

An appeal

- by -

Vicky Dancho, a Director of Pegasus Pharmaceuticals Group Inc.
(“Ms. Dancho”)

- 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/49

DATE OF DECISION: July 10, 2014

DECISION

SUBMISSIONS

Patrick J. Sullivan

counsel for Vicky Dancho, a Director of Pegasus
Pharmaceuticals Group Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Vicky Dancho, 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. On May 31, 2013, the Director issued a Determination (the Corporate Determination) finding six companies (Pegasus Pharmaceuticals Group Inc., Panagin Pharmaceuticals Inc., Pegasus Lifecare Inc., Pepmetric Technologies Inc., Tatech Bioscience Inc., and Pegasus Biopharmaceuticals Inc.) collectively “Pegasus”, to be associated companies under section 95 of the *Act*. In that Determination, the Director also found Pegasus in contravention of section 18 of the *Act* in failing to pay wages to eighteen of its former employees.
3. The total amount of wages and accrued interest was \$216,716.19. The Director also imposed a \$500 penalty on Pegasus for the contravention, pursuant to section 98 of the *Act*. The Corporate Determination, which included a Notice to Directors explaining their personal liability under the *Act*, was sent to Vicky Dancho, Pegasus’ registered and records office, and to other Pegasus directors. The date for appealing the Corporate Determination was July 8, 2013.
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. Dancho was a director of Pegasus Pharmaceuticals Group Inc. between June 1 and December 3, 2012, (the time the complainants’ wages were earned and payable) she was personally liable to pay \$148,341.07, representing not more than two months’ unpaid wages for each of the employees, pursuant to section 96 of the *Act* (the Director Determination). The delegate concluded that there was insufficient evidence that Ms. Dancho authorized, permitted or acquiesced in Pegasus’ contraventions, and found her not personally liable for the administrative penalties. The date for appealing the Director Determination was April 22, 2014.
5. Ms. Dancho 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. Dancho 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. Dancho’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, April 2013, and March 11, 2014, indicated that Pegasus Pharmaceuticals Group Inc. (incorporated March 21, 1997), Panagin Pharmaceuticals Inc. (incorporated September 28, 1998), Pegasus Lifecare Inc. (incorporated July 4, 2005), Pepmetric Technologies Inc. (incorporated February 18, 2004), Tatech Bioscience Inc. (incorporated August 16, 2007), and Pegasus Biopharmaceuticals Inc. (incorporated June 1, 2010), were all “active” at the time the wages were earned and payable. The BC Company Summary report for Pegasus Pharmaceuticals Group Inc. confirmed that Ms. Dancho was a director between June 1 and December 3, 2012, when the complainants’ wages were earned and should have been paid.
10. Counsel for Ms. Dancho says that Ms. Dancho was not provided with an opportunity to respond to the complaints, contending that Ms. Dancho “was never personally contacted” by the delegate about the complaints. Counsel also says that Ms. Dancho was not aware she was a registered director of Pegasus Pharmaceuticals Group Inc., and that in August 2012 when she learned that she had been registered as a director, she took steps to resign. Counsel submits that the delegate incorrectly found Ms. Dancho to be a director of Pegasus Pharmaceuticals Group Inc. between June 1, 2012, and December 3, 2012, when the complainants’ wages were earned, and that this constitutes an error of law.
11. Counsel says that as Ms. Dancho had no involvement in any of the Pegasus companies, she cannot be held liable for any wages owed by them. He further asserts that Ms. Dancho was not provided with an opportunity to contest the finding made in the Corporate Determination to associate the companies.
12. Finally, counsel submits that the Pegasus Companies’ inability to pay the complainants’ wages is the result of the British Columbia Securities Commission’s decision to freeze substantially all of the Pegasus Companies’ bank accounts, and that the delegate erred in law in failing to consider that the Pegasus Companies’ inability to pay the complainants’ wages is beyond Ms. Dancho’s control.

ANALYSIS

13. 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.
14. 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).
15. 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.
16. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.
17. 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,
 - ...
18. 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.

19. The corporate records establish that Ms. Dancho was a director and officer of Pegasus Pharmaceuticals Group Inc. at the time the wages were earned and payable. A Notice of Change of Directors was filed under the *Business Corporations Act* confirming that Ms. Dancho ceased to be a director of Pegasus Pharmaceuticals Group Inc. as of June 6, 2013. However, Ms. Dancho remained an officer after that date.
20. The Tribunal has held that corporate records, which the Director can rely on to establish director and officer status, raise a rebuttable presumption that a person is a director/officer. A defence to section 96 liability can be successfully raised if a director/officer can show, on credible and cogent evidence, that the Registrar's records are inaccurate, either because the person resigned or is not properly appointed. (*Wilnofsky*, BC EST # D106/99, and *Michalkovic*, BC EST # D056/00)
21. In *Michalkovic*, the Tribunal held that it would be a rare and exceptional circumstance where a person recorded as a director with the Registrar would not be found to be a director for the purposes of section 96. Showing that he or she does not actually perform the duties, functions and tasks of a director is insufficient. An honest person who is in business with a rogue who misappropriates funds and denies the director access to the company and records will be held liable (*Peter Stursberg*, BC EST # D380/01) as will a person who is a volunteer and receives no benefit from his involvement in the corporation (*Hernandez*, BC EST # D150/02). In *Grand East*, BC EST # D074/06, the Tribunal held that liability will be imposed even where there is good evidence of fraud or oppressive conduct on the part of other directors, or where the directors have exercised due diligence in attempting to operate the company properly.
22. Ms. Dancho says, simply, that she was “unaware” that she was a “registered director.” The record establishes that she was, and remains, an officer. I find no error in the Director's determination that Ms. Dancho was liable for wages under section 96 of the *Act*.
23. The section 112 “record” establishes that the Corporate Determination, in which the Director made a decision to associate the companies and found the complainants entitled to wages, was sent to Ms. Dancho 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 although the mail sent to Ms. Dancho's address was unclaimed, the Corporate Determination was successfully delivered to Pegasus' registered and records office on June 4, 2013. I find that Ms. Dancho was notified of the Corporate Determination. She did not appeal that Determination despite having knowledge of the opportunity to do so.
24. 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. Dancho has not established fraud or fresh evidence, Ms. Dancho cannot now argue the Director's decision to associate the companies or Pegasus' liability for wages.
25. Ms. Dancho says that the Pegasus Companies' inability to pay the employees' wages is a result of a decision of the British Columbia Securities Commission to freeze all or substantially all of the Pegasus Companies' 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

26. 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