

An appeal

- by -

Pik Sing William Cheung, a Director of New California Restaurant Ltd.
("Mr. Cheung")

- 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/7

DATE OF DECISION: April 3, 2013

DECISION

SUBMISSIONS

David K. Georgetti

counsel on behalf of Pik Sing William Cheung, a Director of New California Restaurant Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Pik Sing William Cheung, a Director of New California Restaurant Ltd. (“Mr. Cheung”), a Director of New California Restaurant Ltd. (“New California”), filed an appeal of a section 96 determination that was issued on November 23, 2012 (the “Section 96 Determination”) by a delegate of the Director of Employment Standards (the “Director”). The Section 96 Determination concluded that Mr. Cheung was a Director of New California, an employer found to have contravened provisions of the *Act*, at the time wages owed to Woon Cheung Cheng (“Mr. Woon Cheng”) and Yui Chi (Eugene) Cheng (“Mr. Eugene Cheng”) were earned or should have been paid, and as such was personally liable under section 96 of the *Act* for an amount of \$5,545.68.
2. Mr. Cheung, through his legal counsel, has filed an appeal of the Section 96 Determination invoking all three (3) grounds of appeal in section 112(1) of the *Act*. More specifically, counsel is alleging that the Director erred in law and failed to observe the principles of natural justice in making the Section 96 Determination, and there is new evidence that has become available that was not available at the time the Section 96 Determination was made.
3. Mr. Cheung’s counsel, by way of remedies, has checked off all three (3) boxes on the Appeal Form seeking the Employment Standards Tribunal (the “Tribunal”) to change or vary the Section 96 Determination or to cancel it or to refer it back to the Director. Mr. Cheung’s appeal was mailed by his counsel to the Tribunal on February 4, 2013. The appeal period for the Section 96 Determination expired on December 31, 2012. Therefore, Mr. Cheung’s appeal is approximately one (1) month late. Mr. Cheung’s counsel has provided written submissions in support of his request for an extension of time to file his appeal late, together with his submissions on the substantive merits of the appeal.
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 can be decided under Rule 22 of the *Rules* and section 114 of the *Act*. Accordingly, I will assess Mr. Cheung’s appeal of the Section 96 Determination based solely on the Reasons for the Section 96 Determination (the “Reasons”), counsel’s written submissions on behalf of Mr. Cheung, and my review of the section 112(5) “record” that was before the Director when the Section 96 Determination was being made.
5. As indicated in the Tribunal’s correspondence to Mr. Cheung dated March 14, 2013, if the Tribunal is satisfied that the appeal, or part of it, has presumptive merit and should not be dismissed under section 114 of the *Act*, the Tribunal will invite Mr. Woon Cheng, Mr. Eugene Cheng, and the Director to file a Reply in response to the question of whether the Tribunal should extend the deadline for Mr. Cheung to file his appeal. In such case, Mr. Cheung will be afforded an opportunity to make a final Reply to these submissions, if any.

ISSUES

6. The issues in this appeal are threefold, namely, whether Mr. Cheung has shown that the Director erred in law or failed to observe the principles of natural justice in making the Section 96 Determination, and whether there is new evidence warranting cancellation of the Section 96 Determination.

THE FACTS

7. On July 14 and 27, 2011, Mr. Eugene Cheng and Mr. Woon Cheng respectively filed their complaints under section 74 of the *Act* alleging that New California contravened the *Act* by failing to pay them all wages (the “Complaints”).
8. A delegate conducted an investigation into the Complaints and issued a determination against New California on May 28, 2012 (the “Corporate Determination”), finding that the latter contravened Part 3, section 18 and Part 7, section 58 of the *Act* in respect of the employment of the Complainants and ordered New California to pay them a total of \$7,037.37, an amount that included wages and interest under section 88 of the *Act*.
9. The Director also imposed administrative penalties on New California under section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1,000.00 for contraventions of section 18 of the *Act* and section 46 of the *Regulation*.
10. The total amount of the Corporate Determination against New California was \$8,037.37.
11. The Corporate Determination included a notice to New California’s Directors and Officers explaining their personal liability under the *Act* with copies to New California’s registered and records office and to its sole Director, Mr. Cheung. The appeal period on the Corporate Determination expired on July 5, 2012, without any appeal being lodged.
12. When the Corporate Determination remained unsatisfied, the delegate, based on the corporate search of New California performed on July 27, 2011, noted that New California was incorporated on February 25, 2011, and Mr. Cheung was listed as its sole Director, and continued in that capacity when the Complainants’ wages were earned and should have been paid. As a result, on November 23, 2012, the delegate issued the Section 96 Determination holding Mr. Cheung personally liable for up to two months’ unpaid wages for each employee, totalling \$5,545.68, including interest accruing to the date of the Section 96 Determination.
13. With respect to the administrative penalty issued against New California in the Corporate Determination, the delegate found there to be insufficient evidence to show Mr. Cheung authorized, permitted or acquiesced in the contraventions by New California. As a result, the delegate did not hold Mr. Cheung personally liable for the administrative penalties against New California in the S. 96 Determination.
14. Pursuant to the Director’s record in this appeal, I note that the Section 96 Determination against Mr. Cheung was issued and sent by registered mail on November 23, 2012, to Mr. Cheung at his address on Georgia Street in Vancouver. There is a Canada Post Tracing sheet in the record that shows that Mr. Cheung received the S.96 Determination on December 7, 2012. However, as indicated in the Tribunal’s decision in the appeal of the Corporate Determination, Mr. Cheung filed his appeal of the Section 96 Determination within a couple of days after filing the appeal of the Corporate Determination. The appeal of the Corporate Determination was filed approximately seven (7) months after the expiry of the appeal date and in the case of the Section 96 Determination, it was filed approximately one (1) month after the expiry of the time for appealing.

15. I note the Tribunal, in its decision at BC EST # D036/13 dismissed the appeal of the Corporate Determination. The appeal decision of the Corporate Determination extensively canvases the full history of the Complaints including the investigative efforts of the delegate and the evidence of the parties and witnesses.

SUBMISSIONS AND ANALYSIS

16. As indicated in the appeal decision of the Corporate Determination, counsel for Mr. Cheung filed identical submissions in both appeals.
17. The submissions of counsel first address the matter of the late appeal of Mr. Cheung and why the appeal period for the Section 96 Determination should be extended. More specifically, as indicated in the appeal decision of the Corporate Determination, counsel for Mr. Cheung contends that Mr. Cheung is a native of Hong Kong and speaks Cantonese and, therefore, suffers a language barrier and did not comprehend the significance of the Employment Standards complaint process. He also contends that Mr. Cheung and New California were unrepresented at the time both determinations were made. He states that Mr. Cheung was only able to comprehend the nature of the claims against him after he sought legal counsel in connection with the service of the Writ of Seizure and Sale (the “Writ”).
18. While I do not intend to reiterate my reasons in the appeal of the Corporate Determination verbatim here, I was not persuaded that Mr. Cheung suffered a “language barrier” preventing him from appealing the Corporate Determination in a timely fashion and, for the same reasons, I do not find that he suffered any “language barrier” creating an obstacle for him to appeal the Section 96 Determination in a timely fashion. If he needed counsel to represent him in order to understand or navigate the Employment Standards process, he could have retained counsel earlier when he received the preliminary findings letter before the Corporate Determination was made, or when he received the Corporate Determination, or when he received the letter describing the collections process one month after the Corporate Determination was made, or when the Section 96 Determination was made. Of course, Mr. Cheung eventually found legal counsel to represent both New California and himself in both appeals, albeit late.
19. As indicated in the appeal decision to the Corporate Determination, the threat of collection proceedings appears to have been the impetus behind Mr. Cheung seeking out counsel and appealing both the Corporate Determination and the Section 96 Determination.
20. Having said this, in the case of the Section 96 Determination, it is important to note that a person challenging a Director/Officer determination 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; and
 - (iii) Whether circumstances exist that would relieve the Director/Officer from personal liability under subsection 96(2).
21. In an appeal of a section 96 determination, the Director/Officer is precluded from arguing the corporate liability (see *Kerry Steinemann Director/Officer of Pacific Western Vinyl Window & Doors Ltd.*, BC EST # D180/96). Therefore, any arguments in counsel’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.

22. As indicated previously, the time for filing the appeal of the Corporate Determination expired and this Tribunal rejected New California's very late-filed appeal by dismissing that appeal under section 114(1)(b) and (f) of the *Act*.
23. I also note that in this appeal, counsel has not advanced any argument that touches on any issues that arise under section 96 of the *Act*. Although counsel has indicated why Mr. Cheung is shown as a Director and not Mr. Eugene Cheng, there is no dispute that Mr. Cheung was indeed a Director of New California and so listed in the corporate search of New California at the time the wages of Mr. Eugene Cheng and Mr. Woon Cheng were earned and should have been paid. Mr. Cheung or his counsel also does not dispute the amount of personal liability imposed on Mr. Cheung, which amount I note is within the limit of personal liability prescribed in section 96 of the *Act*, namely, two (2) months of the Complainants' wages. I also find that Mr. Cheung has not raised any issue, nor adduced any evidence, that would indicate circumstances that might exempt him from personal liability under section 96(2) of the *Act*.
24. Having said this, I note that the identical submissions of counsel in both the Section 96 Determination and the Corporate Determination are rather telling. Those submissions, as indicated in the appeal decision of the Corporate Determination, are submissions that simply buttress and elaborate on the position or argument advanced by Mr. Cheung on behalf of New California, during his limited involvement in the investigation of the Complaints. In the appeal decision of the Corporate Determination, the Tribunal found those same submissions did not qualify as new evidence under the test for new evidence set out in the Tribunal's decision in *Re: Merilus Technologies Inc.* (BC EST # D171/03). Similarly, in this appeal, I find the same evidence does not qualify as new evidence.
25. Moreover, the purported new evidence counsel is adducing in this appeal challenges the correctness of the Corporate Determination and, as indicated previously, in an appeal of a S.96 determination, the director or officer is precluded from arguing the corporate liability. In the result, Mr. Cheung may contest or dispute the merits of the Corporate Determination in his appeal of the S.96 Determination. However, he may only argue issues, if any, that arise under section 96 of the *Act*.
26. In conclusion, I find that Mr. Cheung has not raised any relevant issues that may be raised under section 96 of the *Act*. Pursuant to section 114(1)(f) of the *Act*, I find that Mr. Cheung's appeal of the Section 96 Determination has no reasonable prospect of success. I also find, pursuant to section 114(1)(b) of the *Act*, that Mr. Cheung's appeal of the Section 96 Determination was not filed within the applicable time limit.

ORDER

27. Pursuant to subsections 114(1)(b) and (f) of the *Act*, I dismiss Mr. Cheung's appeal of the Section 96 Determination on the basis that the appeal was not filed within the applicable time limit and there is no reasonable prospect that it will succeed. As a result, the Section 96 Determination, dated November 23, 2012, is confirmed as issued.

Shafik Bhalloo
Member
Employment Standards Tribunal