

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Bing Lu Zhang
(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.: 2020/058

DATE OF DECISION: July 29, 2020

DECISION

SUBMISSIONS

Ryan R. Lee

counsel for Bing Lu Zhang

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Bing Lu Zhang (the “Appellant”) appeals a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 6, 2020 (the “Director Determination”).
2. A former employee of Tenkk Consulting Ltd. and QW Investment Management Ltd. carrying on business as CPIG Sales and Brokerage (collectively, the “Employer”) filed a complaint with the Director 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 concluding that the Employer had contravened the *ESA* in failing to pay the employee wages and finding that the employee was entitled to wages and interest in the amount \$7,274.64. (the “Corporate Determination”)
4. The Corporate Determination, which included a notice to directors and officers explaining their personal liability under the *ESA*, was sent to the Employer with copies to the registered and records office as well as to the Employer’s officers and directors. 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. A corporate registry search on February 25, 2019, disclosed that Tenkk Consulting Ltd. was incorporated on March 21, 2011, that the Appellant became a Director of Tenkk on August 8, 2017 and that she remained a Director until November 30, 2017. The search further disclosed that QW Investment Management Ltd. carrying on business as CPIG Sales and Brokerage was incorporated on October 12, 2016 and that the Appellant was a director of QW Investment Management Ltd. until January 1, 2018.
6. The delegate determined that the Appellant was a director of the Employer during the time the Employee’s wages were earned or should have been paid, and that she was personally liable for up to two months’ unpaid wages.
7. The delegate found that the Appellant was liable to pay \$5,200, representing two months’ unpaid wages for the employee and interest, pursuant to section 96 of the *ESA*.
8. The Appellant contends that the Director erred in law and failed to observe the principles of natural justice in making the Determination. The Appellant also argues that there is evidence that was not available to the Director at the time the Determination was issued.
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. After reviewing the appeal submissions, I sought submissions from the Director and from the employee. Neither party made submissions.

10. These reasons are based on the Appellant's written submissions, the section 112(5) "record" that was before the delegate at the time the Determination was made, and the Reasons for the Determination.

FACTS AND ARGUMENT

11. 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 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. The Appellant says that Zi An (Charles) Wang ("Mr. Wang") is the owner, director, shareholder, officer and controlling mind of Canada Prime Investment Group ("CPIG") and several related companies including Tenkk Consulting Ltd. and QW Investment Management Ltd. She asserts that the businesses of the companies were intermingled and employees hired by one company worked for multiple companies in the CPIG Group. She says that the companies operated out of one office in Richmond that was listed as the records and registered address for each of the companies.

13. The Appellant says that she was hired by CPIG as an assistant in May 2016. In October 2016, she entered into an employment contract for the position of administration and marketing officer with CPIG but did work for other companies, including Tenkk, reporting to Mr. Wang. The Appellant says that she was not paid for her work and in March 2018, CPIG stopped paying all its employees. She says that the CPIG Group moved offices in May 2018 as it could no longer afford rent and that she returned to work at her father's restaurant.

14. The Appellant says that on January 12, 2017, Mr. Wang added her as a director of QW and removed himself. She says that there had been no prior discussions between them about this change, that she was unaware of the change, and that she never consented to it. All of the notices of the change of directors had the Richmond office as a mail and delivery address.

15. The Appellant says that in July 2017, Mr. Wang informed her that the CPIG Group was under investigation by the B.C. Securities Commission and that he wanted to change her job title for one of his companies so that the company could continue to operate without the scrutiny of the Commission. The Appellant

asserts that she did not know what a director was at that time, that Mr. Wang told her it was just a job title and that there were no legal responsibilities associated with it. She says she did not receive any documents to sign and never received any confirmation that any changes were made.

16. The Appellant further states that on July 12, 2017, Mr. Wang filed a notice of change of directors for Tenkk removing himself and adding her. She says that she did not consent to act as a director, and submits as new evidence an unsigned consent to act as a director of Rose Garden Education Development Centre Ltd., Tenkk's predecessor company. It is dated July 11, 2017. The Appellant says she has never seen the corporate minute book for QW and has never signed anything consenting to act as a director for that company.
17. The Appellant says she was not aware that Mr. Wang had filed corporate forms changing the directorship and that she continued to act as his employee. In support of her appeal submission, the Appellant submitted pay statements from the CPIG Group for 2017 identifying her as an Administrative Assistant and a 2016 T4 slip issued by CPIG setting out her employment income.
18. The Appellant further states that in March 2018, she became concerned about her liability when a colleague asked her about unpaid wages. She says she asked Mr. Wang if being a director made her responsible for the employees' unpaid wages, and that Mr. Wang assured her that it was just a title.
19. In June 2018, CPIG Group abandoned its offices because it was unable to make rent payments. The Appellant says she noticed that Mr. Wang had left Tenkk's corporate minute book behind, so she took it with her when she left. In July 2018, the landlord of CPIG's new office contacted the Appellant, asking who Bing Lu Zhang was, as he was going to sue Tenkk for unpaid rent. It was at this time that the Appellant says she became aware Mr. Wang had unilaterally made changes to the company that could result in legal consequences to her.
20. In September 2018, Mr. Wang informed the Appellant that the employee had filed a complaint for unpaid wages, and asked her to prepare correspondence regarding the employee's employment.
21. The Appellant further argues that the Director failed to observe the principles of natural justice as she was given no opportunity to participate in the Director's investigation. She says she did not receive any of the delegate's notices as they were all sent to an address which is the former address of a company she no longer works for, and that the Director obtained the company address from forms that she had no involvement in preparing. The Appellant says she was not aware that a Determination had been issued against her until the employee sent her a copy in February 2020.
22. The Appellant says that although this evidence was available at the time the Determination was being made, as she was never contacted it was never provided to the delegate during the investigation.
23. The Appellant argues that, under sections 122(4) 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. The consent can take the form of an election or appointment at a meeting where the individual is present and does not object to the appointment (s. 122(4)(b) of the *BCA*); the individual provides written consent to the company (s. 123(1)(a)(i) of the *BCA*); or the individual performed the

actions of a director or realized the benefits exclusively available to a director after they knew or ought to have known of their election as a director (s. 123(1)(b)(ii) of the *BCA*).

24. The Appellant says that she was employed to perform administrative tasks for the Employer and that she was not responsible for any of their administrative decisions. She also notes that, throughout the Director's investigation, Mr. Wang represented Tenkk and QW and at no point did he claim not to be a director. She further notes that Mr. Wang sued her to recover payment of an accounting invoice, alleging that he had to hire a third party to bring the companies up to date, which constitutes further evidence he is still acting as the operating mind of Tenkk and QW.

25. The Appellant seeks to have the Determination cancelled.

ANALYSIS

26. 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.

27. The sole issue on this appeal is whether the Appellant was a director of either of the corporate entities at the time the employee's wages were earned or should have been paid.

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
 - (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,

...

29. Corporate records raise a rebuttable presumption that a person is a director of a company. (*Wilinofsky*, BC EST # D106/99) However, that presumption can be rebutted if a director can prove, on a balance of probabilities, that they were not a director because they were never properly appointed or because they resigned. (*Michalkovic*, BCEST # D056/00, upheld on Reconsideration BC EST # RD047/01)

30. 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.
31. While the evidence submitted on appeal was available during the investigation of the complaint, I accept that the Appellant did not present it to the Director because she was never notified of the investigation into the employee's wages. All the correspondence was sent to the corporate offices, from which the group of companies no longer operates. I further accept that, had the Appellant been notified about the complaint, she would have informed the Director about her work for the Employer companies and her lack of knowledge and consent to acting as a director of QW and Tenkk. I also find that the new evidence is material to the issue of whether or not she is a corporate director, and that it is both credible and probative of the issue on appeal.
32. Although the corporate searches confirmed that the Appellant became a director of the employer companies, I am satisfied, on the new evidence, that the corporate records are incorrect.
33. I find the Appellant's evidence that she was never properly appointed as a corporate director of either of the two corporate employers under the *BCA* and that she never consented to act as a director, to be both credible and persuasive.
34. The consent form to act as a director for the predecessor company of Tenkk was never signed. There is no evidence the Appellant consented to be a director of QW, either by way of a written consent form or corporate minutes indicating that she agreed to do so.
35. The Appellant received payroll statements from CPIG for 2017 confirming that she was an Administrative Assistant. The Appellant also submitted a May 16, 2017 letter from Mr. Wang addressed "to whom it may concern" confirming that she was employed full time with CPIG in charge of "administration and marketing." The evidence supports the Appellant's assertions that she was only an employee of the group of companies, including the Employer.
36. There is no evidence to suggest that the Appellant acted as, or performed the functions of, a director. The evidence is that Mr. Wang has always held himself out to be the directing mind of CPIG. During the Director's investigation of the wage complaint, Mr. Wang alone responded to the Director's correspondence on behalf of the corporate entities.
37. I allow the appeal. I am persuaded that Appellant has met her burden of demonstrating that the corporate records are incorrect and that the Determination should be cancelled.

ORDER

38. Pursuant to section 115(1)(a) of the *ESA*, the Determination, dated March 6, 2020, is cancelled.

Carol L. Roberts
Member
Employment Standards Tribunal