

EMPLOYMENT STANDARDS TRIBUNAL

An appeal
pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

Lu Lu Yan, a director of Refresh Wellness LLC and Epic Allianz Ltd.
("Ms. Yan")

- of a Determination issued by -

The Director of Employment Standards

PANEL: Shafik Bhalloo, K.C.

FILE NO.: 2023/105

DATE OF DECISION: November 1, 2023

DECISION

SUBMISSIONS

Lu Lu Yan on her own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (“ESA”), Lu Lu Yan (“Ms. Yan”), a director of Refresh Wellness LLC (“Refresh”) and Epic Allianz Ltd. (“Epic Allianz”) (collectively the “Companies” or “Employer”), has filed an appeal of a section 96 determination (corporate officer’s liability for unpaid wages) that was issued on June 9, 2023 (“Determination”) by the Director of Employment Standards (“Director”).
2. The Determination concluded that Ms. Yan was a director of the Companies, an employer found to have contravened provisions of the *ESA*, at the time wages were earned or should have been paid to Huiying Wang (“Ms. Wang”), and as such was personally liable under section 96 of the *ESA* for wages payable to her in the amount of \$3,986.84 inclusive of accrued interest.
3. In her appeal, Ms. Yan invokes a single ground of appeal, namely, evidence has become available that was not available at the time the Determination was being made.
4. It should be noted that the Tribunal received Ms. Yan’s appeal of the Determination on July 17, 2023, the last day on which the appeal could be made. In the Appeal Form, Ms. Yan sought an extension of the appeal deadline to August 15, 2023, because she required more time to provide the Tribunal with additional reasons and arguments for her appeal.
5. On July 18, 2023, the Tribunal granted the requested extension to Ms. Yan to file her reasons and arguments and any supporting documents no later than 4:00 p.m. on August 15, 2023.
6. On August 10, 2023, Ms. Yan submitted additional supporting documents with some notes on the submitted documents. The documents are bank records of e-transfers purportedly made to Ms. Wang.
7. In correspondence dated August 15, 2023, the Tribunal notified the Director and Ms. Wang that it had received Ms. Yan’s appeal and was enclosing the same for informational purposes only. The Director and Ms. Wang 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 the Director to provide a copy of the section 112 record (“record”).
8. On September 6, 2023, the Tribunal received a submission from the delegate of the Director which included a copy of the record. The Tribunal sent the same to Ms. Yan and to Ms. Wang. Both were provided an opportunity to object to its completeness, but neither did. Accordingly, the Tribunal accepts the record as complete.
9. On October 24, 2023, the Tribunal sent correspondence to the parties advising them that a panel is assigned to decide the appeal.

10. 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 based on the Determination, the Reasons for the Determination (“Reasons”), Ms. Yan’s submissions, and my review of the record when the Determination was being made. If I am satisfied that Ms. Yan’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 Ms. Wang and the Director to file reply submissions on the merits of the appeal. Ms. Yan will then be given an opportunity to make a final reply to the submissions, if any.

ISSUE

11. The issue at this stage of the proceeding is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

FACTS AND REASONS FOR THE DETERMINATION

12. By way of background, on June 3, 2021, Ms. Wang filed a complaint under section 74 of the *ESA* alleging that Refresh and/or Epic Allianz contravened the *ESA* by failing to pay her wages for all hours worked and for failing to provide her with compensation for length of service (“Complaint”).
13. An investigation was conducted into Ms. Wang’s Complaint and on September 15, 2022, the Director issued a determination (“Corporate Determination”) against the Employer after finding that Refresh and Epic Allianz were associated employers under section 95 of the *ESA*.
14. The Corporate Determination found that Ms. Wang was owed wages and interest totaling \$3,825.25 for employer deductions in contravention of section 21 of the *ESA*, outstanding regular wages, vacation pay and compensation for length of service. It was also determined that administrative penalties were owed for contravention of section 18, 21, 58 and 63 of the *ESA*.
15. The Corporate Determination, which included a notice to directors and officers explaining their personal liability under the *ESA*, was sent to Refresh, Epic Allianz, and Ms. Yan by regular mail and email.
16. The appeal period for appealing the Corporate Determination expired on October 11, 2022, and October 24, 2022, respectively for service of the Corporate Determination by email and regular mail.
17. As at the time of the Determination, the Employer had not appealed the Corporate Determination nor paid Ms. Wang the amount owed under the Corporate Determination.
18. Neither Refresh nor Epic Allianz are registered in British Columbia. Refresh was incorporated in Delaware on April 15, 2020. The registered agent for Refresh is listed as Harvard Business Services Inc. There was no director or officer information available for Refresh.
19. Epic Allianz was incorporated in Ontario on October 5, 2012, and Ms. Yan is listed as its sole director.
20. As indicated previously, the Corporate Determination found that Refresh and Epic Allianz were under common control and, under section 95, associated as one employer.

21. As a director, Ms. Yan was found personally liable for up to two months' unpaid wages to Ms. Wang. Since the total amount found owing to Ms. Wang under the Corporate Determination is less than two months' wages, the Director found Ms. Yan is personally liable for the full amount of the amounts owing in the Corporate Determination including accrued interest.
22. The Corporate Determination also levied four penalties against the Employer of \$500 each for contraventions of sections 18, 21, 58 and 63 of the *ESA*.
23. As to whether there was sufficient evidence to find Ms. Yan authorized, permitted, or acquiesced in the contraventions of the Employer, the Determination found that Ms. Yan was the only contact that Ms. Wang had with the Employer and she was directly responsible for Ms. Wang's work, including administration of payroll.
24. The Determination also notes that Ms. Yan was also the one who, through emails, advised Ms. Wang of the changes to her employment, the termination of her employment and the deductions to her wages. In the result, the Determination found Ms. Yan was directly responsible for Ms. Wang's wages and authorized, permitted, or acquiesced in the contraventions found in the Corporate Determination.
25. Accordingly, the Determination found Ms. Yan to be liable for all four administrative penalties issued in the Corporate Determination totaling \$2,000.

ARGUMENTS

26. In her submissions on the merits, Ms. Yan states that she should not be liable for the administrative penalties. Based on the totality of her submissions, it appears that her argument is based on her contention that the Employer did not contravene the sections of the *ESA* the Director found to have been contravened by the Employer and which gave rise to the penalties in the Corporate Determination.
27. Second, she contends that the "calculation of [her] personal liability is incorrect." This is based on her contention that the Employer not only fully paid all wages but overpaid Ms. Wang.
28. Lastly, she contends that Ms. Wang "fabricated multiple matters" including particularly "the annual salary amount, the termination [of] employment date, [and] the employment contract."
29. In the balance of her submissions, she goes on to explain in detail why no wages are owed to Ms. Wang. Some of her submissions and evidence are a repeat of the evidence adduced to the investigative delegate and in the record and considered by the adjudicative delegate in making the Corporate Determination. I do not find it necessary to set out those submissions here for the reasons set out in the Analysis section below.
30. I also add that the "new evidence" Ms. Yan refers to are bank records purportedly showing what payments were made to Ms. Wang and email exchanges between her and Ms. Wang. All the records are to support Ms. Yan's submission that Ms. Wang was fully paid by Employer or overpaid, and she is not owed any further wages. For the reasons below, I do not find it necessary to set out these records here.

ANALYSIS

31. I have read Ms. Yan's written submissions and documents filed with her appeal including the Determination, the Reasons and the record. I find this appeal is wholly without merit and dismiss it under section 114(1)(f) of the *ESA*. My reasons for so concluding follow.

32. Section 96 of the *ESA* provides as follows:

Corporate officer's liability for unpaid wages

96 (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 an 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 to action under section 427 of the *Bank Act* (Canada) or to a proceeding under an insolvency Act, ...

33. It is settled law in the Tribunal's decisions that in an appeal of a determination made under section 96 of the *ESA* the appellant is limited to arguing only those issues that arise under section 96 of the *ESA*, namely:

- Whether the person was a director when the wages were earned or should have been paid;
- Whether the amount of liability imposed is within the limit for which a director may be found personally liable;
- Whether circumstances exist that would relieve the director from personal liability under subsection 96(2).

34. The director/officer is precluded from arguing the corporate liability in an appeal of a section 96 determination (see *Kerry Steinemann, Director/Officer of Pacific Western Vinyl Window & Doors Ltd.*, BC EST #D180/96).

35. It is also settled law in the Tribunal's decisions 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 (see *Wilinofsky*, BC EST # D106/99; *Michalkovic*, BC EST # D056/00).

36. As mentioned in the previous section, Ms. Yan has provided nothing in her appeal that addresses any of those matters that are permitted to be raised by a director in the appeal of a determination made under section 96 of the *ESA*.

37. She does not dispute that she was recorded as being a director of the Employer when the wages of Ms. Wang were earned or should have been paid. She also does not dispute the amount of liability imposed under section 96. To be clear, she disputes that the Employer or the Companies owe any wages to Ms. Wang but not whether the amount of liability imposed on her as a director of the Companies is within the limit for which a director may be found personally liable. She also does not argue that she should not be held personally liable because she falls within the circumstances described in section 96(2).
38. As indicated previously, Ms. Yan has checked off the “new evidence” ground of appeal in the appeal form. Having closely reviewed Ms. Yan’s written submissions, I find she has not advanced any evidentiary basis for this Tribunal to interfere with the Determination on the “new evidence” ground of appeal. To be more specific, nothing Ms. Yan has adduced in the appeal of the Determination qualifies as new evidence under the following four-prong test for admitting new evidence on appeal set out by the Tribunal in *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03:
- (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 potential 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.
39. The factors delineated in the test above are conjunctive and I find that the evidence adduced by Ms. Yan in this appeal fails, at the very least, on factors (a), (b) and (d).
40. I also note that while Ms. Yan does not rely on the error of law ground of appeal in section 112(1)(a) of the *ESA*, I have also considered this ground of appeal and find that there is no error of law on the part of the adjudicative delegate in making the Determination. More particularly, I find the adjudicative delegate properly interpreted section 96 of the *ESA*; did not misapply any principle of general law; did not act without any evidence; did not adopt a method of assessment which is wrong in principle or act on a view of facts which could not be reasonably entertained: *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1988] B.C.J. No. 2275
41. It is abundantly clear from the submissions of Ms. Yan that she is appealing the Corporate Determination in the appeal of the Determination which is a determination under section 96 of the *ESA* for corporate officer’s liability for unpaid wages. The appropriate time for making the submissions on the merits of the Corporate Determination is in the appeal of the Corporate Determination but the Employer failed to appeal the Corporate Determination. As previously indicated, it settled law that the director/officer is precluded from arguing the corporate liability in an appeal of a section 96 determination (see *Kerry Steinemann, Director/Officer of Pacific Western Vinyl Window & Doors Ltd., supra*). Therefore, Ms. Yan may not make any submissions questioning or raising the matter of the correctness of the Corporate Determination in this appeal.
42. In the result, Ms. Yan’s appeal is without merit and has no reasonable prospect of succeeding. The purposes and objects of the *ESA*, particularly in section 2(b) and (d) of the *ESA*, would not be served by requiring the other parties to respond to this appeal.

43. In the circumstances, the appeal is dismissed under section 114(1)(f) of the *ESA*.

ORDER

44. Pursuant to section 115(1) of *ESA*, I confirm the Determination made on June 9, 2023, against Lu Lu Yan, a director of the Employer, together with any additional interest that has accrued pursuant to section 88 of the *ESA*.

Shafik Bhalloo, K.C.
Member
Employment Standards Tribunal