



An appeal

- by -

King's Taste Foods Inc. and Jin Fine Cuisine Group Ltd. (a dissolved company)
(“Ms. Jin”)

- 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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2012A/1

DATE OF DECISION: March 12, 2012

DECISION

SUBMISSIONS

Christy Jin	on behalf of Jin Fine Cuisine Group Ltd. (a dissolved company)
John Dafoe	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “*Act*”) by Christy Jin on behalf of Jin Fine Cuisine Group Ltd. (a dissolved company) (“Ms. Jin”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on December 5, 2011.
2. The Determination was made in respect of complaints filed by four former employees of King’s Taste Foods Inc., Grace Hsui Chen Chiang, Yu Ling Zhou, Qiao Ling Tan and Bi Xia Luo, who alleged they had not been paid wages earned by them. Jin Fine Cuisine Group Ltd. was named as the employer in one of the complaints, along with King’s Taste Foods Inc.
3. The Director decided to associate King’s Taste Foods Inc. and Jin Fine Cuisine Group Ltd. under section 95 of the *Act* as one employer and found that the employer had contravened Part 3, sections 17 and 18, Part 4, section 36, Part 5, sections 45 and 46 and Part 7, section 58 of the *Act* in respect of the four employees and ordered the employer to pay an amount of \$6,365.68, an amount which included wages and interest.
4. The Director also imposed an administrative penalty on the employer under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1,000.00.
5. The total amount of the Determination is \$7,365.68.
6. Ms. Jin has appealed the Determination in her own name on behalf of Jin Fine Cuisine Group Ltd. She says evidence has become available that was not available at the time the Determination was being made. She seeks to have the Determination cancelled.
7. Ms. Jin has not requested any particular type of hearing on the appeal. The Tribunal has discretion to choose the type of hearing for deciding an appeal. Appeals to the Tribunal are not *de novo* hearings and the statutory grounds of appeal are narrow in scope. The Tribunal is not required to hold an oral appeal hearing and may choose to hold any combination of oral, electronic or written submission hearing; see section 103 of the *Act* and section 36 of the *Administrative Tribunals Act*. The Tribunal finds the matters raised in this appeal can be decided from the written submissions and the material on the section 112(5) “record”, together with the submissions of the parties and any additional evidence allowed by the Tribunal to be added to the “record”.

ISSUE

8. The issue in this appeal is whether Ms. Jin has shown there is any reviewable error in the Determination.

THE FACTS

9. I will set out the facts as they appear in the reasons for the Determination, supplemented where appropriate from the material found in the “record”.
10. King’s Taste Foods Inc. operated a prepared food business. At some point in early 2010, the business shut down. It was not clear from the information provided to or acquired by the Director whether the assets of the business were sold or whether it simply ceased to operate. The Director makes no finding on this in the Determination.
11. A BC Online Corporate Search showed King’s Taste Foods Inc. was incorporated in March 2006 and that as of February 10, 2010, the sole director was Lily King (Ms. King’). Ms. King filed for personal bankruptcy in Ontario on January 11, 2010, where she now appears to be residing.
12. The Director received complaints from four former employees of the employer covering various periods of time from March 2009 to February 2010.
13. The evidence provided by the Complainants showed some of their wages had been paid from an account held by Jin Fine Cuisine Group Ltd. and a search of the BC Online Corporate registry showed the company was incorporated in February 1994 and had one director, Ms. Jin, and one officer, Ms. King. Ms. Jin is the daughter of Ms. King.
14. Jin Fine Cuisine Group Ltd. was voluntarily dissolved on August 9, 2010. There is no indication in the Determination or the material in the “record” that this company continued to operate after it was dissolved.
15. The Complainants indicated they were not paid wages for the last several pay periods of their employment and provided the Director with cheques that could not be cleared because there were insufficient funds in the account on which they were written. Some of the cheques were written on the account of King’s Taste Foods Inc. and some were written on the account of Jin Fine Cuisine Group Ltd.
16. The Director sent letters to King’s Taste Foods Inc. and Jin Fine Cuisine Group Ltd. and the directors and officer of those entities advising of the complaint and that a section 95 association was being investigated. A response was requested but not provided. The only response received in respect of the complaints was from the trustee dealing with Ms. King’s personal bankruptcy.

ARGUMENT

17. In the appeal, Ms. Jin says Jin Fine Cuisine Group Ltd. did not employ any of the complainants. She says she was employed by King’s Taste Foods Inc. as general manager from 2006 to 2010 and part of her job was to hire employees. When King’s Taste Foods Inc. was in financial difficulty, her mother, Ms. King, asked her for help and paid some of the employees from the account of Jin Fine Cuisine Group Ltd. because the accounts of King’s Taste Foods Inc. were frozen. A loan agreement was signed in June 2008, but was not fully honoured. She says King’s Taste Foods Inc. still owes her \$40,000.00 which she has no way of recovering because that company is bankrupt. She was one of many creditors of King’s Taste Foods Inc. that were owed money.
18. The Director says the ground of appeal chosen by Ms. Jin – evidence becoming available – does not apply as the evidence she seeks to present appears to have been available during the investigation and could have been

submitted. The Director says, however, the material provided adds to the understanding of the financial relationship between the two entities and lends support to the section 95 association.

19. The Director acknowledges the appeal more correctly raises an argument that the section 95 association is an error of law.

ANALYSIS

20. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

112 (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*

- (a) *the director erred in law;*
- (b) *the director failed to observe the principles of natural justice in making the determination;*
- (c) *evidence has become available that was not available at the time the determination was made.*

21. I agree with the Director in respect of the ground of appeal chosen by Ms. Jin. It is apparent the material sought to be submitted with the appeal was reasonably available at the time the Determination was being made and could have been provided to the Director during the complaint process. On that basis it will not be accepted or considered.

22. In any event, having failed or refused to participate in the complaint process and ignoring the Director's efforts to have them respond to the complaints, to allow Ms. Jin to enter and argue "new" evidence at this stage would be inconsistent with the objects and purposes of the *Act* and fly in the face of the long standing approach by the Tribunal to such attempts in similar circumstances: see *Tri-West Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97.

23. Notwithstanding the above, I also agree with the Director that this matter more correctly raises a question of law: which is whether the Director erred in associating the two entities under section 95 of the *Act*. As the Tribunal noted in *J.C. Creations Ltd. operating as Heavenly Body Sports*, BC EST # RD317/03, it is important, and fair, that the substance, not the form, of the appeal should be addressed both by the Tribunal and the parties.

24. Section 95 of the *Act* states:

95 *If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,*

- (a) *the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one person for the purposes of this Act, and*
- (b) *if so, they are jointly and separately liable for payment of the amount stated in a determination, a settlement agreement or an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.*

25. The seminal decision in respect of the interpretation and application of section 95 is *Invicta Security Systems Corp.*, BC EST # D349/96. In that decision, the Tribunal examined the language of the provision and, among other things, identified four preconditions to an application of section 95:

1. There must be more than one corporation, individual, firm, syndicate or association;

2. Each of these entities must be carrying on a business, trade or undertaking;
3. There must be common control or direction; and
4. There must be some statutory purpose for treating the entities as one employer.

26. As well, the Tribunal provided the following description of how each of these preconditions would apply:

The reference to “corporation, individual, firm, syndicate or association” in the first precondition is sufficient to capture any legal vehicle through which a business may be conducted. The second precondition requires the entities sought to be included in a Section 95 determination to be “carrying on” a business, trade or undertaking, in the sense that the entity is not defunct or completely withdrawn from the business, trade or undertaking which would bring them into a Section 95 determination. The third precondition is directed toward the manner in which the various entities inter-relate within the common enterprise. One entity may have financial control, another may have operational control and yet another may have *de facto* control through majority shareholding or control of the Board of Directors. These examples are not meant to be exhaustive, but illustrative of how control may be demonstrated. Similarly, direction may be demonstrated in a variety of ways, but generally it will normally be found in an entity which makes significant decisions respecting how the business, trade or undertaking has been, is, or will be, run.

The final precondition identifies the need for a statutory purpose. One of the purposes of the *Act* is to ensure employees in the province receive the basic standards of compensation and conditions of employment. The *Act* not only sets the basic standards of compensation and conditions of employment but also provides a comprehensive scheme for the enforcement of the *Act*, including some collection procedures such as claims of lien, court order enforcement and seizure of assets in appropriate circumstances. It is in the enforcement provisions of the *Act* where Section 95 has been placed. The statutory purpose requirement is met if the one employer determination is for the purpose of enforcing basic standards of compensation and conditions of employment. It is not inconsistent with that purpose to make the one employer declaration for the purpose of facilitating the collection of wages owing under the *Act*.

27. In the circumstances of this case, I find the Director erred in law in associating the two entities as one employer. The Determination indicates a finding by the Director, which is supported by the material in the “record” that the business of King’s Taste Foods Inc. had shut down in early 2010; its sole director filed for personal bankruptcy in January 2010. Jin Fine Cuisine Group Ltd. was voluntarily dissolved on August 9, 2010. There is no indication that the company continued to be, and remains, in business notwithstanding its dissolution.

28. The Determination was issued December 5, 2011, – almost two years after King’s Taste Foods Inc. shut down and nearly sixteen months after Jin Fine Cuisine Group Ltd. was dissolved. While the Director makes a finding that “the business was being carried on by both KTF and JFCG”, I can only accept that finding as referring to a period considerably in the past, as the evidence and the Determination indicate King’s Taste Foods Inc. had shut down its business in early 2010 and there is no evidence that Jin Fine Cuisine Group Ltd. was carrying on a business when the association was made. The findings of fact made in the Determination and the material in the “record” make it unlikely that Jin Fine Cuisine Group Ltd. continued to carry on business after it was dissolved. The precondition requiring the entities to be “carrying on business”, and the language of section 95, speaks in the present tense. As stated in the excerpt from *Invicta Security Systems Corp., supra*, that precondition operates “in the sense that the entity is not defunct or completely withdrawn from the business”.

29. The Determination does not show the associated entities were carrying on business when the Determination was made, and on this basis, I allow the appeal and cancel the Determination.

ORDER

30. Pursuant to section 115 of the *Act*, I order the Determination dated December 5, 2011, be cancelled.

David B. Stevenson
Member
Employment Standards Tribunal