



Citation: Zi An Wang (Re)
2020 BCEST 81

An appeal

- by -

Zi An Wang
(the “Appellant”)

- 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: Carol L. Roberts

FILE No.: 2020/048

DATE OF DECISION: July 8, 2020

DECISION

SUBMISSIONS

Zi An Wang on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Zi An Wang (the “Appellant”), a Director of Tenkk Consulting Ltd. and QW Investment Management Ltd. carrying on business as CPIG Sales and Brokerage, has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 6, 2020 (the “Director Determination”).
2. The Director received a complaint from a former employee of Tenkk Consulting Ltd. (“Tenkk”) and QW Investment Management Ltd. carrying on business as CPIG Sales and Brokerage (collectively, the “Employer”) alleging that the Employer had contravened the *ESA* in failing to pay her wages for work performed between September 13, 2017, and March 12, 2018.
3. On April 18, 2019, the Director issued a determination finding that the Employer had contravened the *ESA* in failing to pay wages. The delegate calculated that wages and interest in the total amount of \$7,274.64 were owed to the employee (the “Corporate Determination”). The delegate also imposed administrative penalties in the amount of \$3,500 on the Employer for contraventions of the *ESA*, for a total amount owing of \$10,774.64.
4. The Corporate Determination, which included a notice to directors and officers outlining their personal liability under the *ESA*, was sent to the Employer with copies to the registered and records office as well as to the officers and directors including the Appellant. The last date to appeal the Corporate Determination was May 27, 2019. The Employer neither appealed the Determination nor paid the amount determined owing.
5. The delegate conducted a corporate registry search on February 25, 2019, and found that Tenkk was incorporated on March 21, 2011. A Notice of Change of Directors filed on July 16, 2018, indicated that the Appellant, who was removed as a director effective July 22, 2017, was reinstated as a director effective November 30, 2017. The Appellant remained the sole Director effective October 17, 2019.
6. A corporate registry search conducted by the delegate on October 30, 2019, indicated that QW Investment Management Ltd. carrying on business as CPIG Sales and Brokerage was incorporated on October 12, 2016. The Appellant was removed as a director of QW Investment Management Ltd. effective June 12, 2017, and reinstated as a director on October 18, 2018.
7. The delegate found that the Appellant was a director of the Employer during the time the Employee’s wages were earned or should have been paid, and consequently, that he was personally liable for up to two months’ unpaid wages. The delegate concluded that the Appellant was personally liable to pay \$5,590.11, representing two months’ unpaid wages for the employee and interest, pursuant to section 96 of the *ESA*.

8. The delegate found insufficient evidence that the Appellant authorized, permitted, or acquiesced in the Employer's contraventions and determined that he was not personally liable for the administrative penalties.
9. The Appellant appeals the Director Determination contending that the Director failed to observe the principles of natural justice in making the Director Determination.
10. Upon receiving the appeal submissions, the Employment Standards Tribunal (the "Tribunal") sought the section 112 record from the Director's delegate. On April 20, 2020, the Tribunal provided that record to the parties and sought their submissions on the completeness of the record. The Appellant contended that documents submitted by the Employee and relied on by the delegate were not included in the record and specifically enumerated nine documents that he believed were necessary for "a comprehensive hearing."
11. The Director confirmed that the record was complete and submitted no additional documents.
12. I am satisfied that the record is complete. The records sought by the Appellant are not relevant to the Director Determination. While all the specified records identified by the Appellant may have been relevant to the Corporate Determination issued April 18, 2019, they have no bearing on the question of whether or not the Appellant was a director of the Employer, which is the subject of the appeal.
13. Section 114 of the *ESA* provides that 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.
14. These reasons are based on the written submissions of the Appellant, the section 112(5) "record" that was before the delegate at the time the decision was made, and the Reasons for the Determination.

FACTS AND ARGUMENT

15. The 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 the 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.

16. The Appellant advances four arguments on appeal as follows:
- 1) that he was not a director of Tenkk from November 30, 2017;
 - 2) that he was not a director of QW Investments from January 1, 2018;
 - 3) that neither QW Investment nor its predecessor company, CPIG Sales and Brokerage, is related to Tenkk, and that in any case, the employee did not work for QW Investments; and
 - 4) the “entire determination is mistakenly structured.”
17. The Appellant makes a number of arguments including that he “gave” a predecessor company of Tenkk to “Stacey” to “open” and that he ceased to be a director on July 22, 2017. The Appellant says that Tenkk was incorporated in July 22, 2017, rather than 2011 as found by the Director.
18. The Appellant says that “Stacey” removed herself as a director of Tenkk in July 2018 and added him. He argues that he did not accept the directorship and that because he did not do so, the “transfer of directorship” did not comply with the provisions of the *Business Corporation Act* (“BCA”). He further argues that “Stacey” did not inform him of the transfer of directorship, nor did she ask him for his agreement to do so. He argues that he is not a director of Tenkk. He further submits that he is not the “controlling mind” of Tenkk and has not been since November 2017.
19. The Appellant also argues that CPIG Sales and Brokerage, the predecessor company to QW Investment, ceased its activities in October 2017 after being investigated by the B.C. Securities Commission. He submits that “Stacey” “changed the company’s business into QW Investment”, and in October 2018, submitted a change of director form replacing her name with his. He contends that he was never asked to be a director, and he did not agree or accept to be a director. He says he was not a director of QW Investment from January 1, 2018.
20. The Appellant made further submissions that address the delegate’s findings in the Corporate Determination. As the Corporate Determination was never appealed, it is not now open to the Appellant to make further arguments about either the quantum or the corporate liability for wages. (see *Kerry Steinemann, Director/Officer of Pacific Western Vinyl Window & Doors Ltd.*, BC EST # D180/96) I have not set out any of the Appellant’s arguments on these issues.

ANALYSIS

21. Section 114 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, 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 Appellant based his appeal on the grounds that the Director failed to comply with natural justice.

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.

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.

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.

28. The thrust of the Appellant's submissions is that he is not a director of either of the corporate entities identified as the Employer.

29. 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

- (i) is in receivership, or
- (ii) is subject action under section 427 of the *Bank Act* (Canada) or to a proceeding under an insolvency Act,

...

30. In *The Director of Employment Standards (Re: Michalkovic)*, BC EST # RD047/01, the Tribunal set out the proper approach for determining who is a corporate officer and director as follows:

The corporate records, primarily those available through the Registrar of Companies or available at a corporation's registered and records office, raise a rebuttable presumption that a person is a director or officer. In other words, the Director of Employment Standards may presumptively rely on those corporate records to establish director or officer status.

It is then open to the person, who, according to the corporate records, is a director or officer, to prove on the balance of probabilities that the company records are *inaccurate*, for example, because the person resigned and the documents were not properly processed, a person is not properly appointed etc....

31. Furthermore, the Tribunal has also held that while corporate records raise a rebuttable presumption that a person is a director of a company, the burden of proving that one is not a corporate director or officer lies with the individual who denies that status. (see *Wilnofsky*, BC EST # D106/99)

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.

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.

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.

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.

36. Consequently, I also find no error of law in the Determination, and conclude there is no reasonable prospect the appeal will succeed.

ORDER

37. Pursuant to section 114 (1)(f) of the *ESA*, I dismiss the appeal. Accordingly, pursuant to section 115 of the *ESA*, the Determination dated March 6, 2020, is confirmed in the amount of \$5,590.11, 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