

An appeal

- by -

Bo Wang, a Director of Sinorama Travel Vancouver Inc.
("Mr. Wang")

- 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.: 2019/10

DATE OF DECISION: April 17, 2019

Lee's letter also noted that she had spoken to Mr. Xi Wang Wang, another of the listed directors, on November 1, 2018, to discuss the outstanding wages. Further attempts by the delegate to speak to Mr. Hong Qian were unsuccessful.

7. The letter sent to Mr. Wang was confirmed as delivered on November 30, 2018.
8. On January 7, 2019, Delegate Lee issued a Determination ("the Corporate Determination") against STV finding that the employees were owed wages and interest. The Director also imposed two administrative penalties on STV in the total amount of \$1,000 for contraventions of the *ESA*.
9. The Corporate Determination, which included a notice to directors and officers regarding their personal liability for wages under the *ESA*, was sent to STV, with copies to the directors and the registered and records office.
10. On the same day, Delegate Lee also issued a Determination against the corporate directors because STV was no longer in business and there was a risk that its assets would disappear.
11. In the Determination under appeal (the "Director Determination"), Delegate Lee noted that a September 10, 2018, Corporate Search indicated that STV was incorporated in British Columbia on October 24, 2012, and that Mr. Wang was listed as a director. A further search conducted December 27, 2018, indicated that Mr. Wang continued to be listed as a Director.
12. Delegate Lee determined that as Mr. Wang was a director at the time the Complainants' wages were earned or should have been paid, he was liable for up to two months of the unpaid wages of the four employees. Delegate Lee was unable to conclude that Mr. Wang authorized, permitted, or acquiesced in the contravention and found that he was not personally liable for the administrative penalties.

Argument

13. Mr. Wang says that while he is a Canadian citizen, he spends most of his time in China taking care of his investments and businesses there. Mr. Wang outlined his business dealings with Mr. Hong Qian, stating that they had an arrangement whereby Mr. Wang would contribute part of the rental and renovation costs in exchange for an investment in the company. Mr. Wang says that the parties agreed that he would only share in the profits of the company, not in the management or control of it. Mr. Wang says that Mr. Hong Qian informed him that he had incorporated STV, and that Mr. Wang was a shareholder.
14. Mr. Wang says that, in approximately March 2014, when preparing his income tax return, his accountant informed him that STV's incorporation records demonstrated that he had been a director since the date of incorporation. Mr. Wang says that at no time had he consented to being a director and asked his accountant to prepare a letter of resignation. Mr. Wang contends that he delivered the letter of resignation and that Mr. Hong Qian assured him that he would "handle that for [him]."
15. Mr. Wang says that after returning to Canada from China in October 2018, he received a letter from the Branch. Because he does not read English, he had a friend explain it to him and understood there was a dispute between STV and its employees over wages. Mr. Wang says he called Mr. Hong Qian, who told

him “not to worry” and that he had retained a lawyer to deal with the issue. Mr. Wang then returned to China. He says he does not understand why he was ordered to pay wages.

16. Mr. Wang says that he contacted Mr. Hong Qian again in mid-January [2019] and that Mr. Qian again told him not to worry about the Determination as he had sufficient funds to pay the outstanding wages.
17. In support of his appeal, Mr. Wang submitted a copy of his April 10, 2013, notice of resignation to the directors of STV, effective October 24, 2012.
18. Mr. Wang contends that he did not consent to be a director of STV, and, without his consent, he could not be properly appointed as a director.
19. Mr. Wang further submits that he had no knowledge of the investigation and preliminary findings. He contends that, had he been aware, he would have made submissions to the Branch.
20. Mr. Wang asks that the Determination be varied to remove him as a director.

ANALYSIS

21. Section 114(1) of the *ESA* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the 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 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.
22. 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.
23. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I conclude that Mr. Wang has not met that burden and dismiss the appeal.

Failure to observe the principles of natural justice

24. Natural justice is a procedural right which includes the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker. There is nothing in the appeal submission supporting this ground of appeal. The Record confirms that Mr. Wang was notified of the investigation and the preliminary findings and given an opportunity to respond. Mr. Wang also acknowledged receiving Delegate Riminchan's letter, which he says he had a friend explain to him. I conclude that Mr. Wang was made aware of the complaints and his potential personal liability under the *ESA* and given an opportunity to respond.
25. I find no basis for this ground of appeal.

New Evidence

26. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:
1. 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;
 2. the evidence must be relevant to a material issue arising from the complaint;
 3. the evidence must be credible in the sense that it is reasonably capable of belief; and
 4. 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.
27. Mr. Wang was properly notified of the investigation and his potential liability under the *ESA*. I find that he had every opportunity to present all of the arguments he made on appeal to Delegate Lee during the investigation. For this reason, I conclude that the submissions made by Mr. Wang do not constitute "new evidence." Nevertheless, I have considered it and, in my view, conclude that it would not have led Delegate Lee to a different conclusion on the material issue. I have considered those arguments below.

Error of law

28. 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,

- (b) any liability to an employee for wages, if the corporation is subject to an action under section 427 of the *Bank Act* (Canada) or to a proceeding under an insolvency Act,

...

29. The Tribunal has held 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. (*Wilinofsky*, BC EST # D106/99, *Michalkovic*, BC EST # D056/00)
30. Mr. Wang argues that he was improperly appointed. Even if I accept that Mr. Wang was made an STV director without his knowledge and consent, he says that he was aware that he was listed in the corporate records as a Director of STV in 2014. If Mr. Wang did in fact submit a letter of resignation dated April 2013 (which I note is one year earlier than he says he became aware of his corporate position), he took no subsequent steps to ensure that his name had been removed from the company records. Mr. Wang does not explain if his accountant informed him of his continued directorship in STV in subsequent taxation years or what steps he did or did not take in response to that information.
31. The Tribunal has held that an honest person who is in business with a rogue who misappropriates funds and denies the director access to the company and records will be held liable (*Peter Stursberg*, BC EST # D380/01) as well as a person who is a volunteer and receives no benefit from his involvement in the corporation (*Hernandez*, BC EST # D150/02). In *Grand East*, BC EST # D074/06, the Tribunal held that liability will be imposed even where there is good evidence of fraud or oppressive conduct on the part of other directors.
32. If Mr. Wang's submission is to be believed, he trusted a business partner to protect him from any liability for wages, despite being notified on a number of occasions, including from his accountant and the Branch, that he was a corporate director. Additionally, Mr. Wang, who appears to be a sophisticated businessman, failed to make any inquiries, either with a lawyer or the Branch, regarding his potential legal liability.
33. I find no error in the delegate's conclusion that Mr. Wang was a director of STV and is liable for the unpaid wages of the four employees under section 96 of the *ESA*.
34. The appeal is dismissed.

ORDER

35. Pursuant to section 114 of the *ESA*, I deny the appeal. I order that the Determination, dated January 7, 2019, be confirmed in the amount of \$21,723.79 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