

An appeal

- by -

Peter Ly, a Director or Officer of Ming & Sing Chinese Express Poco Ltd.
(“Mr. Ly”)

- 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: David B. Stevenson

FILE No.: 2017A/33

DATE OF DECISION: April 24, 2017

DECISION

SUBMISSIONS

Ritu Mahil
counsel for Peter Ly, a Director or Officer of Ming & Sing Chinese Express Poco Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Peter Ly, a Director or Officer of Ming & Sing Chinese Express Poco Ltd., (“Mr. Ly”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on January 31, 2017.
2. The Determination found Mr. Ly was a director and officer of Ming & Sing Chinese Express Poco Ltd. (“Ming & Sing Poco”), an employer found to have contravened provisions of the *Act*, at the time wages were earned or should have been paid to fifteen former employees and as such was personally liable under section 96 of the *Act* for wages in the amount of \$18,953.10.
3. This appeal is grounded in an assertion that the Director erred in law and failed to observe principles of natural justice in making the Determination. Mr. Ly seeks to have the Determination cancelled. The appeal was filed with an appeal of a Determination issued against Ming & Sing Poco.
4. The Appeal Form was accompanied by a request to extend the time period for filing an appeal.
5. In correspondence dated March 15, 2017, the Tribunal acknowledged having received an appeal, requested Ming & Sing Poco provide written reasons and argument for the grounds of appeal, with supporting documents if any, requested the section 112(5) record (the “record”) from the Director, notified the parties that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and, following such review, all or part of the appeal might be dismissed.
6. The record has been provided to the Tribunal by the Director and a copy has been delivered to legal counsel for Mr. Ly, and an opportunity has been provided to object to its completeness. There has been no such objection and, accordingly, the Tribunal accepts the record as being complete.
7. No written reasons and argument for the grounds of appeal advanced by Mr. Ly has been received by the Tribunal.
8. I have decided this appeal is appropriate for consideration under section 114 of the *Act*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal and my review of the material that was before the Director when the Determination was being made. Under section 114(1) of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

114 (1) *At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any appeal if the tribunal determines that any of the following apply:*

- (a) *the appeal is not within the jurisdiction of the tribunal;*
- (b) *the appeal was not filed within the applicable time limit;*

- (c) *the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;*
- (d) *the appeal was made in bad faith or filed for an improper purpose or motive;*
- (e) *the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
- (f) *there is no reasonable prospect the appeal will succeed;*
- (g) *the substance of the appeal has been appropriately dealt with in another proceeding;*
- (h) *one or more of the requirements of section 112(2) have not been met.*

9. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and the complainants will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal will succeed.

ISSUE

10. The issue here is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *Act*.

THE FACTS

11. The facts relevant to this appeal are brief.
12. Ming & Sing was a restaurant that closed suddenly on, or about October 18, 2016, causing the termination of many of its employees.
13. As a result of complaints filed by six such employees, the Director conducted an investigation of employee records provided under a Demand for Employer Records and found other former employees of Ming & Sing Poco who were owed wages.
14. The Director issued a Determination against Ming & Sing Poco on January 31, 2017 (the “corporate determination”), which found Ming & Sing Poco liable for wages to the fifteen former employees in the amount of \$20,801.73. The Director also imposed administrative penalties on Ming & Sing Poco in the amount of \$1,000.00.
15. An appeal by Ming & Sing Poco of that Determination has been dismissed in BC EST # D047/17.
16. A BC On-line: Registrar of Companies corporate search conducted by the Director on November 17, 2016, indicated Ming & Sing Poco was incorporated on July 11, 2012, and Mr. Ly was listed as a director and officer. This search, as well as a later search, confirmed Mr. Ly was a director and officer of Ming & Sing Poco during the period the wages of the fifteen former employees were earned or should have been paid.
17. Based on the information acquired and the findings made, the Director concluded Mr. Ly was liable under section 96 of the *Act* for the amount set out in the Determination. Mr. Ly was not found liable for the administrative penalties imposed on Ming & Sing Poco in the corporate determination.

ARGUMENT

18. Mr. Ly has made no argument on the appeal that might show there is an error in the Determination on one of the statutory grounds.
19. More particularly, nothing in the appeal addresses Mr. Ly's personal liability as a director and officer of Ming & Sing under section 96 of the *Act*.

ANALYSIS

20. 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 being made.*

21. There are two reasons why this appeal must be summarily dismissed. The first relates to the effect of the decision of the appeal of the corporate determination. The second relates to the allowable scope of an appeal of a Determination issued under section 96 of the *Act*. The first two reasons are related.
22. On the first matter, I have already noted the appeal of the corporate determination has been dismissed. There can no longer be any argument that there is an error in the corporate determination.
23. In other words, Mr. Ly is bound by both the corporate determination and the result of the appeal of the corporate determination.
24. Second, a person challenging a determination issued under section 96 of the *Act* is limited to arguing those issues which arise under that provision: whether the person was a director or officer when the wages were earned or should have been paid, whether the amount of the liability imposed is within the limits for which a director or officer may be found personally liable; and whether circumstances exist that would relieve the director or officer from personal liability under section 96(2) of the *Act*. The director/officer is precluded from raising and arguing the corporate liability: see *Kerry Steineman, Director/Officer of Pacific Western Vinyl Windows & Doors Ltd.*, BC EST # D180/96.
25. Mr. Ly has made no argument at all in this appeal and nothing in the appeal addresses any of those matters that may be raised by Mr. Ly concerning his liability under section 96 of the *Act*. Mr. Ly has not met the burden of showing an error in the Determination and, consequently, there is no basis for altering the Director's finding on Mr. Ly's personal liability under that provision.
26. Based on all of the above, I find this appeal has no reasonable prospect of succeeding. The purposes and objects of the *Act* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1)(f) of the *Act*.

ORDER

27. Pursuant to section 115 of the *Act*, I order the Determination dated January 31, 2017, be confirmed in the amount of \$18,953.10, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal