



An appeal

- by -

Xiang Ma
("Ms. Ma")

- 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: Shafik Bhalloo

FILE NO.: 2019/51

DATE OF DECISION: August 19, 2019

DECISION

SUBMISSIONS

Xiang Ma on her own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Xiang Ma (“Ms. Ma”), a Director of C1Stop Canada Inc. (“C1”), has filed an appeal of a section 96 determination that was issued on April 16, 2019 (the “Section 96 Determination”).
2. The Section 96 Determination concluded that Ms. Ma was a director of C1, an employer found to have contravened provisions of the *ESA*, at the time wages were earned or should have been paid to the Yu Zhang (“Mr. Zhang”), and as such, was personally liable under section 96 of the *ESA* for wages in the amount of \$2,155.66 inclusive of interest.
3. In her appeal, Ms. Ma submits that evidence has become available that was not available when the Section 96 Determination was being made. While the Appeal Form shows that she is seeking to have the Section 96 Determination varied, her appeal submissions suggest that she is seeking a cancelation of the Section 96 Determination.
4. In correspondence dated May 29, 2019, the Tribunal notified the Director and Mr. Zhang that it had received Ms. Ma’s appeal and was enclosing the same for informational purposes only. The Director and Mr. Zhang were also advised that no submissions on the merits of the appeal were being sought from any of them at this time. The Tribunal also requested from the Director to provide a copy of the section 112(5) “record” (the “Record”).
5. On June 11, 2019, the Tribunal received the Record from the Director and forwarded a copy of the same to Mr. Zhang and to Ms. Ma on June 12, 2019. Both were provided an opportunity to object to its completeness by 4:00 p.m. on June 26, 2019, but neither did. Accordingly, the Tribunal accepts the Record as complete.
6. On July 9, 2019, the Tribunal sent correspondence to the parties advising them that a Panel was assigned to decide the appeal.
7. Section 114(1) of the *ESA* permits the Tribunal to dismiss all or part of an appeal without seeking submissions from the other parties. I have decided that this appeal is appropriate to consider under section 114(1). Accordingly, I will assess the appeal solely on the basis of the Section 96 Determination, Ms. Ma’s submissions, and my review of the Record when the Section 96 Determination was being made. If I am satisfied that Ms. Ma’s appeal or part of it has some presumptive merit and should not be dismissed under section 114(1) of the *ESA*, the Tribunal will invite Mr. Zhang and the Director to file reply submissions on the merits of the appeal. Ms. Ma will then be given an opportunity to make a final reply to the submissions, if any.

ISSUE

8. The issue of this appeal is whether Ms. Ma has shown any basis for this Tribunal to cancel the Section 96 Determination.

THE FACTS

9. By way of background, C1 operates an immigration consulting service in Richmond, British Columbia.
10. Mr. Zhang was employed with C1 as an Assistant from May 29, 2018, to July 25, 2018.
11. After the termination of his employment, Mr. Zhang filed a complaint under section 74 of the *ESA* alleging that C1 contravened the *ESA* by failing to pay him regular wages (the “Complaint”).
12. On December 14, 2018, the delegate of the Director conducted a hearing of the Complaint and issued a determination on April 16, 2019 (the “Corporate Determination”) finding C1 to have contravened the provisions of the *ESA* and the *Employment Standards Regulation* (the “Regulation”).
13. The Corporate Determination ordered C1 to pay Mr. Zhang regular wages, vacation pay, and interest totaling \$2,155.66. The Corporate Determination also levied administrative penalties in the amount of \$2,000 under section 29 of the *Regulation* against C1 for contraventions of sections 17, 18, and 27 of the *ESA* and section 46 of the *Regulation*. The total amount of the Corporate Determination is \$4,155.66.
14. The Corporate Determination, which included a notice to directors and officers explaining their personal liability under the *ESA*, was sent by registered mail to C1’s registered and records office address on Shell Road, Richmond, British Columbia, and to its two directors, Ms. Ma and Harry Piao (“Mr. Piao”) at the mailing address provided for them in in the B.C. Online Corporate Registry search of C1 conducted by the delegate on October 1, 2018. It should be noted that the registered and records office address for C1 and the mailing address of Mr. Piao remained the same in the subsequent Corporate Registry search of C1 by the delegate on March 7, 2019, but Ms. Ma, at that time, had ceased to be a director of C1.
15. As at the date of this appeal decision, C1 has not appealed the Corporate Determination and the time for filing the appeal expired on May 24, 2019.
16. While Ms. Ma participated at the hearing of the Complaint, it was not on behalf of C1 but on her own behalf to provide evidence regarding her directorship of C1 and to dispute her personal liability for any wages found owing to Mr. Zhang in advance of any determination by the Director against C1.
17. Since no one represented C1 in the hearing, the delegate feared that C1’s assets would disappear and accordingly, issued the Section 96 Determination against Ms. Ma on the same date as the Corporate Determination.
18. In the Reasons for the Section 96 Determination (the “Reasons”), the delegate of the Director summarizes Ms. Ma’s evidence including the evidentiary basis for the Section 96 Determination against Ms. Ma. The summary of the evidence the delegate provides in the Reasons is similar to and consistent with that delineated by the delegate in the reasons relating to another section 96 determination issued against

Ms. Ma on the same date as the Section 96 Determination under appeal here. More particularly, the other section 96 determination against Ms. Ma concerned a colleague of Mr. Zhang who was an office administrator with C1. Ms. Ma attended at the hearing of the employee's complaint and gave similar evidence about her directorship of C1 as she did at the hearing of Ms. Zhang's Complaint against C1, all with a view to disputing her personal liability for any wages that may become owing to the employee.

19. At the hearing of Mr. Zhang's Complaint, Ms. Ma stated she had previously worked with Mr. Piao and, in April 2018, she once again was working with him in a business called Well Environment. During this period, in April 2018, Mr. Piao asked her to help him with a new company he wanted to start to provide immigration services to students from China and help them find jobs. He wanted Ms. Ma to become a director of the new company and told her that she did not need to do anything except sign company documents. She acceded to his request and became a director of the new company, namely, C1.
20. However, she contended at the hearing of the Complaint that, effectively, she was only an employee of C1 working in the position of a general manager. Her duties and responsibilities included accounting, payroll, administrative, and human resources. She pointed out that she did not approve payroll; Mr. Piao did. She also did not have any control over C1; she only assisted Mr. Piao and took direction from him. It was Mr. Piao who had signing authority, although she did sign an application on behalf of C1 to open a business account with WeChat.
21. In May 2018, when C1 failed to pay her wages, she did not feel comfortable working with Mr. Piao and wanted to quit her directorship in C1. Mr. Piao "begged" her to continue as a director of C1 and she acquiesced only because she was expecting some commissions from Well Environment and felt that she had to continue as a director of C1 if she was going to obtain payment of these commissions.
22. Ms. Ma submitted incorporation documents of C1 at the hearing of the Complaint. She pointed out that the documents showed 1156366 B.C. Ltd. as the incorporator and Mr. Piao as owner of all shares of the company. She owned no shares in C1.
23. At the hearing, Ms. Ma also confirmed to the delegate that she was a director of C1 until the end of July 2018 when she officially resigned as a director. She was not needed after all the employees of C1 were dismissed.
24. She also submitted into evidence at the hearing her text message correspondences dated August 25, 2018, and September 14, 2018, with Mr. Piao. In the August 25 text message, she asks Mr. Piao when he "could finish the process (resignation)" from C1 and in the September 14 text messages she asks, "have you done of (sic) my resignation of (sic) Director?"
25. At some point after these text messages to Mr. Piao, Ms. Ma found the password to the BC Registry and updated her directorship information in November 2018.
26. The Record indicates that on October 1, 2018, the delegate conducted a BC Registry Services online corporate search of C1. The search, with a currency date of September 17, 2018, showed that C1 was incorporated on April 2, 2018, and Ms. Ma was listed as one of two directors of C1 along with Mr. Piao. A subsequent search on March 7, 2019, with a currency dated of January 15, 2019, listed Mr. Piao as the sole director.

27. On November 30, 2018, a Notice of Change of Directors was filed (presumably by Ms. Ma after she found the password to the BC Registry) and she ceased to be a director of C1 as of July 31, 2018. In the result, the delegate states the search confirmed that Ms. Ma was a director of C1 between May 28, 2018, and July 25, 2018, when Mr. Zhang's wages were earned or should have been paid.
28. The delegate also notes in the Reasons that Ms. Ma did not dispute that she was a director when Mr. Zhang's wages were earned and should have been paid. While Ms. Ma stated that she discussed her resignation as a director of C1 with Mr. Piao multiple times, she only officially resigned as a director at the end of July 2018.
29. According to the delegate, the gist of Ms. Ma's argument at the hearing was that she should not be held liable for unpaid wages to Mr. Zhang because she herself was only an employee of C1 and did not perform any functions, tasks, or duties of a director or exercise authority of a director.
30. In rejecting Ms. Ma's argument that she was not a director of C1 at the material times, the delegate contended that exceptions to the personal liability of a director under section 96(2) of the *ESA* do not include any discretion to relieve a director who is listed in the corporate registry from unpaid wage liabilities based on a functional test of a director. The delegate went on to elaborate as follows:
- Corporate records raise a rebuttable presumption that a person is a director. In other words, the Director of Employment Standards may presumptively rely on those records to establish that a person is a director. While Xiang Ma never acted as a director, her liability under Section 96 as a listed director in the corporate records and the presumption of correctness is not rebutted. (See *Edward McHollister* BC EST # D099/08 and *Lucile M. Pacey* BC EST #D121/04) Therefore, the fact that Xiang Ma never acted as a director does not relieve her of her liability for unpaid wages.
31. The delegate also rejected Ms. Ma's contention that she should not be personally liable for unpaid wages to Mr. Zhang because 11156366 B.C. Ltd. was the incorporator of C1, and Mr. Piao owned 100% its shares and she did not personally profit from C1's business. According to the delegate, neither share ownership in nor financial gain from the company's business are relevant considerations in determining liability under section 96 of the *ESA* where one is listed as a director or officer in the corporate records.
32. The delegate also did not find persuasive Ms. Ma's submissions that she was "tricked" by Mr. Piao into becoming a director and promised by him that she would not incur any liability acting as a director of C1. The delegate stated that while Ms. Ma may not have been aware of the implications and responsibilities of a listed director on corporate records, her liability under section 96 is not mitigated because she was "uninformed, misinformed or misled about the potential risks of being named a director (*Dyan Judith Van Dam* BC EST #D080/04.)". The delegate went on to add:
- This holds true for misrepresentations and even fraudulent conduct by other directors. (See *Edward McHollister* BC EST # D099/08.) I find that Xiang Ma is not relieved of her liability under section 96 of the Act based on misrepresentation or oppressive conduct.
33. Accordingly, the delegate concluded that Ms. Ma was a corporate director of C1 from May 28, 2018, until July 31, 2018, during which wages were earned and owed to Mr. Zhang and she is personally liable for up to two months' unpaid wages.

34. Since the Corporate Determination calculated the total amount owing to Mr. Zhang is \$2,155.66, far less than the total of the two months' wages of Mr. Zhang, the delegate held that Ms. Ma was personally liable to pay Mr. Zhang the full amount owing.
35. As for the administrative penalties levied against C1 in the Corporate Determination, the delegate found there was no evidence that Ms. Ma authorized, permitted or acquiesced in the contraventions of C1 and did not find her responsible for the penalties.

SUBMISSIONS OF MS. MA

36. Ms. Ma submits identical arguments that were raised in an earlier appeal by her, which was dismissed in 2019 BCEST 83. More particularly Ms. Ma states that evidence has come available that was not available at the time the Section 96 Determination was being made. She submits three documents. The first is a document titled "RELEASE AND WAIVER OF LIABILITY CONSENT AGREEMENT" (the "Release and Indemnity Agreement"). The document is purportedly signed by Mr. Piao, Ms. Ma, and a witness, Kenny Lo ("Mr. Lo"). According to Ms. Ma, Mr. Lo was a former work colleague of hers and a friend of Mr. Piao.
37. The Release and Indemnity Agreement provides that Mr. Piao is releasing and indemnifying Ms. Ma from "all liability, claims, demands, losses or damages caused or alleged to be caused in whole or in part by the operation of C1Stop Canada Inc."
38. The second document is a letter from Ms. Ma to Mr. Piao with a subject heading "Letter of Resignation" and dated April 3, 2018 (the "April 3 Resignation Letter"). The document is purportedly signed by a witness whose signature has a likeness to Mr. Lo's purported signature in the Release and Indemnity Agreement. It is also purportedly signed by Mr. Piao. It reads as follows:
- I am writing to clarify to you that your decision to name me a Director of C1Stop Canada Inc. is not appropriate as I am a regular employee and do not have any shares or interest of (sic) your company.
- I will be performing my regular line of duty regardless of the executive title you have awarded me. Earning my regular wages and hours are still my commitment.
39. The third document is a letter from Ms. Ma to Mr. Piao dated May 30, 2018, with a similar subject heading to the April 3 Resignation Letter: "Letter of Resignation" (the "May 30 Resignation Letter"). It is purportedly signed by Mr. Piao and witnessed by Mr. Lo. It reads as follows:
- I resign as a director of, together with any other office or appointment held by me with C1STOP CANADA INC (sic)
- My resignation is effective immediately. Whereas my Manager duty (sic) shall retain.
40. In her written submission in the appeal, Ms. Ma states that when Mr. Piao asked her to be a director of C1, which he was planning to incorporate in April 2018, she was not interested. However, as a "condition" of her agreement, she states:
- [He] agreed the (sic) concept of my letter of resignation and Release and waiver of liability consent agreement that I submitted (sic) him on Apr 3, 2018 to clarify that I was a regular employee and he waived my liability for (sic) director.

May 30, 2018 was the date I handed in my resignation letter to Harry Piao and asked him to process my resignation. ... He held the paper until recently as I need it (sic). This letter verified that I already ceased to be a director on May 30, 2018 and effective immediately. So I was not a director when C1stop Canada Inc (sic) owed Yu Zhang wage (sic) in July, 2018.

...

Overall, I already resigned from the position of director of C1stop Canada Inc. on May 30, 2018 so I should not be personal (sic) liable for wage (sic) of \$2,155.66 owed to Yu Zhang of July, 2018 (sic)

ANALYSIS

41. As indicated in the section above, this appeal makes the identical arguments that were raised in an earlier appeal by Ms. Ma, which was dismissed in 2019 BCEST 83. In that appeal, like this appeal, Ms. Ma argued she was not personally liable under section 96 of the *ESA* because she was not a director of C1 at the time the employee's wages were earned or should have been paid by C1. She relied on the same three "new" documents in that appeal, namely, the April 3 Resignation Letter, the May 30 Resignation Letter and the Release and Indemnity Agreement. I adopt and apply all of the same reasoning and decision in that earlier decision in this appeal and similarly dismiss Ms. Ma's arguments here.
42. As in the earlier appeal, the facts in this appeal also do not show that circumstances described in section 96(2) of the *ESA* would apply to relieve Ms. Ma from personal liability.
43. Lastly, as in the earlier decision, I find the delegate's legal analysis in the Reasons in this case is correct and persuasive when she states that exceptions to the personal liability of a director under section 96(2) of the *ESA* do not include any discretion to relieve a director who is listed in the corporate registry from unpaid wage liabilities based on a functional test of a director. I also find the delegate is correct in stating that share ownership in or financial gain from the company's business are not relevant considerations in determining liability under section 96 of the *ESA* where one is listed as a director or officer in the corporate records. I also agree with the delegate that while Ms. Ma may not have been aware of the implications and responsibilities of a listed director on corporate records, her liability under section 96 is not mitigated because she was uninformed, misinformed or misled about the potential risks of being named a director.
44. In the circumstances, I find no merit in this appeal, and I find there is no reasonable possibility that this appeal can succeed, and it is dismissed under section 114(1)(f) of the *ESA*.

ORDER

45. Pursuant to section 115 of *ESA*, I confirm the Section 96 Determination made on April 16, 2019, against Ms. Ma, a former Director of C1, together with any additional interest that has accrued pursuant to section 88 of the *ESA*.

Shafik Bhalloo
Member
Employment Standards Tribunal