

An appeal

- by -

Mansoorah Chaudhry a Director or Officer of Huggies Buggies Day Care Inc.
("Ms. Chaudhry")

- 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)

TRIBUNAL MEMBER: Shafik Bhalloo

FILE No.: 2013A/94

DATE OF DECISION: March 5, 2014

DECISION

SUBMISSIONS

Mansoorah Chaudhry

on her own behalf as a Director or Officer of Huggies Buggies Day Care Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Mansoorah Chaudhry (“Ms. Chaudhry”) a Director or Officer of Huggies Buggies Day Care Inc. (“Huggies”), has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 22, 2013 (the “Section 96 Determination”).
2. The Section 96 Determination concluded that Ms. Chaudhry was a Director and Officer of Huggies, an employer found to have contravened provisions of the *Act*, at the time wages owed to Syeda Nizami (“Ms. Nizami”) and Sameena Shahid (“Ms. Shahid”) (collectively, the “Complainants”) were earned or should have been paid and, as such, was personally liable under section 96 of the *Act* for an amount of \$5,190.20.
3. Ms. Chaudhry has filed an appeal of the Section 96 Determination arguing that the Director failed to observe the principles of natural justice in making the Section 96 Determination, and seeking the Employment Standards Tribunal (the “Tribunal”) to change or vary the Section 96 Determination.
4. Rule 22 of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”) and section 114 of the *Act* set out the Tribunal’s discretionary power to dismiss all or part of an appeal without seeking submissions from the parties. I have decided that this appeal may be decided under Rule 22 of the *Rules* and section 114 of the *Act*. Accordingly, I will assess Ms. Chaudhry’s appeal of the Section 96 Determination based solely on the Reasons for the Section 96 Determination (the “Reasons”), Ms. Chaudhry’s written submissions, and my review of the section 112(5) “record” that was before the Director when the Section 96 Determination was being made.
5. If the Tribunal is satisfied that the appeal, or part of it, has presumptive merit and should not be dismissed under the *Act*, the Tribunal will invite the Complainants and may invite the Director to file Reply submissions on the appeal. In such case, Ms. Chaudhry will be afforded an opportunity to make a final reply to the submissions, if any.

ISSUE

6. The questions in this appeal are whether the Director failed to observe the principles of natural justice in making the Section 96 Determination and if there is any basis to vary, change or cancel the Section 96 Determination.

THE FACTS AND SUBMISSIONS

7. Huggies is a day care operation that was incorporated on May 12, 2010, with Ms. Chaudhry listed as its sole Director and Officer.
8. Huggies employed the Complainants, Ms. Nizami and Ms. Shahid, as Early Childhood Education Teachers and, in the case of Ms. Shahid, as a Manager. On February 22, 2013, the Complainants filed their complaints

under section 74 of the *Act* (the “Complaints”), alleging that Huggies contravened the *Act* by failing to pay them all wages. The delegate conducted an investigation of the Complaints and initiated contact with Ms. Chaudhry by way of a letter dated April 12, 2013, setting out the nature of the Complaints and inviting Huggies to pay the wages claimed by the Complainants or provide its response to the Complaints. The delegate also issued a Demand for Employer Records requesting payroll records of Huggies pertaining to the Complainants. Ms. Chaudhry initially responded to the said letter by way of a telephone call to the delegate, and then with a follow-up letter dated May 5, 2013. In the May 5 letter, Ms. Chaudhry indicated that Huggies did not have the records sought and blamed the Complainants for “(misplacing) everything” and blamed them for the closure of Huggies’ day care. Ms. Chaudhry also indicated she was “broke” and “left with no money” and that her “checks had bounced”. She also shared that she was “looking for work” and when she finds work, she “will be in a position for settlement”.

9. On May 29, 2013, the delegate responded to Ms. Chaudhry’s letter of May 5, 2013, reiterating to Ms. Chaudhry the amounts both Complainants were owed and advising her to make arrangements, in these circumstances, to pay the Complainants the amounts owing, failing which a determination would be issued and penalties would be assessed. The delegate asked for Ms. Chaudhry to respond “no later than by June 6, 2013”, but Ms. Chaudhry failed to do so. As a result, the delegate, on October 25, 2013, issued a determination against Huggies (the “Corporate Determination”) finding Huggies owed the Complainants wages and interest totalling \$5,179.82. The delegate also determined that administrative penalties were owed in the amount of \$1,500.00.
10. The Corporate Determination, which included a notice to the Directors and Officers of Huggies explaining their personal liability under the *Act*, was sent to Huggies with copies to the registered and records office and to the sole Director and Officer, Ms. Chaudhry. The Corporate Determination also indicated that the appeal period would expire on December 2, 2013. In light of Huggies’ financial status, the delegate felt compelled to issue the Section 96 Determination prior to the expiration of the appeal period for the Corporate Determination and did so on November 22, 2013.
11. In issuing the Section 96 Determination against Ms. Chaudhry, the delegate relied on a January 22, 2013, BC Online: Registrar of Companies – Corporation Search of Huggies which showed Ms. Chaudhry listed as its sole Director and Officer. The delegate went on to determine that Ms. Chaudhry was in the same capacity when the Complainants’ wages were earned or should have been paid. Accordingly, the delegate, in the Section 96 Determination, held that Ms. Chaudhry is personally liable for up to two months’ unpaid wages for each of the Complainants. Based on the Corporate Determination, the delegate concluded that neither of the Complainants is owed wages that exceed more than two months’ wages and ordered Ms. Chaudhry to pay the full amount ordered previously in the Corporate Determination plus additional interest totalling \$5,190.20.
12. With respect to the administrative penalties levied against Huggies in the Corporate Determination, the delegate found that there was insufficient evidence that Ms. Chaudhry authorized, permitted or acquiesced in the contraventions of Huggies and, therefore, did not find Ms. Chaudhry personally liable for the administrative penalties.
13. On December 30, 2013, Ms. Chaudhry filed an appeal of the Section 96 Determination (which was received by the Tribunal on December 31, 2013). In the appeal, as indicated previously, Ms. Chaudhry argues that the Director failed to observe the principles of natural justice in making the Section 96 Determination. Attached to her Appeal Form is a note, dated December 30, 2013, wherein she indicates that she is relying upon the “same grounds of appeal” submitted previously in the appeal of the Corporate Determination which included brief written submissions, numbering six (6) paragraphs in total. I propose to set them out verbatim below:

1. That the Determination made by the Director of Employment Standards is not based on facts of the case and is therefore not commensurate with the principles of natural justice.
2. That the two employees namely Syeda Nizami and Sameena Shahid have stated the wrong facts before the Director and claimed wrong wages.
3. That the said two employees have inflicted irreparable damage to the working of the Day Care resulting in immense pecuniary loss by acting against the interests of the Day Care, reporting wrongly to the authorities that resulted in the canceling of its license, and by removing the records of the Day Care that was [sic] in their custody as a trust.
4. That the said two employees made a secret plan to leave the Day Care all of a sudden leaving the Day Care in doldrums where the employees are required to provide care to the kids on daily basis without break. If they were intent on leaving the Day Care for some good reason, they should have done so by extending a valid notice of resignation well in time. By all fair standards, they were required to submit a notice with sufficient time period that should have enabled the Day Care to substitute them with employees of equal competency and to train the new ones sufficiently.
5. That the said employees should have come to the Director to claim their wages with clean hands and good intent. I am ready to pay their genuine wages but they should be asked to explain their conduct that made the Day Care to suffer [sic] as a result of its closure.
6. That the Determination has accommodated only one-sided view and did not heed to what I had to say in response to the one-way claims. It is therefore requested that I may be heard personally while the said Determination be declared as one-sided and the one that includes harsh penalty beyond the expectation of a normal employer of a very small scale [sic].

ANALYSIS

14. In the case of appeals of determinations against corporate directors and officers under section 96 of the *Act*, the appellant is limited to arguing only those issues that arise under section 96 of the *Act*, namely:
 - (i) whether the person was a director/officer when the wages were earned or should have been paid;
 - (ii) whether the amount of liability posed is within the limit for which a director/officer may be found personally liable; and
 - (iii) whether circumstances exist that would relieve the director/officer from personal liability under subsection 96(2).
15. In an appeal of a section 96 determination, the director/officer is precluded from arguing the corporate liability (see *Kerry Steineman, Director/Officer of Pacific Western Vinyl Window & Doors Ltd.*, BC EST # D180/96). Therefore, any arguments in Ms. Chaudhry's submissions questioning or raising the matter of the correctness of the Corporate Determination may not be raised in the appeal of the Section 96 Determination.
16. Having said this, I note in this case the time for filing the appeal of the Corporate Determination expired before Huggies filed its late appeal. The late appeal was subsequently dismissed pursuant to section 114(1)(b) and (f) of the *Act*. Ms. Chaudhry, as indicated previously, is advancing the same written submissions in the appeal of the Section 96 Determination as those she previously advanced in the appeal of the Corporate Determination which only challenge the merits of the latter determination and in my view have no place for consideration in the appeal of the Section 96 Determination.
17. I note also that there is nothing in Ms. Chaudhry's submissions in support of the appeal of the Section 96 Determination that advance any argument that touches on any issues that arise under section 96 of the *Act*.

Ms. Chaudhry does not dispute that she was a director or officer of Huggies during the material time the wages were earned by the Complainants and should have been paid. Ms. Chaudhry also does not dispute the amount of personal liability imposed on her, which amount is within the limit of personal liability prescribed in section 96 of the *Act*, namely, two (2) months of the Complainants' wages. Ms. Chaudhry also does not raise any issue, and has not adduced any evidence, that would indicate circumstances that might exempt her from personal liability under section 96(2) of the *Act*. In these circumstances, I find Ms. Chaudhry's appeal of the Section 96 Determination has no reasonable prospect of success.

ORDER

18. Pursuant to subsection 114(1)(f) of the *Act*, I dismiss Ms. Chaudhry's appeal of the Section 96 Determination on the basis that there is no reasonable prospect that it will succeed. As a result, pursuant to section 115 of the *Act*, I order the Section 96 Determination, dated November 22, 2013, be confirmed as issued.

Shafik Bhalloo
Member
Employment Standards Tribunal