

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Saul Niddam
("Appellant")

- of a Determination issued by -

The Director of Employment Standards

PANEL: John Chesko
SUBMISSIONS: Daniel Camenzilu, counsel for Saul Niddam
FILE NUMBER: 2024/063
DATE OF DECISION: October 18, 2024

DECISION

OVERVIEW

1. Saul Niddam (“Appellant”) appeals a section 96 determination issued on April 30, 2024 (“Section 96 Determination”), by a delegate (“Delegate”) of the Director of Employment Standards (“Director”).
2. The Section 96 Determination held that the Appellant was a director of Kenza Culinary Corp. (“Kenza” or “Employer”), which was found to owe wages to employee Kevin Dowdall (“Employee”) contrary to the *Employment Standards Act (ESA)*. The Section 96 Determination held that the Appellant, as a director of Kenza, was personally liable for two months wages and interest totalling \$28,248.93 pursuant to section 96 of the *ESA*.
3. The Appellant appeals on the grounds that new evidence has become available that was not available at the time the Section 96 Determination was being made and that the Director failed to observe the principles of natural justice in making the Section 96 Determination.

BACKGROUND

4. Kenza operates a culinary and hospitality business in Calgary, Alberta. Kenza has been federally incorporated since June 2022.
5. The Employee was employed by Kenza as Chief Operating Officer from August 15, 2022, to January 2023. The Employee stopped working on or about January 19, 2023, as Kenza had not paid the Employee since August 30, 2022. The Employee worked remotely from his location in Langley, British Columbia. As the Employee resided and worked in British Columbia, his case falls within the jurisdiction of the *ESA*.
6. The evidence submitted by the Employee included payroll statements issued by Kenza setting out the amount of wages earned but unpaid as well as communications from Kenza’s representative confirming that wages were unpaid and owed and payment would be forthcoming. However, Kenza repeatedly failed to provide the promised wage payments and the Employee eventually filed a complaint under section 74 of the *ESA* alleging Kenza had contravened the *ESA* by failing to pay wages.
7. A delegate of the Director (“Investigative Delegate”) was assigned to the case and followed up and requested evidence and submissions.
8. The Investigative Delegate prepared a report dated August 18, 2023, summarizing the information received concerning the complaint and included a list of relevant records and documents (“Investigation Report”).
9. The Investigation Report specifically noted the Appellant was named as a director and/or officer of Kenza and could be personally liable for two months unpaid wages pursuant to section 96 of the *ESA*. I highlight the following excerpts from the Investigation Report:

Attention: Saul Niddam

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 Kenza Culinary Corp.

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. 003]

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 the status as director and/or officer:

Opportunity to Respond

If you wish to dispute your status as a director and/or officer of Kenza Culinary Corp. 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:

9:00 a.m. on August 31, 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. 003-004]

12. The Investigative Delegate sent a further investigation report dated April 3, 2024 ("Second Investigation Report") to the company, the Appellant, and the Employee.
13. The Second Investigation Report set out the information concerning the Employee's claim for unpaid wages and again specifically noted that the Appellant was listed as the named director and/or officer of Kenza and could be subject to personal liability under section 96 of the *ESA*. The Second Investigation Report provided the Appellant further opportunity to respond and warned that a determination may be issued against the Appellant:

Opportunity to Respond

If you wish to dispute your status as a director and/or officer of Kenza Culinary Corp. 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:

April 9, 2024

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. 003-004]

14. There were no responses from the Appellant within the requested time limits concerning the Appellant's status as director of Kenza. I also note there were no responses received from Kenza concerning the Employee's wage claim.
15. The Investigation Reports and listed documents were provided to the Delegate.

Corporate Determination

16. The Delegate issued a determination against the Employer dated April 30, 2024 ("Corporate Determination").
17. The Corporate Determination held that Kenza had contravened the *ESA* and owed the Employee wages and interest totaling \$61,894.36. The Corporate Determination also levied administrative penalties totaling \$1,000 for a total amount payable of \$62,894.36.

Section 96 Determination

18. The Delegate also issued the Section 96 Determination dated April 30, 2024, against the Appellant. As set out above, the Section 96 Determination held that the Appellant, as a director of Kenza, was personally liable for two months wages and interest totalling \$28,248.93.

Appeal of Section 96 Determination by Appellant

19. The Appellant appealed 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 and that the Director of Employment Standards failed to observe the principles of natural justice.
21. The Appellant sets out submissions and evidence in support of the Appellant's appeal.
22. The Appellant submits that while they are "indeed listed on paper as a Director," the Appellant did so as a favour to help Ms. El Yacoubi, a romantic partner, who was the directing mind of the Employer, Kenza. The Appellant submits he was supposed to have been removed as director of the company by Ms. El Yacoubi at a later date, but that this was never done. The Appellant submits he "had no involvement" with the company and has no knowledge about the Employee, the unpaid wages claim, or anything about company operations. The Appellant submits he has heard nothing about the company and had no communications with Ms. El Yacoubi since the end of their relationship. The Appellant submits he was taken advantage of and should not be liable for the Section 96 Determination.
23. The Appellant further submits the Director failed to observe the principles of natural justice in making the Section 96 Determination. The Appellant submits he received no communications concerning the company at any time after he submitted the official paperwork to be named director.

The Appellant submits “he was shocked when he received the [Section 96] Determination, dated April 30, 2024, which stated he is liable for \$28,248.93 in unpaid wages.” The Appellant submits the Director failed to comply with natural justice by not informing him of the case against him and in not providing an opportunity to respond to the “allegation of unpaid wages prior to the Determination.”

24. The Appellant also submits he should not be held liable for any administrative penalty owing by the Employer as the Appellant “did not authorize, permit or acquiesce to the contravention of unpaid wages.”
25. In conclusion, the Appellant submits he made a “judgement error” in agreeing to become the named director of Kenza. The Appellant submits he was taken advantage of by Ms. El Yacoubi, the directing mind of the company, and the situation amounts to “rare and exceptional circumstances” that should absolve him from personal liability under section 96 of the *ESA*. Further, the Appellant submits the Director did not adhere to principles of natural justice in not providing an opportunity for him to respond prior to the issuance of the Section 96 Determination.
26. In sum, the Appellant submits he should not be held liable for the unpaid wages and interest set out in the Section 96 Determination, nor for any administrative penalties.

ANALYSIS

27. These reasons are based on the written submissions of the Appellant, the Section 96 Determination, and the section 112(5) record (“Record”).
28. 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

29. 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.
30. 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 a new hearing of the case, nor is it intended to be an opportunity to resubmit an appellant's facts and arguments and ‘try again’ with another forum.

New Evidence

31. On the Appeal Form the Appellant alleges that new evidence has become available since the time the Section 96 Determination was being made.
32. The test that must be met to introduce new evidence on an appeal is clearly established. In *Bruce Davies et al.*, BC EST # D171/03, the Tribunal set out the following requirements for introducing new evidence on appeal:
- (a) the evidence could not reasonably, 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;
33. 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.
34. 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 about the status of director. As noted above, the Investigation Reports clearly set out that the Appellant was the named director of Kenza Culinary Corp. and was required to respond and provide evidence to rebut the corporate record listing them as director and/or officer.
35. The Record also shows the Appellant was delivered a Demand for Employer Records in July 2023. As noted above, the Investigation Reports dated August 18, 2023, and April 3, 2024, specifically warned the Appellant about potential section 96 liability and clearly set out that the Appellant was required to respond. I note the Director confirmed the Demand for Employer Records and the Investigation Reports were sent to the Appellant.
36. 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 et al.*, *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 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 not participate during the investigation and determination stage and then submit information and evidence on appeal that could and should have been

presented earlier (see *Kaiser Stables*, BC EST # D058/97; *Dunning and Bourque*, BC EST #D550/97 limited participation).

37. 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. As set out in the Record, the Appellant received multiple Investigation Reports noting he was the named director and could be held personally liable for unearned wages. The Appellant was clearly advised to respond during the investigation and determination stage. The Appellant has also not presented information that did not exist at the time of the investigation or determination. Accordingly, I find the Appellant's submissions do not meet the requirements for new evidence.

38. I find there is no merit in this ground of appeal, and it is dismissed.

Failure to Observe Principles of Natural Justice

39. On the Appeal Form, the Appellant alleges the Director of Employment Standards failed to observe the principles of natural justice.

40. Natural justice has been described as the right to a fair procedure. It includes specific rights such as the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker (see *Re 607730 B.C. Ltd. (cob English Inn & Resort)*, BC EST # D055/05, and *Imperial Limousine Service Ltd.*, BC EST # D014/05).

41. A party alleging failure to comply with natural justice must provide evidence in support of the allegation. It isn't enough to just allege a failure of natural justice. There needs to be specific evidence or argument about how the determination procedure did not meet requirements of natural justice (see *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99).

42. I have reviewed the Record and considered the Appellant's submissions. I find there is no basis for the Appellant's argument on this ground nor is there any basis on the Record for concluding the Director failed to observe the principles of natural justice.

43. The evidence is clear that the Appellant was aware of the case to be made and had the right to present his case and respond to the evidence. The Record indicates the Appellant was provided detailed information about the Employee's complaint including specific information about the Appellant's status as named director and potential personal liability pursuant to section 96 of the *ESA*. Indeed, the Appellant was invited and given every opportunity to respond and provide evidence and submissions. As noted, the Appellant was provided with the Investigation Reports and directed to review and provide further submissions on any errors, omissions or clarifications.

44. In sum, the Appellant has not shown the Director failed to observe the principles of natural justice in making the Section 96 Determination.

45. I find there is no merit in this ground of appeal, and it is dismissed.

Other grounds

46. 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).
47. Even though I have found the Appellant has not demonstrated that there was new evidence or that the Director failed to observe the principles of natural justice, I will also consider the Appellant's submissions on other grounds in the alternative.
48. 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 Kenza, was personally liable for two months wages and interest totalling \$28,248.93
49. 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).
50. 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

51. 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 . . .
52. It is settled law in the Tribunal's decisions that in an appeal of a determination 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 personally liable; and
- Whether circumstances exist that would relieve the director from personal liability under subsection 96(2).

53. It is settled law in Tribunal 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).
54. The Appellant has not provided evidence that would overcome the section 96 liability set out in the Determination. Indeed, the Appellant confirms that he was, in fact, the named Director of Kenza and submitted the official paperwork, albeit as a personal favour to his then romantic partner. The Appellant presented evidence that he had little involvement with the company and has not spoken with the directing mind of Kenza since the relationship ended. However, the Appellant's evidence does not directly challenge the corporate records, nor the validity of the Appellant's appointment as director. I have reviewed the decisions submitted by the Appellant and find they support the Section 96 Determination and do not assist the Appellant. I note there are decisions of the Tribunal that have held named directors remain personally liable even where the named director was manipulated by rogues and were even prevented from receiving information (see *Stursberg*, BC EST # D380/01).
55. The corporate registry evidence, and indeed the Appellant's own evidence, is clear that the Appellant was a director of Kenza during the time period the Employee was employed and 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 he should not be held personally liable because he was not a director of Kenza.
56. The Appellant also submits that he should not be personally liable for any administrative penalty. However, I note the Section 96 Determination specifically held the Appellant was not personally liable for any of the administrative penalty. As set out in the Section 96 Determination, "I find that Saul Niddam is not personally liable for the administrative penalty." [p. R3]
57. In sum, 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 would find the evidence was considered and the law properly applied and that there was no error of law.
58. I find this appeal is without merit and has no reasonable prospect of succeeding.

Summary dismissal

59. 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.

60. As set out above, I find the Appellant has not met the required onus to demonstrate that there was new evidence that should have been considered, or that the Director failed to meet the requirements of natural justice in making the Section 96 Determination. I have also considered and held that there was no error of law in the Section 96 Determination.
61. I find there is no reasonable prospect the appeal would succeed and dismiss the appeal.

ORDER

62. Pursuant to section 114(1)(f) of the *ESA*, the appeal is dismissed.
63. 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*.

/S/ John Chesko

John Chesko
Member
Employment Standards Tribunal