Employment Standards TRIBUNAL

Citation: Zi An Wang (Re)
2020 BCEST 107

An Application for Reconsideration

- by -

Zi An Wang
(the "applicant")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Kenneth Wm. Thornicroft

FILE No.: 2020/106

DATE OF DECISION: August 19, 2020

DECISION

SUBMISSIONS

Zi An (Charles) Wang — on his own behalf

INTRODUCTION

1. This is an application for reconsideration filed by Zi An (Charles) Wang (the "applicant") pursuant to section 116 of the *Employment Standards Act* (the "*ESA*"). The application concerns an appeal decision, 2020 BCEST 81, issued by Tribunal Member Roberts on July 8, 2020 (the "Appeal Decision").

2. By way of the Appeal Decision, the Tribunal confirmed a determination issued against the applicant under section 96(1) of the *ESA* on March 6, 2020 (the "Section 96 Determination"). Section 96(1) 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."

3. In my view, this application does not pass the first stage of the two-stage *Milan Holdings* test (see *Director of Employment Standards and Milan Holdings Inc.*, BC EST # D313/98) and, as such, must be dismissed. My reasons for reaching that conclusion now follow.

PRIOR PROCEEDINGS

4. Fenqi Tang (the "complainant") filed an unpaid wage complaint under section 74 of the *ESA* and this, in turn, eventually resulted in a determination being issued against Tenkk Consulting Ltd. and QW Investment Management Ltd. on April 18, 2019 (the "Corporate Determination"). The Corporate Determination, issued by a delegate of the Director of Employment Standards (the "delegate") held these two firms – which were declared to be one employer under section 95 of the *ESA* – jointly and separately liable for unpaid wages in the total amount of $7,274.64 including section 88 interest.

5. In addition, and also by way of the Corporate Determination, the two firms were held liable for $3,500 on account of seven separate $500 monetary penalties (see section 98 of the *ESA*). Accordingly, the total amount payable under the Corporate Determination is $10,774.64.

6. The applicant represented Tenkk Consulting Ltd. during the course of the delegate's investigation. The Corporate Determination was never appealed and it now stands as a final order.

7. Since the Corporate Determination remained unpaid as of March 6, 2020, the Section 96 Determination was issued against the applicant in the total amount of $5,590.11 including section 88 interest.

8. The applicant appealed the Section 96 Determination on the ground that the Director of Employment Standards failed to observe the principles of natural justice in issuing the determination (section 112(1)(b) of the *ESA*).

9. On July 8, 2020, the Appeal Decision was issued, dismissing the appeal and confirming the Section 96 Determination. The Tribunal Member rejected the applicant's "natural justice" ground of appeal. The relevant portions of the Appeal Decision regarding this ground of appeal are as follows (paras. 24 – 27):

> 24. Natural justice is a procedural right that includes the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker.
>
> 25. I find no basis for the Appellant's argument on this ground. Not only was he notified of the Employee's wage complaint, he responded to it on behalf of Tenkk. Furthermore, the Corporate Determination, dated April 18, 2019, was sent by registered mail to the Appellant along with a notice advising him of his potential personal liability as a director for unpaid wages. Canada Post tracking information confirms he received the Corporate Determination on April 30, 2019. As noted above, because the Corporate Determination was not appealed, it is not now open to the Appellant to challenge the merits of the decision.
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> 26. In the Corporate Determination, the Director made a finding under section 95 of the *ESA* that Tenkk and CPIG were associated employers. As a consequence of that finding, the Director is able to treat the corporations as one employer. Thus, whether the Employee was employed by QW or by Tenkk, by virtue of the section 95 finding, Tenkk is jointly responsible for the payment of wage claims.
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> 27. There is no argument, nor is there any basis in the record for concluding, that the delegate failed to observe the principles of natural justice. I deny the appeal on this ground.

10. The Tribunal Member also considered the applicant's fundamental ground of appeal, namely, that he was not a corporate director when the complainant's unpaid wage claim crystallized. This argument was also rejected (see Appeal Decision, paras. 32 – 36):

> 32. The Corporate Records indicate that the Appellant was a director of Tenkk as of November 30, 2017, and remained the sole director as of March 20, 2018.
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> 33. The Appellant argued that under sections 121, 122, and 123 of the Business Corporation Act (SBC 2002, c. 57) (the "BCA"), no election or appointment of a director is valid unless the individual consents to the appointment and that he did not consent to such appointment as a director.
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> 34. I do not accept the Appellant's argument in this regard. Even if I was persuaded that the Appellant's consent to an appointment was required (and I do not, given that he was a founding and sole director of the CPIG Group), section 123(1)(b) of the *BCA* provides that an individual from whom consent is required may consent to an election or appointment of a director by performing the functions of a director. The evidence is that the Appellant responded to the Director's inquiries regarding the Employee's wage claim on Tenkk's behalf. At no time during the Director's investigation did the Appellant advance any argument that he was not a director of Tenkk.
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> 35. The Appellant has provided no evidence that satisfies me, on a balance of probabilities, that he was not a corporate director or officer of one of the associated companies during the period when the Employee's wages were earned.
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> 36. Consequently, I also find no error of law in the Determination, and conclude there is no reasonable prospect the appeal will succeed.

11. The applicant's appeal was dismissed pursuant to section 114(1)(f) of the *ESA*.

THE APPLICATION FOR RECONSIDERATION

12. The applicant advances the following assertion of bias against the Tribunal Member who issued the Appeal Determination:

> When I received your determination, I researched the Administrative Tribunals Act and understood that you are appointed by the Minister of Labour BC and your role is not really an objective party to determine the fitness of the Director's determination. Instead of, you are like the big boss I have to fight on.
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> I felt very disappointed also about the potential interest deliver within the Ministry of labour and the tribunal, because there is conflict of interest existed in my eyes…
>
> Ministry of Labour has the capability to hire, reward and terminate you and directors of ESB. Both EST and ESB are in fact two government functional departments to achieve the same goal of the Ministry of Labour which is to increase speed of ESB case processing and to achieve a 85% completion of cases within 180days. [*sic*]

13. The applicant also advanced some arguments with respect to the merits of the Appeal Decision. The applicant appears to be saying that it was an error of law for the Tribunal to treat the Corporate Determination as a final order with respect to the complainant's unpaid wage entitlement. The applicant continues to assert that he was not a corporate director when the complainant's unpaid wage claim crystallized. He also claims that he is the victim of an "extortion trap" by the complainant.

FINDINGS

14. The allegation that the Tribunal Member was biased – seemingly based on the argument that both the Employment Standards Branch and the Tribunal are provincially-funded entities – is not, in my view, well-founded. Indeed, it strikes me as being wholly frivolous and vexatious. Bias is a serious allegation, and there is an absolute dearth of any cogent evidence in the record before me to indicate that the Tribunal Member was, or even appeared to be, predisposed to rule against the applicant in this matter.

15. With respect to the applicant's arguments regarding the merits of the Appeal Decision, the Tribunal's jurisprudence clearly supports three propositions.

16. First, a final order regarding a complainant's unpaid wages – as fixed by a determination against the corporate employer – cannot be challenged by way of collateral attack in a separate appeal of a determination issued against the corporation's directors and/or officers. The proper course to challenge the original unpaid wage determination is by way of an appeal of the determination issued against the corporation. Since, in this instance, no such appeal was ever filed, the wages determined to be owing to the complainant were finally determined.

17. Second, in an appeal of a determination issued against a corporate officer or director under section 96 of the *ESA*, the issues properly before the Tribunal are whether the individual was a corporate officer/director when the unpaid wages "were earned or should have been paid", and whether the "2-month unpaid wages" were correctly calculated. As set out in the Appeal Decision: "…the [applicant]

responded to the Director's inquiries regarding the [complainant's] wage claim on Tenkk's behalf [and] at no time during the Director's investigation did the [applicant] advance any argument that he was not a director of Tenkk." Further, the applicant never challenged the correctness of the 2-month unpaid wage calculation in his appeal. The sole basis for the applicant's appeal of the Section 96 Determination was that he was not a director of either corporate entity when the complainant's unpaid wage claim crystallized. The applicant, in his reconsideration application, stated that following his receipt of the Corporate Determination, in April 2019, he "wrote a long email to the [delegate] to state my disagreement on her decision and received her zero response" [*sic*]. The applicant either was, or should have been, well aware of his potential liability under section 96 of the *ESA* if the Corporate Determination stood as a final order (see Appeal Decision, para. 25). Nevertheless, the applicant never caused either corporation to file an appeal of the Corporate Determination.

18. Third, in determining whether an individual is a corporate director or officer, the Director of Employment Standards is entitled to rely on records filed with the BC Corporate Registry. These records establish a "rebuttable presumption" that individuals named in the records as corporate directors or officers are actually corporate directors or officers. As noted above, the applicant represented Tenkk Consulting Ltd. during the delegate's investigation, and even wrote a letter to the delegate, presumably on behalf of one or both of the corporations named in the Corporate Determination, expressing his disagreement with the Corporate Determination. In my view, the findings in the Appeal Decision, especially at paras. 34 – 35 (reproduced above), are a complete answer to the applicant's argument that he cannot be held liable as a corporate director under section 96(1) of the *ESA*.

ORDER

19. Pursuant to section 116(1)(b) of the *ESA*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal