



Citation: Hong Qian (Re)
2019 BCEST 111

An appeal

- by -

Hong Qian
("Mr. Qian")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

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

PANEL: Carol L. Roberts

FILE NO.: 2019/157

DATE OF DECISION: October 22, 2019

DECISION

SUBMISSIONS

Hong Qian on his own behalf as a Director of Sinorama Travel Vancouver Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Hong Qian (“Mr. Qian”), a Director of Sinorama Travel Vancouver Inc., has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on August 1, 2019 (the “Director Determination”).
2. Between August 31 and September 25, 2018, the Director received complaints from a number of former employees of Sinorama Travel Vancouver Inc. (“Sinorama”) alleging that Sinorama had contravened the *ESA* in failing to pay wages.
3. On August 1, 2019, the Director issued a Determination (the “August Corporate Determination”) finding Sinorama in contravention of the *ESA* in failing to pay wages to five former employees in the total amount of \$15,997.03. The Director’s delegate also imposed administrative penalties in the amount of \$1,000 for the contraventions pursuant to section 98 of the *ESA*. The August Corporate Determination, which included a Notice to Directors/Officers explaining their personal liability under the *ESA*, was sent to Mr. Qian as well as the registered and records office, and to other Sinorama directors.
4. The delegate noted that in January 2019, a Determination (the “January Corporate Determination”) had been issued against Sinorama as well as a Determination issued against Mr. Qian (the “January Director Determination”) in respect of similar complaints.
5. On March 29, 2019, a preliminary findings letter regarding the five former employees, along with information on corporate director liability for unpaid wages, was sent by registered mail to Sinorama as well as its directors including Mr. Qian. Sinorama did not dispute the delegate’s findings that the employees were owed wages, arguing only that Consumer Protection BC forced the company out of business and freezing its bank accounts.
6. The delegate issued the Director Determination on August 1, 2019, the same day as the August Corporate Determination because the corporate employer was out of business and there was a risk that assets would disappear.
7. The delegate determined that because Mr. Qian was a Director of Sinorama at the time the complainants’ wages were earned and payable, he was personally liable to pay \$15,977.03, representing not more than two months’ unpaid wages for each of the employees and interest, pursuant to section 96 of the *ESA*. The delegate concluded that there was insufficient evidence that Mr. Qian authorized, permitted, or acquiesced in Sinorama’s contraventions, and found him not personally liable for the administrative penalties.

8. Mr. Qian appeals the Director Determination contending that new evidence has become available that was not available when the Director Determination was being made.
9. Section 114 of the *ESA* provides that the Employment Standards Tribunal (the “Tribunal”) may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria.
10. These reasons are based on Mr. Qian’s written submissions, the section 112(5) “record” that was before the delegate at the time the decision was made, and the Reasons for the Determination. If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114 (1) of the *ESA*, the Respondent will and the delegate may be invited to file further submissions. If the appeal is not meritorious, it will be dismissed.

FACTS AND ARGUMENT

11. The August Corporate Determination contained the following “Notice to Directors/Officers”:

If a separate Determination is made against you as a director/officer of a company, you may not argue the merits of this Determination against the company by appealing the Determination that is made against you as a director/officer.

There are only three grounds on which you may appeal a Determination made against you as a director/officer:

 - 1) That you were not a director/officer of the company at the time wages were earned or should have been paid;
 - 2) That the calculation of your personal liability as a director/officer is incorrect; and/or,
 - 3) That you should not be liable for the penalty, where a penalty has been imposed, on the grounds that you did not authorize, permit or acquiesce in the company’s contravention.
12. A BC Company Registry search conducted September 2018 confirmed that Sinorama was incorporated in British Columbia on October 24, 2012, and that as of June 22, 2018, Hong Qian was a Director of Sinorama. Mr. Qian does not dispute that he was a corporate director of Sinorama at the time the employees’ wages were earned or should have been paid.
13. Mr. Qian contended that Consumer Protection BC took money from its general account that was to be used to pay Sinorama employees and that Sinorama is waiting for Consumer Protection BC to return the funds. A fuller factual background to this appeal is contained in *Sinorama Travel Vancouver Inc.*, 2019 BCEST 34, but in summary, Sinorama’s business license was suspended and its corporate bank accounts frozen by Consumer Protection BC because it did not have sufficient working capital to operate a travel service business.
14. Mr. Qian argues that Consumer Protection BC forcibly closed Sinorama’s office, “deprived our employees of the right to work”, “forcibly sealed our bank accounts and forcibly took away the wages we should pay our employees” and seeks the assistance of the Tribunal to recover wages from Consumer Protection BC.

15. Attached to the appeal are documents which Sinorama included with its appeal of the January Corporate Determination, including August 2018 letters from Consumer Protection BC regarding the closure of Sinorama's business and corporate bank records for the months of June to December 2018.

ANALYSIS

16. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:
- the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination;
 - evidence has become available that was not available at the time the determination was being made.
17. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the determination on one of the statutory grounds. I find that Mr. Qian has not met that burden.
18. 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 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 is in receivership,
 - ...
19. In *Re Merilus Technologies*, BC EST # D171/03, the Tribunal established the following four-part test for admitting new evidence on appeal:
- (a) the evidence could not, 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 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.
20. I am not persuaded that evidence has become available that was not available at the time the Director Determination was being made. The information submitted on appeal is not new, as it was largely submitted in a previous appeal. Furthermore, none of the material is relevant to the issue of Mr. Qian's liability for employee wages.

21. Through his appeal of the Director Determination, Mr. Qian is doing nothing more than making the same arguments made before the delegate during both Corporate Determinations. Those arguments were determined to be irrelevant by the delegate, and they were also rejected in the appeal of the January Corporate Determination.
22. Mr. Qian does not deny he was a Director of Sinorama at the time the employees' wages were earned, nor does he dispute that the employees are owed wages. His argument that Sinorama is unable to pay its employees because the corporate bank account was frozen was dismissed in Sinorama's appeal of the January Corporate Determination. Consequently, Mr. Qian is personally liable for up to two months wages for each employee.
23. I find no error in the Director Determination and dismiss the appeal.

ORDER

24. Pursuant to section 114(1)(f) of the *ESA*, I dismiss the appeal. Accordingly, pursuant to section 115 of the *ESA*, the Director Determination, dated August 1, 2019, is confirmed in the amount of \$15,977.03, together with whatever further interest that has accrued under section 88 of the *ESA* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal