

An appeal

- by -

Peter Tuan Luong
("Luong")

- of a Determination issued by -

The Director of Employment Standards

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

PANEL: Kenneth Wm. Thornicroft

FILE NO.: 2018A/102

DATE OF DECISION: December 24, 2018

DECISION

SUBMISSIONS

Maxwell J. Brunette

counsel for Peter Tuan Luong

INTRODUCTION

1. On June 19, 2018, Chantal Webb, a delegate (the “delegate”) of the Director of Employment Standards (the “Director”), issued a determination pursuant to section 79 of the *Employment Standards Act* (the “ESA”) against Fusionpipe Software Solutions Inc. (“Fusionpipe”). I shall refer to this determination as the “Corporate Determination”.
2. By way of the Corporate Determination, Fusionpipe was ordered to pay the total sum of \$29,355.52 on account of unpaid wages (vacation pay) and section 88 interest due to five former employees (the “Complainants”). The Complainants all ceased working for Fusionpipe as of February 27, 2018. In addition, and also by way of the Corporate Determination, the delegate levied two separate \$500 monetary penalties against Fusionpipe (see section 98 of the *ESA*). Thus, the total amount payable under the Corporate Determination is \$30,355.52. Fusionpipe did not appeal the Corporate Determination (the appeal period expired on July 27, 2018) and it now stands as a final order.
3. Subsection 96(1) of the *ESA* provides as follows: “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.” In accordance with this provision, the delegate issued a determination against the present appellant, Peter Tuan Luong (“Luong”), on September 10, 2018, given that Mr. Luong was identified in the B.C. Corporate Registry as being a Fusionpipe director (as of the effective date of the initial registry search, February 7, 2018, and he continued to be so listed in a later search conducted on September 5, 2018). I shall refer to the determination issued against Mr. Luong on September 10, 2018, as the “Section 96 Determination”.
4. B.C. Corporate Registry records raise a rebuttable presumption that individuals identified as corporate directors or officers of a particular firm are, in fact, directors or officers as the case may be (see *Director of Employment Standards and Michalkovic*, BC EST # RD047/01, and *Barahmand*, BC EST # RD072/13).
5. By way of the section 96 Determination, Mr. Luong was ordered to pay the total sum of \$29,588.56 on account of unpaid wages and section 88 interest. This liability is in relation to the unpaid wages owed by Fusionpipe to the Complainants. The delegate held that Mr. Luong “was a director between August 28, 2017 and February 27, 2018, when the Complainants’ wages were earned or should have been paid” and since the Complainants’ individual unpaid claims all fell below the 2-month threshold, Mr. Luong was personally liable for the full amount of each Complainant’s unpaid wage claim (see “Reasons for the Determination” at page R2).
6. The delegate did not levy any monetary penalties against Mr. Luong because there was insufficient evidence that he authorized, permitted or acquiesced in Fusionpipe’s contraventions of the *ESA* (see subsection 98(2)).

REASONS FOR APPEAL

7. Mr. Luong appeals the Section 96 Determination on all three available statutory grounds, namely, that the delegate erred in law, failed to observe the principles of natural justice, and on the ground that he now has evidence that was not available at the time the Section 96 Determination was issued (see subsections 112(1)(a), (b) and (c) of the *ESA*). Fundamentally, however, Mr. Luong's position is quite straight forward – he maintains that he was not a Fusionpipe director when the bulk of the Complainants' unpaid wage claims crystallized.
8. Mr. Luong concedes that he was a Fusionpipe director from May 21, 2010, until December 3, 2015 (when he resigned). Mr. Luong subsequently consented to serve as a Fusionpipe director on January 16, 2018, but says that he did not formally assume a directorship until January 31, 2018, when he was so appointed by a Board of Director's resolution. The Complainants' unpaid wage claims span the period from August 28, 2017 to February 27, 2018, and that being the case, Mr. Luong "should not be personally liable for wages which were earned or should have been paid prior to January 31, 2018". Mr. Luong has provided several documents that appear to corroborate his position regarding his status as a Fusionpipe director and officer since May 21, 2010. Presumably, these documents constitute his "new evidence" submitted under subsection 112(1)(c) of the *ESA* although, obviously, all of this evidence was "available" when the Section 96 Determination was issued on September 10, 2018.

FINDINGS AND ANALYSIS

9. During the course of the investigation that preceded the issuance of the Corporate Determination, Mr. Luong had some communications with the Employment Standards Branch. On March 18, 2018, Mr. Luong sent an e-mail to an Employment Standards Branch officer (not the individual who issued the determinations in this matter) that apparently followed an earlier telephone conversation with this same individual. The last paragraph of the March 18 e-mail reads as follows: "Note I have only recently joined the Board of Director's [*sic*] on **January 31st, 2018**, after returning from Parental leave from the company" [**boldface** in original text].
10. A copy of the Corporate Determination, dated June 19, 2018, was delivered by registered mail to Mr. Luong. This document contained a "Notice to Directors/Officers" referring to section 96 and other matters concerning director/officer liability.
11. Mr. Luong, by way of an e-mail to the delegate sent on June 20, 2018, acknowledged receipt of the Corporate Determination, and advised the delegate that Fusionpipe was in difficult financial straits and that its staff had been locked out of Fusionpipe's offices by the landlord. This e-mail also somewhat obliquely refers to insolvency proceedings. The subsection 112(5) record before me shows that as of March 16, 2018, there had not been any formal proceedings under the *Bankruptcy and Insolvency Act* although it also appears that such a proceeding is contemplated, if it has not already been filed.
12. The Section 96 Determination was issued following an investigation rather than an oral hearing. Had the latter occurred, Mr. Luong would have been afforded the opportunity to provide the documents he has appended to his Appeal Form. These documents appear to corroborate his position that he was not a Fusionpipe director as of January 31, 2018. I also note that the Employment Standards Branch was aware in mid-March 2018 that Mr. Luong's position was that he rejoined the Fusionpipe board of

directors on January 31, 2018. Consistent with section 77 of the *ESA*, the delegate might well have been obliged to make further inquiries of Mr. Luong regarding when he actually became a Fusionpipe director prior to issuing the Section 96 Determination.

13. In issuing the Section 96 Determination, the delegate appears to have relied solely on B.C. Corporate Registry records that show Mr. Luong was a Fusionpipe director as of February 7, 2018 (the delegate's search was conducted on March 9, 2018). However, the subsection 112(5) record also includes a B.C. Corporate Registry record entitled "Notice of Change of Directors", filed February 1, 2018, which shows that as of January 31, 2018, Mr. Luong became a "new director". This document is entirely consistent with Mr. Luong's position that he was not a Fusionpipe director during the entire period from August 28, 2017, to February 27, 2018, when the Complainants' unpaid wage claims crystallized.
14. B.C. Corporate Registry records raise a rebuttable presumption regarding an individual's status as a director or officer of a particular corporation. In this case, the records appear to show only that Mr. Luong was a Fusionpipe director as of January 31, 2018. If that were the situation, he may not be liable for any of the Complainants' unpaid wages that were earned or became payable prior to January 31, 2018. However, there is also another consideration, namely, whether Mr. Luong functioned as a corporate director or officer prior to January 31, 2018. Individuals who function as officers or directors may be held liable under subsection 96(1) even if they are not formally recorded as directors or officers in the B.C. Corporate Registry or in internal corporate records (see *Barahmand, supra*). The delegate did not address this matter in her reasons.
15. Further, while it appears to be the case that there were no formal proceedings under the *Bankruptcy and Insolvency Act* concerning Fusionpipe as of March 16, 2018, it may be that such proceedings were filed at a later date. If *Bankruptcy and Insolvency Act* proceedings (or other insolvency proceedings involving Fusionpipe) were filed prior to the issuance of the Section 96 Determination, Mr. Luong may have a complete defence under subsection 96(2)(b) of the *ESA* (see *Archibald*, BC EST # D090/00).
16. Given that the record before the delegate raised a legitimate question regarding whether Mr. Luong could be held liable for the full amount of the Complainants' unpaid wages – and the delegate's failure to address this matter with Mr. Luong prior to issuing the Section 96 Determination, or to address it in her reasons – I am of the view that this matter should be returned to the Director for further investigation.

ORDER

17. Pursuant to subsection 114(2)(a) of the *ESA*, I am referring the matter of Mr. Luong's personal liability under subsection 96(1) back to the Director for further investigation. The Director shall afford Mr. Luong a reasonable opportunity to participate in the Director's further investigation. The Director shall have 90 days from the date of this decision to file a report with the Tribunal. The Tribunal, after hearing from the parties, will then issue a final order in this appeal.

18. In the interests of expediting the resolution of this appeal, I encourage the parties to make all reasonable efforts to settle the matter of Mr. Luong's personal liability to the Complainants (see subsections 2(d) and 114(2)(b) of the *ESA*).

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal