



An appeal

- by -

Irwin Lupovici, a Director and Officer of Bong Wear Company Ltd.
(“Mr. Lupovici”)

- 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.: 2015A/28

DATE OF DECISION: March 26, 2015

DECISION

SUBMISSIONS

Irwin Lupovici on his own behalf as a Director and Officer of Bong Wear Company Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Irwin Lupovici (“Mr. Lupovici”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on December 12, 2014 (the “Section 96 Determination”).
2. The Section 96 Determination concluded that Mr. Lupovici was a director and officer of Bong Wear Company Ltd. (“BWCL”), an employer found to have contravened provisions of the *Act*, at the time wages owed to Kan Tai (Albert) Chui (“Mr. Chui”) and to Pauline Wong (“Ms. Wong”) (collectively, the “Complainants”) were earned or should have been paid. Therefore, the Section 96 Determination held that Mr. Lupovici was personally liable under section 96 of the *Act* for an amount of \$9,948.80, inclusive of accrued interest.
3. The deadline for filing an appeal of the Section 96 Determination was January 19, 2015, but Mr. Lupovici filed his appeal approximately one (1) month after the expiry of the said deadline, on February 20, 2015.
4. Mr. Lupovici has appealed the Section 96 Determination on the basis that new evidence has become available that was not available at the time the Section 96 Determination was being made. He is seeking the Employment Standards Tribunal (the “Tribunal”) to vary or change the Section 96 Determination by cancelling the penalties levied against BWCL in the corporate decision the delegate issued against BWCL on August 21, 2014 (the “Corporate Determination”), and to allow BWCL “to settle the amounts owing to the employees directly with them”.
5. Having reviewed the appeal materials, including the late-filed written submissions of Mr. Lupovici and the section 112(5) “record” (the “Record”), I find this appeal is an appropriate case for consideration under section 114 of the *Act*. Therefore, I will assess the appeal based solely on the Reasons for Section 96 Determination (the “Reasons”), the Corporate Determination, the written submissions of Mr. Lupovici and my review of the Record that was before the Director when the Section 96 Determination was being made. If I am satisfied the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Complainants and the Director will be invited to file a reply to the question of whether to extend the deadline to file the appeal. Mr. Lupovici will then be given an opportunity to make a final reply to these submissions, if any.

ISSUE

6. The issue in this appeal is whether there is any reasonable prospect that Mr. Lupovici’s appeal of the Section 96 Determination will succeed.

THE FACTS

7. The Complainants filed their complaints under section 74 of the *Act*, alleging that BWCL contravened the *Act* by failing to pay them wages (the “Complaints”).
8. A delegate of the Director conducted an investigation into the Complaints, and the Director issued a Corporate Determination against BWCL on August 21, 2014, finding BWCL owed the Complainants wages and interest totaling \$19,317.46. The Corporate Determination also levied administrative penalties against BWCL in the amount of \$1,500.00.
9. The Corporate Determination, which included a notice to directors and officers of BWCL explaining their personal liability under the *Act*, was sent to BWCL, with copies to the latter’s registered and records office and to its directors and officers.
10. The time for appealing the Corporate Determination expired on September 29, 2014, without BWCL lodging an appeal. As the Complainants were not paid the amounts ordered under the Corporate Determination, the delegate conducted a corporate search of BWCL on November 7, 2012, which indicated that BWCL was incorporated on December 3, 1997, and Mr. Lupovici was listed as one of its directors and officers. The delegate conducted a further search on BWCL on October 20, 2014, which showed that Mr. Lupovici was still listed as its director and officer. The searches also confirmed Mr. Lupovici was a director and officer of BWCL between December 31, 2011 and November 8, 2012, when the Complainants’ wages were earned or should have been paid. As a result, the delegate issued the Section 96 Determination against Mr. Lupovici, holding the latter personally liable for up to two (2) months’ unpaid wages for each of the Complainants.
11. With respect to the administrative penalties issued in the Corporate Determination against BWCL for contraventions of sections 17 and 18 of the *Act* and section 46 of the *Employment Standards Regulation* (the “*Regulation*”), the delegate noted that there was insufficient evidence that Mr. Lupovici authorized, permitted or acquiesced in the contraventions of BWCL and, therefore, did not find Mr. Lupovici personally liable for the administrative penalties.
12. The Section 96 Determination was then sent to Mr. Lupovici by registered mail on December 12, 2014. The Section 96 Determination expressly showed, on the third page, the appeal expiry date of January 19, 2015. Mr. Lupovici’s appeal of the Section 96 Determination, while dated February 13, 2015, was received by the Employment Standards Branch (the “Branch”) on February 20, 2015, approximately one (1) month late.

SUBMISSIONS OF MR. LUPOVICI

13. Mr. Lupovici is making two (2) sets of written submissions: one under the heading “Grounds for appeal” and another under the heading “Reason for Late Appeal”.
14. With respect to “Grounds for appeal”, his submissions are brief, and I propose to set them out verbatim below:

The Company is not disputing that it owes wages to the employees. The company is however, disputing the fairness of the penalty.

The company negotiated a settlement with Albert Chui in May 2014. When the Employment Standards Branch was contacted by the company, it was told that it was too late and that a determination had been made.

The company has never disputed that funds were owed. However, the company has been in very difficult financial circumstances for some time and is only now in a position to actually consider making payments to the employees.

The shareholder of the company has been unable to borrow money to inject into the company as he has not been getting income from the company and thus does not qualify for a loan.

In addition to the financial problems at the company, the shareholder of the company suffered two personal losses with the deaths of his father and godfather during the year which distressed him greatly and made it difficult to focus on business.

The company has always been willing to settle these claims with the employees. It is only now that it is able to address these debts. However, the penalties are going to be very difficult for the company to settle.

The company asks that it be allowed to settle the amounts owing to the employees directly with them and that the penalties be vacated.

15. With respect to Mr. Lupovici's reasons for the late appeal, he states that his father-in-law passed away in late October, 2014, and he was out of town until December 17, 2014. He states that this is the first time in his 30 years in business that he has found himself in this situation. He states that BWCL has not made any money in the last five (5) years and that he is "trying to stay in business and start making money".

ANALYSIS

16. In an appeal of a determination issued 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 imposed is within the limit for which a director/officer may be found personally liable; or
 - (iii) Whether circumstances exist that would relieve the director/officer from personal liability under subsection 96(2).
17. In an appeal of a section 96 determination, the director/officer is precluded from arguing corporate liability or the merits of the corporate determination (see *Kerry Steinemann, Director/Officer of Pacific Western Vinyl Windows & Doors Ltd.*, BC EST # D180/96).
18. Further, it should also be noted that the Director may issue a section 96 determination based on the corporate records filed with, and maintained by, the Registrar of Companies. However, when an individual is recorded as a director or officer of a company in the records maintained by the Registrar of Companies, a rebuttable presumption of fact arises that the individual actually is a director or officer of the company in question. In *Re: Wilinofsky* (BC EST # D106/99), the Tribunal stated that this presumption is rebuttable by credible and cogent evidence that the Registrar's records are inaccurate. However, the evidentiary burden of proving that one is not a corporate director or officer lies with the individual who denies such status.
19. Having said this, Mr. Lupovici, in his written submissions, does not deny that he was a director and officer of BWCL when the wages were earned or should have been paid by BWCL to the Complainants, and admits that BWCL owes the Complainants wages.

20. I also note that Mr. Lupovici does not challenge in his written submissions, the amount of liability imposed on him in the Section 96 Determination as a director and officer of BWCL.
21. Finally, Mr. Lupovici has not presented any circumstances that would relieve him as a director and officer of BWCL from personal liability under subsection 96(2) of the *Act*.
22. Mr. Lupovici's submissions, for the most part, appear to be responding to the Corporate Determination, and the time for appealing the Corporate Determination long expired without BWCL appealing it. As indicated previously, a director or officer of a company is precluded from arguing corporate liability or the merits of the corporate determination in an appeal of a section 96 determination.
23. The Corporate Determination was issued on August 21, 2014, and sent by registered mail to BWCL's business office in Richmond, British Columbia, and to its registered and records office, as well as to its directors and officers, and the time for appealing that Corporate Determination expired on September 29, 2014. It is unclear whether Mr. Lupovici was in town at the time, and whether or not he received the Corporate Determination, but the Corporate Determination was never appealed. If Mr. Lupovici wanted to file a late appeal of the Corporate Determination, he should have done so when he returned to town and provided BWCL's reason for appealing late, but he cannot appeal the Corporate Determination in his appeal of the Section 96 Determination.
24. As Mr. Lupovici has raised the new evidence ground of appeal in his appeal, I feel compelled to address it very briefly by pointing out that there is nothing in the written submissions of Mr. Lupovici in the appeal that would qualify as new evidence, let alone relevant new evidence. In these circumstances, I do not find that Mr. Lupovici's appeal has any reasonable prospect of succeeding, and I dismiss it.

ORDER

25. Pursuant to section 114(1)(f) of the *Act*, I dismiss Mr. Lupovici's appeal. Accordingly, pursuant to section 115(1) of the *Act*, the Section 96 Determination, dated December 12, 2014, is confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal