substantial information and evidence demonstrating my lack of authority within the company. Despite this, the Director of the Determination [*sic*] failed to consider this evidence. There is uncontradicted evidence showing that I did not possess the usual authorities or powers associated with a corporate officer…."
- "My first awareness [of the complainants' unpaid wage claims] came when I received correspondence from the BC Labor office [sic] in August 2023, over a year after my resignation. At that point, there was nothing I could have done, however, even if they had made me aware, I had no authority while at RYU."

THE COMPLAINANT'S (JF) AND DELEGATE'S SUBMISSIONS

19. JF's submissions do not specifically address the principal issues that are properly before me in this appeal, namely, the appellant's status as an RYU director and the calculation of her liability under section 96(1) of the *ESA*. Rather, JF's submissions largely address the particulars of his own unpaid wage claim. As I previously noted, JF's unpaid wage entitlement, as determined in the Corporate Determination, now stands as a final order and is not open to challenge in this appeal.

20. The delegate makes several points in her submission. First, the delegate says that the appellant's position as a member of RYU's advisory board is separate and distinct from her role as an RYU director, and that holding the former position does not mean that she did not also hold the latter position. Second, the evidence clearly shows that the appellant did not resign her directorship until July 6, 2022 – there is no credible evidence that the appellant resigned her directorship, as she asserts, on January 4, 2022. Third, insofar as the appellant's claim that she never received any compensation for serving as a director, the delegate notes that RYU is not a "charity" as defined in the *Employment Standards Regulation* (*ESR*) and, that being the case, the appellant is not entitled to the relief provided in section 45 of the *ESR*. Fourth, and presumably in relation to section 77 of the *ESA*, the delegate notes that the appellant was aware of her potential liability under section 96 at least since October 5, 2023 (about seven months before the Section 96 Determination was issued). Fifth, and finally, the delegate says that the appellant's arguments regarding the calculation of her section 96(1) liability are fundamentally factually and legally misconceived.

ANALYSIS AND FINDINGS

21. In my view, the critical threshold issue is whether the evidence that the appellant submitted on appeal is admissible "new evidence" within section 112(1)(c) of the *ESA*. Accordingly, I will first turn to that matter.

New evidence

22. New evidence is admissible on appeal provided: i) the "new evidence" is such that, with the exercise of due diligence, it could not have been discovered and presented to the Director of Employment Standards during the investigation; ii) the evidence must be relevant to a material issue arising from the complaint(s); iii) the evidence must be credible in the sense that it is reasonably capable of belief; and iv) 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 (see *Davies et al.*, BC EST # D171/03). The appellant's submission does not specifically address these considerations.

23. The appellant submits two principal documents as "new evidence," the first being an "Advisory Board Agreement" dated as of January 4, 2022, between RYU and the appellant, and the second being a "Consent Resolution of the Audit Committee" dated April 29, 2021. The Section 96 Determination was issued on May 13, 2024. Accordingly, both documents clearly were "available at the time the determination was being made" and, on that basis alone, are presumptively inadmissible. Similarly, the copies of electronic communications that the appellant submitted are all dated prior to the issuance of the Section 96 Determination and, apart from that circumstance, are not relevant to the issues that are properly before me in this appeal.

24. The appellant says that the second document shows that she "was not involved" with the RYU board of directors. However, simply because an individual is not a member of a corporation's audit committee, it does not follow that the individual is not a corporate director. An audit committee need not consist of all members of a corporation's board of directors.

25. The "Consent Resolution" document is not relevant to the question of whether the appellant was a corporate director when JF's unpaid wage claim crystallized. Since this document is not relevant, and was available prior to the issuance of the Section 96 Determination, it is not admissible "new evidence." While public corporations are required to have an audit committee, there is no statutory requirement for all corporate directors to be members of that committee. Thus, the mere fact that the appellant was apparently not a member of RYU's audit committee has no probative value whatsoever with respect to her status as a corporate director.

26. Insofar as the "Advisory Board Agreement" is concerned, the appellant says that this document "was previously inaccessible due to my DocuSign account being locked." The appellant has not provided any evidence to corroborate this assertion, nor any particulars regarding when this alleged "lockout" occurred. The appellant has not provided any particulars regarding the efforts she made, if any, to retrieve this document so that it could have been provided to the Director of Employment Standards during the investigation process. Nor has she provided any explanation regarding why she did not otherwise have a hard copy of this agreement in her possession. Finally, and most critically, while this agreement states that the appellant's role as a member of an advisory board does not constitute her to be a member of RYU's board of directors, this agreement does not, and could not, *prohibit* her from being an RYU board member.

27. The appellant, as shown in the BC Registry Services records noted above, was recorded as an RYU director during the period from February 10, 2021, to July 26, 2022. In a document appended to her submission filed in this appeal, the appellant expressly acknowledged that she *was* an RYU director

until "I tendered my resignation on June 26th, 2022, effective July 26th, 2022", and that "on July 26th, 2022, I formally disassociated myself from RYU." Thus, the appellant's own words confirm her status as an RYU director.

28. The "Advisory Board Agreement" is a contract between the appellant and RYU. Although this agreement states that the appellant, *as an advisor*, would not be an RYU director, that statement simply conforms to the legal principle that an individual cannot become a corporate director simply by way of a contract between the corporation and the individual. Corporate directors must meet certain statutory requirements (see *Business Corporations Act*, section 124), and are elected by the corporation's shareholders or may be appointed under section 122(2) of the *Business Corporations Act*. A director will cease to hold their position in the circumstances set out in section 128 of the *Business Corporations Act*.

29. I am not satisfied that the appellant has adequately explained why the "Advisory Board Agreement" could not have been submitted to the Director of Employment Standards during the complaint investigation process. She says that she was "locked out" of her DocuSign account, but this statement is a bald assertion, entirely uncorroborated by any other particulars or confirmatory evidence. Further, and in any event, I do not consider this agreement to have high probative value regarding her status as an RYU director for the reasons previously given. Accordingly, I find that this agreement is inadmissible on appeal.

30. I should also note that even if I had admitted this agreement, as well as the consent resolution, I conclude, in any event, that neither document has any evidentiary value in terms of affirmatively proving that the appellant was not an RYU director when JF's unpaid wage crystallized. The same can be said for the electronic messages included in the appellant's appeal submissions.

31. The corporate registry's records are presumptively accurate, and it falls on an individual named as a director in those records to rebut, by cogent evidence, that a record showing them to be a director is inaccurate. As the Tribunal has repeatedly stressed, corporate records on file with the provincial corporate registry are subject to a rebuttable presumption of accuracy. However, in this case, the appellant has not discharged her evidentiary burden of demonstrating that the corporate registry's records are, in fact, inaccurate.

Alleged Errors of Law

32. The appellant says that the delegate erred in calculating her two-month unpaid wage liability. There is no calculation error. JF's annual wage was $135,000 and thus two months' wages would be $22,500, plus his 7.7% vacation pay entitlement, for a total of $24,232.50. This latter sum is the very amount set out in the Section 96 Determination, together with additional section 88 interest. The appellant challenges the 7.7% vacation pay component. However, that rate of vacation pay was fixed by JF's employment contract, and that percentage amount of vacation pay is recoverable under the *ESA*. Employers and employees are lawfully entitled under the *ESA* to negotiate vacation pay entitlements that exceed the minimum statutory standards of 4% or 6% (depending on years of service). Similarly, parties can negotiate wages that exceed the minimum wage. In either case, the Director of Employment Standards can enforce the higher amount and is not limited to the statutory minimum standard.

33. The appellant says that she resigned her directorship before ZB's unpaid wage claim crystallized and thus cannot be responsible for that claim. The short answer to that submission is that she is not being held liable for ZB's claim.

34. The other alleged legal errors advanced by the appellant are similarly without merit. Even if one accepts that the appellant was not actively involved in RYU's management and/or was not an active director, those assertions do not provide a defence to section 96(1) liability. Further, even if she never received any compensation for serving as an RYU director, that fact does not relieve her from section 96(1) liability, since RYU was not a "charity." Finally, financial hardship is not a defence to section 96(1) liability.

Natural Justice

35. There was no breach of the principles of natural justice in this case. The appellant was given appropriate notice of her potential liability under section 96(1) well before the Section 96 Determination was issued. The evidence shows that the appellant was first apprised of her potential liability in October 2023 – the Section 96 Determination was issued in May 2024. The appellant was given a fair opportunity to present her evidence and argument regarding her status as a director and her potential personal liability (and she did so). The delegate did not accept the appellant's position that she did not have any liability under section 96(1). However, it does not follow from that outcome that the delegate failed to observe the principles of natural justice in finding the appellant to be liable.

36. This appeal is dismissed.

ORDER

37. Pursuant to section 115(1)(a) of the *ESA*, the Section 96 Determination is confirmed as issued in the amount of $27,053.50 together with whatever additional interest that has accrued under section 88 of the *ESA* since the date of issuance.

/S/ Kenneth Wm. Thornicroft

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal