

An appeal

- by -

Rajdeep Sangha, a Director and Officer of Mighty Enterprises Ltd. carrying on
business as Fresh Slice Pizza
("Mr. Sangha")

- 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.: 2017A/37

DATE OF DECISION: May 8, 2017

DECISION

SUBMISSIONS

Gunita Sangha

on behalf of Rajdeep Sangha, a Director and Officer of
Mighty Enterprises Ltd. carrying on business as Fresh Slice
Pizza

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Rajdeep Sangha (“Mr. Sangha”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 3, 2017 (the “Determination”).
2. The Determination concluded that Mr. Sangha was a director and officer of Mighty Enterprises Ltd. carrying on business as Fresh Slice Pizza (“Mighty”), an employer found to have contravened provisions of the *Act*, at the time wages were earned or should have been paid to Peyman Kanzehlee (“Mr. Kanzehlee”) and Farzaneh Naroue (“Ms. Naroue”) (collectively the “Complainants”) and, as such, was personally liable under section 96 of the *Act* for an amount of \$14, 871.48 inclusive of accrued interest pursuant to section 88 of the *Act*.
3. In his Appeal Form, Mr. Sangha has checked off all three boxes for grounds of appeal, namely, the Director erred in law and breached the principles of natural justice in making the Determination and new evidence has become available that was not available at the time the Determination was made. He is seeking the Employment Standards Tribunal (the “Tribunal”) to cancel the Determination.
4. In correspondence dated March 20, 2017, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending review of the appeal by the Tribunal and, following such review, all or part of the appeal might be dismissed.
5. On March 21, 2017, the Director sent the section 112(5) record (the “Record”) to the Tribunal and the Tribunal sent a copy of the same to Mr. Sangha. Mr. Sangha was provided an opportunity to object to its completeness. No objection to the completeness of the Record has been received and, accordingly, the Tribunal accepts it as being complete.
6. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I am assessing this appeal based solely on the Determination, the Reasons for the Determination (the “Reasons”), the Appeal Form, the written submissions made by Mr. Sangha and my review of the Record that was before the Director when the Determination was being made. Under section 114 of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons listed in subsection 114(1). If 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 further submissions. On the other hand, if it is found the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

ISSUE

7. The issue to be considered at this stage of the proceeding is whether the appeal should be dismissed under section 114(1) of the *Act*.

THE FACTS

8. The Complainants filed their complaints under section 74 of the *Act* alleging that Mighty contravened the *Act* by receiving a payment for employing them, by paying them less than the minimum wage, and by failing to pay them all wages – regular wages, overtime wages and statutory holiday pay (collectively the “Complaints”). The Director conducted an investigation into the Complaints and, on March 3, 2017, issued a determination against Mighty (the “corporate determination”) which found Mighty liable for wages to the Complainants in the total amount of \$26,053.36 inclusive of interest. The Director also imposed administrative penalties on Mighty in the amount of \$3,500.00 pursuant to section 29 of the *Employment Standards Regulation* (the “*Regulation*”).
9. The corporate determination, which included a notice to directors and officers explaining their personal liability under the *Act*, was sent to Mighty’s counsel, with copies to the directors by email. In addition, prior to the corporate determination, the delegate of the Director, during the investigation of the Complaints, notified Mr. Sangha of his potential personal liability in a phone call in September 2016, and again in a Fact-Finding Meeting in October 2016.
10. On August 29, 2016, the delegate conducted a BC Online: Registrar of Companies – Corporation Search of Mighty which showed that Mighty was incorporated on July 17, 2009, and Mr. Sangha was listed as a director and an officer. A further search conducted on December 29, 2016, confirmed that Mr. Sangha continued to be listed as a director and an officer of Mighty. All of the above searches confirmed that Mr. Sangha was a director and an officer of Mighty between February 1 and July 18, 2016, when the Complainants’ wages were earned or should have been paid. Mr. Sangha also confirmed to the delegate, in an interview on September 8, 2016, that he was a director and officer of Mighty during the said material period.
11. As a result, the delegate issued the Determination against Mr. Sangha, holding the latter personally liable for up to two (2) months’ unpaid wages owing to each of the Complainants.
12. As there was insufficient evidence to indicate that Mr. Sangha authorized, permitted or acquiesced in contravention of the *Act*, he was not found liable for the administrative penalties levied against Mighty.
13. The Determination was issued at the same time as the corporate determination against Mighty as the latter ceased operations and indicated that it could not pay the amount required to be paid by the corporate determination.
14. Mighty appealed the corporate determination on March 15, 2017, and the Tribunal dismissed the appeal on May 8, 2017. (see *Mighty*, BC EST # D053/17)
15. On the same date as Mighty’s appeal, March 15, 2017, Mr. Sangha also submitted his appeal. The appeal is based on the same grounds of appeal as the appeal of the corporate determination – error of law, natural justice and new evidence – and the remedy Mr. Sangha is seeking is that the Tribunal change or vary the Determination.

SUBMISSIONS OF MR. SANGHA

16. The written submissions are made by Gunita Sangha (“Ms. Sangha”) on behalf of Mr. Sangha. Ms. Sangha is Mr. Sangha’s wife.

17. The written submissions of Ms. Sangha are 6 pages in length and are, in significant part, an abbreviated version of the 12 pages of submissions she made on behalf of Mighty in the appeal of the corporate determination. I have read the submissions very closely and while I do not find it necessary to reiterate them here in great detail as they are not particularly relevant in an appeal of a section 96 determination, I will briefly describe them below:
- a. Submissions appealing the Determination on compassionate grounds because Mr. Sangha lost his business and Ms. Sangha lost her job and they have three young dependent children.
 - b. “New evidence” in the form of an Affidavit of a former employee of Mighty presented to dispute the Complainants claim of the hours they worked for Mighty.
 - c. “New evidence” in the form of copies of some “schedule sheets” allegedly retrieved from the former employee whose Affidavit is produced in b. above to challenge the hours the Complainants say they worked.
 - d. Some few pages from a copy of the Fresh Slice Manual of another franchisee that says that all employees are required to check off their hours on schedule sheets at the start and finish of each shift and must take their breaks. Allegedly, this document was not available before to Mr. Sangha as Mighty lost all its records when the franchisor took possession of the store. This document is presented to, again, dispute the hours the Complainants claim they worked.
 - e. Some messages exchanged between one of the Complainants and a former employee of Mighty on Facebook to challenge the evidence of the Complainants regarding their work days and hours.
 - f. The Director erred in law in finding that the \$10,000 paid as a “deposit” to Mr. Sangha pursuant to the Memorandum of Understanding was payment for obtaining employment by the Complainants since one of the Complainants had been working for Mighty for about 10 months and the other “had also joined his training before the deposit was paid”.
 - g. The Director erred in law in adding an extra hour of work for the Complainants in the morning on days when school hot lunches were prepared by finding that the Complainants came in at 8:00 a.m. when the Memorandum of Understanding required the store to be open at 9:00 a.m.
 - h. The Director breached the principles of natural justice in “believ[ing] that the [C]omplainants opened the store at 8:00 am on the days [of] the school hot lunches despite the fact that the MOU clearly states the opening time is 9:00 am.” The Director was wrong in concluding that the time the store is opened is not necessarily the time that work began; “no pizza store open[s] at 9:00 am” and “[n]o Fresh Slice store opens before 10:00 am”.
 - i. The Complainants said that one of their friends, Fatih, “helped with the work a few hours per week”. While the Complainants did not specify how many hours Fatih worked, “[a] reasonable estimate would be that she helped 2-3 times per week for a total of 8-10 hours per week” and therefore, these hours would not have been worked by the Complainants and should be deducted from the calculation of hours in the award made to the Complainants.
 - j. When the Complainants “took over the management of the store, they did not work any more hours than regular hours required” and Mr. Sangha told them that 8 hours was all they were required to work each day. Also, the Complainants were not required to be at the store at the same time except during the lunch and dinner hours only which totalled 4 hours when both worked at the same time. Therefore, the Complainants’ were receiving “minimum wages, if not more” for the time they worked. There is no amount owing to them.

ANALYSIS

18. Section 96 of the *Act* provides as follows:

Corporate officer's liability for unpaid wages

- 96 (1) A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months' unpaid wages for each employee.
- (2) Despite subsection (1), a person who was a director or an officer of a corporation is not personally liable for
- (a) any liability to an employee under section 63, termination pay or money payable in respect of individual or group terminations, if the corporation is in receivership,
 - (b) any liability to an employee for wages, if the corporation is subject to action under section 427 of the *Bank Act* (Canada) or to a proceeding under an insolvency Act,
...

19. It is settled law in the Tribunal's decisions that in an appeal of a determination made under section 96 of the *Act* the appellant is limited to arguing only those issues that arise under section 96 of the *Act*, namely:

- Whether the person was a director when the wages were earned or should have been paid;
- Whether the amount of liability imposed is within the limit for which a director may be found personally liable;
- Whether circumstances exist that would relieve the director from personal liability under subsection 96(2).

20. It is also settled law that the director/officer is precluded from arguing the corporate liability in an appeal of a section 96 determination (see *Kerry Steinemann, Director/Officer of Pacific Western Vinyl Window & Doors Ltd.*, BC EST # D180/96). Therefore, Mr. Sangha, or Ms. Sangha on Mr. Sangha's behalf, may not make any submissions questioning or raising the matter of the correctness of the corporate determination in this appeal.

21. In this case, I do not find Ms. Sangha's submissions arguing any issues that arise under section 96 of the *Act*. She is not disputing that Mr. Sangha was a director and officer of Mighty when the wages were earned or should have been paid to the Complainants.

22. I also note that while Ms. Sangha is disputing the amount of wages awarded to the Complainants in the corporate determination, she is not disputing whether the amount of liability imposed on Mr. Sangha is within the limit for which a director may be found personally liable.

23. Finally, I also note Ms. Sangha also does not adduce any evidence in her submissions that would indicate circumstances that might exempt Mr. Sangha from personal liability under section 96(2) of the *Act*.

24. In the circumstances, I am not persuaded that Mr. Sangha's appeal has established any basis for me to interfere with the Determination. I further note that while Mr. Sangha's appeal invokes the "error of law", the "natural justice" and the "new evidence" grounds of appeal, I do not find there is any support in Ms. Sangha's submissions for any of these grounds of appeal. In the result, I find that Mr. Sangha's appeal of the Determination has no reasonable prospect of any success, and I dismiss it pursuant to section 114(1)(f) of the *Act*.

ORDER

25. Pursuant to section 115 of the *Act*, I order the Determination, dated March 3, 2017, be confirmed, together with any interest that has accrued under section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal