

An appeal

- by -

Rachel Xing, a Director of Pegasus Pharmaceuticals Group Inc.
(“Ms. Xing”)

- 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: Carol L. Roberts

FILE No.: 2014A/48

DATE OF DECISION: July 10, 2014

DECISION

SUBMISSIONS

Patrick J. Sullivan

counsel for Rachel Xing, a Director of Pegasus
Pharmaceuticals Group Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Rachel Xing, a Director of Pegasus Pharmaceuticals Group Inc., has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 13, 2014.
2. Four former employees of Pegasus Pharmaceuticals Group Inc. (“Pegasus”) filed complaints with the Director alleging that Pegasus had contravened the *Act* by failing to pay them wages. On January 10, 2014, the Director issued a Determination (the Corporate Determination) finding Pegasus in contravention of section 18 of the *Act* in failing to pay wages to the former employees.
3. The total amount of wages and accrued interest was \$98,193.42. The Director also imposed a \$2,500 penalty on Pegasus for the contraventions, pursuant to section 98 of the *Act*. The Corporate Determination, which included a Notice to Directors/Officers explaining their personal liability under the *Act*, was sent to Rachel Xing, Pegasus’ registered and records office, and to other Pegasus directors and officers. Canada Post tracking records establish that the Corporate Determination was sent to the address indicated for Ms. Xing on the Annual Report. The date for appealing the Corporate Determination was February 17, 2014.
4. On March 13, 2014, the Director’s delegate found that the Corporate Determination had not been satisfied, nor had it been appealed. The delegate determined that as Ms. Xing was a director of Pegasus between December 1, 2012, and June 13, 2013, (the time the complainants’ wages were earned and payable) she was personally liable to pay \$44,388.83, representing not more than two months’ unpaid wages for each of the employees, pursuant to section 96 of the *Act*. The delegate concluded that there was insufficient evidence that Ms. Xing authorized, permitted or acquiesced in Pegasus’ contraventions, and found her not personally liable for the administrative penalties. The deadline for filing an appeal was April 22, 2014.
5. Ms. Xing filed an appeal on April 23, 2014, contending that the Director erred in law in making the Determination and failed to observe the principles of natural justice in making the Determination. Ms. Xing also sought an extension of time in which to file the appeal.
6. Section 114 of the *Act* and Rule 22 of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”) provide that the Employment Standards Tribunal (the “Tribunal”) may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria.
7. These reasons are based on Ms. Xing’s written submissions, the section 112(5) “record” that was before the delegate at the time the decision was made, and the Reasons for the Determination.

FACTS AND ARGUMENT

8. The Corporate Determination contained the following “Notice to Directors/Officers”:

If a Determination is issued against a director/officer of a company, the director/officer may not argue the merits of the Determination against the company by appealing the director/officer Determination.

There are only three grounds on which a Determination made against a director/officer may be appealed:

- 1) That the person appealing was not a director/officer of the company at the time wages were earned or should have been paid;
- 2) That the calculation of the director/officer's personal liability is incorrect; and/or,
- 3) That the director/officer should not be liable for the penalty, where a penalty has been assessed, on the grounds that he or she did not authorize, permit or acquiesce in the company's contravention.

9. BC Company Registry searches conducted November 2012 and March 2014 indicated that Pegasus was incorporated in British Columbia on March 21, 1997, and was "active" at the time the wages were earned and payable. The BC Summary Report for Pegasus confirms that Ms. Xing was a director between December 1, 2012, and June 3, 2013, when the complainants wages were earned and should have been paid.
10. Counsel for Ms. Xing says that Ms. Xing was not provided with an opportunity to respond to the complaints, contending that Ms. Xing "was never personally contacted" by the delegate.
11. Counsel also submits that Pegasus' inability to pay the complainants' wages is the result of the British Columbia Securities Commission's decision to freeze substantially all of Pegasus' bank accounts, and that the delegate erred in law in failing to consider that Pegasus' inability to pay the complainants' wages is beyond Ms. Xing's control.

ANALYSIS

12. Section 114 of the *Act* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the 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, 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.
13. The appeal was filed one day after the deadline in which to file an appeal. Any delay would allow the Tribunal to dismiss the appeal under section 114(1)(b), but I choose to address the appeal under section 114(1)(f).
14. Section 112(1) of the *Act* provides that a person may appeal a determination on 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.
15. Having considered the “record” and Ms. Xing’s submissions, I am not persuaded that she has demonstrated either that the Director erred in law or failed to observe the principles of natural justice.
16. Section 96 of the *Act* provides as follows:
- (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 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 an action under section 427 of the *Bank Act* (Canada) or to a proceeding under an insolvency Act,
 - ...
17. Section 126 of the *Business Corporations Act* [SBC 2002] c. 57 provides that:
- A company must keep a register of its directors and enter in that register
- (a) the full name and prescribed address for each of the directors,
 - (b) the date on which each current director became a director,
 - (c) the date on which each former director became a director and the date on which he or she ceased to be a director, and
 - (d) the name of any office in the company held by a director, the date of the director’s appointment to the office and the date, if any, on which the director ceased to hold the office.
18. The corporate records establish that Ms. Xing was a director of Pegasus at the time the wages were earned and payable, a fact Ms. Xing does not dispute. Ms. Xing also does not dispute that the wages the delegate determined were owed were earned in a two month period in which she was a director of Pegasus.
19. The section 112 “record” establishes that the Corporate Determination was sent to Ms. Xing by registered mail at the address indicated for her in the Corporate Directory, as well as to Pegasus’ registered and records office and Pegasus’ corporate office. Canada Post tracking records indicate that the Corporate Determination was successfully delivered to all those addresses on January 13, 2014. Had Ms. Xing indeed not been given an opportunity to respond to the employee’s complaints of unpaid wages, she had every opportunity to appeal that Determination. She did not, despite knowledge of her opportunity to do so.
20. Once corporate liability has been established, directors cannot, through an appeal of a determination of director liability, reargue the issue of a company’s liability for wages unless they can establish fraud or fresh evidence that is decisive to the merits of the issue (*Steinemann*, BC EST # D180/96). Given that Pegasus neither disputed the initial claims of the employees nor appealed the Corporate Determination and Ms. Xing has not established fraud or fresh evidence, Ms. Xing cannot now, on an appeal of the Director Determination, argue the Director’s Corporate Determination.

21. I am unable to conclude that the Director failed to comply with the principles of natural justice in making the Determination.
22. Ms. Xing says that Pegasus' inability to pay the employees' wages is a result of a decision of the British Columbia Securities Commission to freeze Pegasus' bank accounts. However, this purported decision, of which there is no evidence before me, does not fall within the section 96(2) exceptions for director liability for wages. I am, therefore, not persuaded that the delegate made any palpable or overriding error in making the Determination.

ORDER

23. Pursuant to section 114(1)(f) of the *Act*, I dismiss the appeal. Accordingly, pursuant to section 115 of the *Act*, the Determination, dated March 13, 2014, is confirmed, together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal