

Appeals

- by -

Guiying Jiang, a Director or Officer of Grand East Supermarket Inc. and
Di Liu, a Director or Officer of Grand East Supermarket Inc.

- 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: John Savage

FILE No.: 2006A/50 & 2006A/51

DATE OF DECISION: July 11, 2006

DECISION

SUBMISSIONS

Alan H. Brown, for MJ Labour Contractor Ltd.

Glen Smale, for the Director of Employment Standards

BACKGROUND

1. Grand East Supermarket Inc. (“Grand East”) operated a grocery supermarket in Richmond, BC, from January, 2005, until approximately June 5, 2005. On or about June 5, 2005, the supermarket permanently closed. Some thirty-five employees filed complaints under the *Employment Standards Act*, RSBC 1996, Chap. 113, (the “Act”).
2. The delegate of the Director of Employment Standards, Mr. Glen Smale (“Delegate”), wrote letters to Grand East by certified mail on August 5, 29, September 20, 27 and December 6, 2005, setting out the complainant’s allegations, the role of the Delegate, and asking for a response to the complainant’s allegations. Demands for Employer Records covering each of the complaints were enclosed with the letters. These same letters were sent by certified mail to each of the Directors and Officers of Grand East, including the appellant, Ms. Guiying Jiang (“Jiang”) and Mr. Di Liu (“Liu”).
3. The solicitors for Mr. Shaoming Wang (“Wang”), a Director or Officer of Grand East, acknowledged receipt of the Delegate’s letters and Demands and acknowledged that Wang was a Director during the relevant time period. The solicitor stated that Wang had no personal knowledge of the accuracy or inaccuracy of the allegations and referred the Delegate to Mr. Kang Ho (“Ho”). The Delegate received some payroll records and sought to follow this up with Ho but letters dated September 1 and 20, 2005 failed to illicit any response. There were further letters from the Delegate dated September 27 and December 6, 2005 to Grand East and all the Directors advising of new complaints arising out of the same circumstances.
4. The Delegate concluded his investigation and issued his Determination. The Reasons for Determination, ER#133-346, dated March 2, 2006 run some 70 pages and detail each of the complaints. No appeal was taken from the Determination which finds wages owing of \$51,203.97 and imposes administrative penalties of \$4,000.00. The Reasons for Determination were delivered to each of the Directors and Officers, including Jiang and Liu, by a letter dated March 2, 2006.
5. The Delegate issued further Determinations on March 15, 2006. In those Determinations the Delegate considered the liability of Jiang and Liu as Directors or Officers of Grand East. Grand East was incorporated on April 27, 2004. A Notice of Change of Directors was filed with the Ministry of Finance on July 5, 2005, stating that Jiang and Liu became Directors of Grand East as of January 30, 2005. The Delegate found that the complainant’s wages were earned or should have been paid between February 5, 2005, and June 13, 2005. During this period Jiang and Liu were Directors of Grand East and therefore liable for unpaid wages as provided for in section 96 of the Act.
6. The Appellants appealed the Determinations of the Delegate by an appeal dated April 13, 2006. The grounds of appeal include that the Director erred in law, the Director failed to observe the principles of

natural justice in making the Determinations, and that evidence has become available that was not available at the time the Determinations was being made. The Appellants also submitted, in the alternative, that the Appellants should not be liable for any wages that became due after June 7, 2005. The Tribunal received with the appeal form a lengthy submission from counsel for Jiang and Liu on April 13, 2006, and follow up documents April 18, 2006. A response from the Director was received May 17, 2006. Two short responses from employees were received May 1 and May 15, 2006. The parties were invited by this Tribunal to make a final reply by June 5, 2006 but no further submissions were received.

7. The Tribunal determined to hear the appeals by the written submissions received.

ISSUES

8. The issues in the appeals, as specified in the Appeal Form, are:
1. Whether the Director erred in law in determining the liability of the Directors Jiang and Liu;
 2. Whether there was a breach of natural justice by the Director in determining the liability of the Directors Jiang and Liu;
 3. Whether evidence has become available that was not available at the time the Determinations were being made.

LEGISLATION

9. An appeal under the *Act* is a limited appeal governed by the provisions of section 112 of the *Act*, which provides as follows:
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.
10. A corporate director or officer's liability for unpaid wages is provided for in section 96 of the *Act*:
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,
- (c) vacation pay that becomes payable after the director or officer ceases to hold office, or
- (d) money that remains in an employee's time bank after the director or officer ceases to hold office.

11. In conducting an investigation the Director is obliged to comply with section 77 of the *Act*:

77. If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond. 1995, c. 38, s. 77.

DISCUSSION AND ANALYSIS

(1) Failure to Observe the Principles of Natural Justice

12. The position of the Appellant's on this point is most succinct. The Appellants say that "It is submitted that the Director of Employment Standards failed to observe the principles of natural justice in that the Director failed to provide any opportunity for these appellants to provide any evidence in relation to the Determination".
13. I have reviewed in detail the lengthy submission of the Appellant and the enclosures to that submission. There is no other reference to this ground of appeal in the balance of the submission.
14. The response of the Delegate references the contact and correspondence the Delegate had with the Appellants. A summary of those communications follows.
15. On August 5, 2005 the Delegate sent a letter by certified mail to Grand East, the registered and records office of Grand East, and the two directors known at the time, Wang and Mr. Xiaoning Wu ("Wu"). The letter outlined the nature of the complaints received and sought input from Grand East. Wang's counsel wrote on August 17, 2005, to the Delegate providing the names of the then current directors of Grand East, including Jiang and Liu.
16. On August 29, 2005, the Delegate wrote by certified mail to Jiang and Liu advising that their names appear as Directors for Grand East as of January 30, 2005. The letter says that it is forwarding "all documentation" regarding the complaints and says "Please review the provisions of Section 96 of the *Act* as to the potential liabilities that apply to a Director or Officer of a company". The letter goes on to specify a website for further information on director's liabilities and invites Jiang and Liu to contact the Delegate.
17. The Delegate notes that the letter of August 29, 2005, included the earlier letter of August 5, 2005, and all its attachments. The August 5, 2005, letter specifies the wages claimed by each of the employees and the basis of their claims. It also included extracts from the *Act* including section 96 that specifies a corporate officer's liability under the *Act*. A second letter of August 29, 2005, covers additional complainants and is copied to Jiang and Liu.
18. On September 20, 2005 the Delegate again wrote to Great East and copied the Directors including Jiang and Liu. In that letter notice of a further complaint is provided, that of Yu Chuan Liu, who, according to

the Delegate, is the husband of Jiang and father of Liu. On September 27, 2005 a similar letter but covering additional complainants is sent to Great East and copied to the Directors, including Jiang and Liu. A further letter of December 6, 2005 is sent concerning a new complaint and that is copied to the Directors, including Jiang and Liu.

19. On March 2, 2006 the Determination of the same date against Great East is sent by the Delegate by certified mail to Great East and its Directors, including Jiang and Liu. That Determination includes a covering letter that includes the following statement:

“Under the Act, a Determination may be filed in the British Columbia Supreme Court and collection proceedings may be commenced. Directors and Officers of companies can also be required to pay wages owed to employees and the total administrative penalty amount”.

20. The letter attaches a “Notice to Directors / Officers” that references the issues appealable by a Director or Officers and encloses extracts from the *Act* including section 96 referenced above.

21. A Delegate’s duties under section 77 have been described in the decision of this Tribunal in *Inshalla Contracting Ltd.* BC EST #RD054/06.

22. An investigation under the *Employment Standards Act*, does not necessarily give rise to the full panoply of natural justice rights arising in a purely judicial context. Indeed, it has been held that the attributes of natural justice may vary according to the character of the decision and the context in which it applies: *Martineau v. Matsqui Disciplinary Board* [1980], 1 S.C.R. 602. In general, the appropriate procedures will in each case depend on the provisions of the statute and the context in which they are applied: *Downing v. Graydon*, (1978) 29 O.R. (2d) 292.

23. In the case of investigations under the *Employment Standards Act* the duty of fairness will almost invariably require notice to the parties. The general principle is that notice must be adequate in all the circumstances in order to afford those concerned a reasonable opportunity to present evidence and argument, and to respond to the position of the other party. It will also give the parties other opportunities to resolve the dispute with the assistance of the Employment Standards Branch.

24. To participate in the decision making by a public body or public official, however, individuals must possess sufficient information to enable them to make representations on their own behalf, to effectively prepare their own case and answer the case they have to meet. It is therefore a fundamental element of the duty of fairness at common law that prior notice be given to those entitled to participate in a decision.

25. On the other hand, however, this Tribunal has held that the Director during an investigation should not be placed in a procedural strait-jacket, *Isulpro Industries Inc.*, BC EST #D405/98, so there must be an element of reasonableness applied.

26. Section 77 of the *Employment Standards Act* relates specifically to investigations under the *Act*. It provides as follows:

77. If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

27. As noted by this Tribunal, section 77 does not mandate a face-to-face hearing or meeting between the Delegate and person under investigation, but it does require that reasonable efforts be made so that the

person under investigation is made aware of the allegations and be given a reasonable opportunity to respond: *Re Medallion Developments Inc.*, [2000], BC EST #D235/00.

28. As indicated in the Delegate's submission, the only response to the correspondence from the Delegate detailed above was a letter from Mr. Jack Tang dated August 31, 2005. In my opinion, receipt of the various letters from the Delegate gave Jiang and Liu ample notice of the nature of the investigation and their own potential liability. Those letters specified the nature of the complaints and specific information about each complainant. Some of those letters also noted the potential liability of Directors, made express reference to section 96 of the Act, and invited a response.
29. In the circumstances, in my opinion, there was no breach of natural justice in the circumstances of the Delegate Determinations of March 15, 2006 finding Jiang and Liu liable as corporate Directors of Great East.

(2) Whether New Evidence is Available

30. The Appellants also appeal citing section 112(1)(c) of the *Act*. Section 112(1)(c) of the *Act* provides a right of appeal where a party has evidence that "has become available that was not available at the time the determination was being made". Forming part of the Appellant's submission is voluminous written materials which chronicles the involvement of the Appellants in Grand East.
31. In deciding whether the Tribunal should receive new evidence on appeal the Tribunal noted in *Re Merilus Technologies Inc.*, [2003] BC EST #D171/03 that it has been guided by the test applied in civil courts for admitting fresh evidence on appeal.
32. The test for admitting fresh evidence on appeal involves the consideration of the following factors: (1) whether the evidence could, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or hearing (the "Due Diligence Requirement"), (2) the evidence must be relevant to a material issue in the appeal (the "Relevancy Requirement"), (3) the evidence must be credible in the sense that it is reasonably capable of belief (the "Credibility Requirement"), and (4) the evidence must have high probative value, in the sense that, if believed, it could, on its own, or when considered with other evidence, have led the Director to a different conclusion on a material issue (the "Probative Value Requirement").

(a) The Due Diligence Requirement

33. The Appellants lengthy submission involves allegations by the Appellants of wrongdoing and even fraud against other Directors officers and shareholders of Grand East. It seems clear that some of this information was not available to the Appellants at the beginning of the investigation by the Delegate. Some became available during the course of the investigation and some became available only very late in the process, e.g., the report of NP McFarland is dated February 20, 2006.
34. The essentials of these allegations of wrongdoing are, however, reflected in correspondence dated August 31, 2005, from Mr. Jack Tang to the Delegate. In that correspondence Mr. Tang alleged that the assets of Great East had been illegally sold to Great China Trading in June, 2005, that Jiang had not been involved in the business management, nor the administration of the company, and that actions were being commenced and injunctions sought regarding the allegedly fraudulent conduct of a fellow director.

35. On September 22, 2005, a Writ of Summons and Statement of Claim was filed with Jiang and Liu as Plaintiffs and Grand East, Wang, Ho, and others named as Defendants. That document again sets forth the allegations made by Jiang and Liu against Wang and Ho in the Appellants submission in this case, so the nature of the allegations were well known to the Appellants early on during the investigation by the Delegate.
36. The latest material evidence presented in the submission is the report of NP McFarland dated February 20, 2006. This predates the Determination against Grand East by two weeks and predates the Determination against Jiang and Liu by more than three weeks. If this was material it could have been delivered to the Delegate before either of these Determinations.
37. The submission of the Appellants is that the dominant director Wang acted oppressively in such a way that the Tribunal should relieve the Appellants from liability as Directors. The oppressive conduct is enumerated in paragraph 15 of the submission. The submission of the Appellants also argues that the Appellants did what they could to ensure that Grand East was run properly.
38. These allegations are all contained in the Statement of Claim and affidavit of Jiang made in support of obtaining an injunction against Wang. In short, the oppressive actions alleged, and the diligence of the Directors in ensuring Grand East was run properly, were all known to the Appellants long before the investigation of the Delegate was concluded.
39. In my opinion, in these circumstances, the Due Diligence Requirement is not met. Although this Tribunal has held that all four of the requirements must be met I will consider briefly the other requirements seriatim.

(b) The Relevancy Requirement

40. I have noted above the oppressive conduct alleged by the Appellants that they say should give rise to relief of liability under section 96.
41. The first example of oppressive conduct is the alleged fraudulent representation that Grand East was related to the Hualian supermarket chain in China. The Appellants say that this representation induced them into investing in and loaning money to and “in the process become directors of” Grand East.
42. The second and third examples of oppressive conduct cited is the allegation that Wang failed to keep proper financial records or provide proper financial records when requested to do so, nor notice of expenditures of over \$20,000. It is apparent that neither monthly records, nor notice of expenditures of over \$20,000 were reported to the Appellants.
43. The fourth, fifth, and sixth examples of oppressive conduct relate to the conveying of all of Grand East’s assets to Great China and Allied Pioneers in June 2005. The effect of these actions was that the assets of Grand East were not available to satisfy the obligations of Grand East to its employees.
44. The Appellants also give examples of their own conduct to show that they attempted to ensure that Grand East was run properly.

45. Apart from the first allegation, in my opinion these latter allegations might have some relevance to the issues, if oppressive conduct or due diligence are relieving factors when considering section 96. Whether the relevancy requirement is met depends on the law as it relates to directors liability under the *Act*.

(c) The Credibility Requirement

46. In my opinion the evidence is capable of belief and thus the Credibility Requirement is met.

(d) The Probative Value Requirement

47. In order to assess the Probative Value Requirement it is necessary to consider the law as it relates to Directors Liability under the *Act*.

(3) Director's Liability Under the Act

(a) Business Corporations Act

48. The *Act* does not define the term "director" contained in section 96. It is therefore necessary to consider how that term is defined in legislation dealing with directors, in this case the *Business Corporations Act*, S.B.C. 2002, C. 57.

49. Apart from an initial director, which does not apply here, the relevant provision is section 122:

122. (1) Directors, other than the first directors of a company who are in their first term of office, must be elected or appointed in accordance with this Act and with the memorandum and articles of the company.
- (2) If the memorandum or articles so provide, the directors may, subject to subsection (3), appoint one or more additional directors.
- (3) Despite any provision to the contrary in the memorandum or articles, the number of additional directors appointed under subsection (2) must not at any time exceed
- (a) 1/3 of the number of first directors, if, at the time of the appointments under subsection (2), one or more of the first directors have not yet completed their first term of office, or
- (b) in any other case, 1/3 of the number of the current directors who were elected or appointed as directors other than under subsection (2).
- (4) No election or appointment of an individual as a director under this section is valid unless
- (a) the individual consents in accordance with section 123 to be a director of the company, or
- (b) the election or appointment is made at a meeting at which the individual is present and the individual does not refuse, at the meeting, to be a director.

50. The term “director” is defined in section 1(1) as follows:

“director” means,

- (a) in relation to a company, an individual who is a member of the board of directors of the company as a result of having been elected or appointed to that position, or
- (b) in relation to a corporation other than a company, a person who is a member of the board of directors or other governing body of the corporation regardless of the title by which that person is designated;

51. In this case the Delegate filed as part of the record a Notice of Change of Directors in Form 10 filed under section 127 of the *Business Corporations Act*. The Notice was filed on July 5, 2005 and indicates that Jiang and Liu became directors as of January 30, 2005.

52. The Notice of Change of Directors is consistent with the Share Purchase Agreement dated January 26, 2005 that provides that the Board of Directors will include Jiang and Liu.

53. In an affidavit filed in legal proceedings Jiang attests on September 19, 2005 that Jiang is a director and shareholder and that she attended a directors meeting on April 15, 2005 and took steps to try to ensure she was apprised of major decisions being made with respect to Grand East. In his submission to this Tribunal, counsel for Jiang and Liu states that “as a part of the investment, each of these appellants entered into a shareholders agreement pursuant to which: these appellants were entitled to and became directors of Grand East”.

54. In my opinion the evidence before the Delegate indicates that both Jiang and Liu were directors of the Grand East corporation as required by section 96 of the *Act*. The new evidence, even if it could or should be considered, is confirmatory of this finding.

(b) Statutory Interpretation

55. The main thrust of the Appellant’s submission appears to be that neither of the Appellants should be liable because, as directors, they were subject to oppressive conduct by their fellow directors. Moreover, they did what they could to ensure that Grand East was run properly. Whether these factors are relevant to a finding of liability against directors under section 96 depends on the interpretation of the *Act*.

56. Any consideration of the interpretation of the *Act* must start with consideration of section 8 of the *Interpretation Act*, RSBC 1996, C. 238:

- 8. Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. R.S.B.C. 1979, c. 206, s. 8.

57. In reference to the equivalent Ontario act, Mr. Justice Iacobucci held in *Matchtinger v. OJ Industries Ltd.*, [1992] 1 S.C.R. 996 (at page 1003) that the objective of the *Act* is to protect the interests of employees by requiring employers to comply with certain minimum standards.

58. In *Helping Hands Agency Ltd. v. British Columbia (Director of Employment Standards)*, (1995), 131 D.L.R. (4th) 336 (at page 340) Legg, J.A., said that the *Act* is “remedial legislation” and “Consistent with

s. 8 of the *Interpretation Act*, R.S.B.C. 1979, c. 206, the ESA should be given such fair, large and liberal constructions as best ensures the attainment of its objects”.

59. With respect to the issue of Directors liabilities, however, the Courts have recognized that somewhat different considerations apply. The Courts have said that the predecessor of section 96 represents an extraordinary provision. As noted by our Court of Appeal in *Bell v. Director of Employment Standards*, No. CA020398, Vancouver Registry, BCCA June 20, 1996, the imposition of liability upon directors for corporate debts is the exception to the rule (paragraph 32):

The corporation, of course, is a separate legal entity and a director is not responsible for any of its debts absent a clear statutory exception.

60. In *Barrette v. Crabtree Estate*, [1993] 1 S.C.R. 1027 the Court held in favour of the directors with Madam Justice L’Heureux-Dub commenting on a similar provision in the *Canada Business Corporations Act* as follows:

[in] terms of the general principles governing company law, the provision is exceptional in at least three respects. First, the rule departs from the fundamental principle that a corporation’s legal personality remains distinct from that of its members. In doing so [it]... creates an exception to the more general principle that no one is responsible for the debts of another. Further, unlike other statutory rules which impose personal liability on directors [it]...does not contain an exculpatory clause.

...

Finally, the provision in question imposes on directors a positive obligation. This distinguishes it from most statutory rules, which prohibit directors from engaging in certain acts or transactions.

61. These same observations apply to the current provision, although I note that the current provision provides for some limited statutory exceptions.

(c) *Discussion and Analysis*

62. The liability of directors and officers for employee wages has been described as one of “absolute liability”, for example, by E. Edward Siemens in *Directors’ Liability in Canada*, STP Specialty Technical Publishers Inc., North Vancouver, 1994-97.

63. In 1994 Mark Thompson was appointed Commissioner of the Employment Standards Review and recommended against incorporation of a due diligence defence in *Rights and Responsibilities in a Changing Workplace, A Review of Employment Standards in British Columbia*, pp.155-156. As noted by Siemens (at page I 2-7):

64. The report also indicates that the standard of conduct that would be required to mount a due diligence defence should be consistent with other statutes, such as BCCA. On the premise that directors must act in the interests of the company’s shareholders, the report states that such duties would conflict with the *Employment Standards Act*, which exists to protect the interests of the employees.

65. For these reasons and due to the commissioner’s view that apparent administrative problems would arise from a due diligence defence, no changes to the absolute liability imposed on directors and officers under the *Employment Standards Act* were recommended.

66. Whether there should be a discretion to not impose liability on directors has been the subject of some academic discussion. *Innis Christie, et. al.*, in *Employment Law in Canada*, 2nd Ed., Butterworths, 1993 references the issue as follows (p. 851-2):

To begin with, in this and other contexts in which director liability exists, it is possible for directors to acquire insurance against the loss. As well, the legislative imposition of director liability may encourage directors of corporate entities to see employees paid first so as to limit their own liability. In small corporate entities this may be an important factor. It is not uncommon for the directors of smaller corporate employers to be the main stakeholders and directing minds of the employer. One of the main reasons for having incorporated the business will have been to acquire the protection of limited liability. In these circumstances, however, it is common for these stakeholders to have personally guaranteed the corporation's indebtedness to major creditors such as financial institutions. In cases of impending insolvency, and in the absence of personal liability for employees' pay claims, the stakeholders/directors will have a personal interest in seeing the major creditors paid (and thereby reducing their own liability) at the expense of the employees. Legislation imposing director liability for pay claims helps to redress this imbalance of incentives.

However, circumstances may exist where there is a need to limit or refuse remedies against the directors of corporate employers which have failed to pay the employees. While the provisions recognize a general need to limit employee's claims against directors in the form of time limitations for monetary amounts, there is no discretion in the employment standards legislation to deny the employees' claims where the directors, or some of them, had no part in the nonpayment decision and did not acquiesce in it, or where the business failure and consequent failure to pay was not through the fault of the directors. Such a discretion exists in the Bankruptcy Act where the entitlement to a discharge order, and the terms and conditions of discharge, will depend upon whether the court finds the bankrupt to have been responsible for the bankruptcy situation.

67. With respect to persons who are not recorded in corporate records as a director or officer, the Tribunal will apply the functional test to determine whether they are de facto directors or officers. If persons perform the functions of directors or officers they will be liable under the *Act* as de facto directors or officers.
68. The considerations are different, however, with respect to persons who are recorded as directors or officers in the records of the company. With respect to such persons this Tribunal made the following observations in *Michalkovic* BC EST # RD047/01:

In our view, in summary, the case law reviewed here and in *Wilinofsky* stands for the following propositions:

1. The corporate records, primarily those available through the Registrar of Companies or available at a corporation's registered and records office, raise a rebuttable presumption that a person is a director or officer. In other words, the Director of Employment Standards may presumptively rely on those corporate records to establish director or officer status.
2. It is then open to the person, who, according to the corporate records, is a director or officer, to prove on the balance of probabilities that the company records are *inaccurate*, for example, because the person resigned and the documents and the documents were not properly processed, a person is not properly appointed, etc.
3. There may well be circumstances where it would be inappropriate to find that a person is a director or officer despite being recorded as such. However, it will be the rare and

exceptional case to be decided on all the circumstances of the particular case and not simply by showing that he or she did not actually perform the functions, duties, or tasks of a director or officer.

4. The determination of director-officer status should be narrowly construed, at least with respect to Section 96.

69. It has been held that it is inappropriate to apply the functional test in determining whether a person is a director who is listed in the corporate records of the company as a director: *Pacey* BC EST #D121/04.
70. In the instant case, however, the Appellants, at least in some places in their submission, appear to admit that they are directors but rely on the statement of the Tribunal in *Michalkovic* that “there may well be circumstances where it would be inappropriate to find that a person is a director or officer despite being recorded as such” and in *Mott* BC EST # D334/01 where the Tribunal opined “There may be cases where there is some actual evidence of oppressive conduct by other directors, that might persuade an Adjudicator to relieve a person named as a director from liability under s.96”.
71. Despite these statements from the Tribunal, no cases have been cited to me, nor have I been able to find any cases where the Tribunal has expanded on or explicated these *obiter dicta* to relieve a director from liability under s. 96. There are some cases that reference these decisions.
72. There is a series of cases that deal with questions regarding whether a person is a director. The Tribunal has held that an apparently timely but uncorroborated resignation is not sufficient to rebut the presumption founded on corporate records: *Hester* BC EST #D190/02. Credible evidence that a person never consented to or had knowledge of appointment as a director coupled with evidence that the person never acted as a director has been held sufficient to rebut the presumption arising from corporate records: *Nam* BC EST #D102/04. In *Malet-Veale* BC EST #D047/04 the Tribunal held that an assertion that an officer had no knowledge of his appointment without other explanation did not entitle reconsideration.
73. In my opinion the above cases are consistent with the approach that a director’ personal liability is an exception to the general rule, so that a careful examination is necessary to determine whether a person is a director, and the extent of their liability. They do not assist the Appellants here where they acted as directors and are duly appointed as directors but were, if the allegations are proven, dealing with rogues.
74. There is another series of cases where the Tribunal has considered whether the particular circumstances of a directorship might give rise to relief. In *Van Dam* BC EST #D088/04 the Tribunal held that not being knowledgeable about the liabilities of a Director did not relieve a Director from liability. The fact that a Director has no knowledge of potential liabilities under section 96 and is unpaid and a volunteer does not absolve a director from liability: *Hernandez* BC EST #D150/02. In *Peter Stursberg* BC EST #D380/01 the Tribunal considered whether an honest person in business with a rogue, where the director was denied information, and even physical access to the company and records, could be relieved of liability. The Tribunal concluded not.
75. In my opinion the question of whether this Tribunal has the authority to relieve a director from liability under the *Act* in the case of oppressive conduct, or because a director has been duly diligent, must be founded in the *Act* and *Regulations* and, where applicable, under the *Administrative Tribunals Act*, S.B.C. 2004.

76. Subsection 96(1) imposes personal liability on a director or officer for “unpaid wages”. The liability on the director is only for wages that were earned or should have been paid if the person was a director or officer “at the time wages...were earned or should have been paid....”
77. There are four general exceptions to personal liability which are enumerated in subsections 96(2)(a), (b), (c) and (d). None of those subsections are applicable here. Nor do any of these provisions grant the Tribunal the discretion to relieve against the liability of directors based on oppression or due diligence. There is nothing in the *Administrative Tribunals Act* that confers discretion on this Tribunal in such matters.
78. The jurisdiction of the Tribunal is set out in Parts 12 and 13 of the *Act*. An examination of the powers of this Tribunal does not reveal any general power to relieve a person from the consequences of breaches of the *Act*.
79. As referenced above by *Innis Christie*, some legislation does confer discretion on a decision maker whether to impose liability.
80. Section 173.(1)(a) of the *Bankruptcy Act*, R.S.C. 1985, c. B-3, for example, allows a Court to consider whether the bankruptcy arises in circumstances “for which the bankrupt cannot justly be held responsible”. In such circumstances there can be relief.
81. Under the *Canada Business Corporations Act*, R.S.C. 1985, Chap. C-4, a director can escape liability for the payment of employee wages by section 123(4) if it can be shown that “the director exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances, including reliance in good faith on” financial statements or reports from professionals.
82. There are numerous examples in provincial legislation where due diligence is a defence. Under section 10 of the *Business Practices and Consumer Protection Regulation*, BC Reg. 294/2004, “due diligence” is an express defence to administrative penalties arising from certain breaches of the *Business Practices and Consumer Protection Act*. In a similar vein, “due diligence” is a defence to certain administrative penalties imposed under the *Cremation, Interment and Funeral Services Act* by section 5 of the *Administrative Penalties Regulation*, BC Reg. 297/2004. Under the *Real Estate Services Act*, SBC 2004, C. 42, the real estate council may by section 57 cancel administrative penalties if satisfied that a licensee exercised “due diligence” to prevent contravention of a rule.
83. Clearly there is no similar or analogous provision in the *Act*. The Employment Standards Tribunal is a statutory creation. It is not a court with inherent jurisdiction. In my opinion, such a Tribunal is not to be credited with any powers which are not expressly or by necessary implication entrusted to it: *Re Assessment Equalization Act and Re An Appeal of McMillan Bloedel and Powell River Ltd. et. al.* (1961-62), 36 W.W.R.(N.S.) 463, *Vancouver v. Rayonier Canada (B.C.) Ltd.*, (1977) BC Stated Case 102, Victoria Registry, 1393/1394/76.
84. In a similar matter, the Tribunal has considered whether it has the authority to relieve a party from administrative penalties imposed for breaches of the *Act* once those breaches have been established, and concluded that it does not have that power: *Kopchuk*, BC EST D# 049/05.
85. In the circumstances, notwithstanding the statements referenced in *Mott* and *Michalkovic*, I have concluded that there is no power in the Tribunal to relieve against the consequences of directorship in

circumstances where there has been oppressive conduct against a person duly appointed and who acts as a director. Likewise, it is not a defence to liability to say that a person duly appointed and who acts as a director, was duly diligent in attempting to have the corporation run properly,

86. In my opinion, the statement in *Michalkovic*, that there may well be circumstances where it would be inappropriate to find a person is a director despite being recorded as such, does not apply in circumstances where someone is duly appointed and acts as a director. In my opinion, the statement in *Mott*, which is *obiter dicta*, if intended to suggest this Tribunal has the jurisdiction to relieve a director from liability under the *Act* because of oppressive conduct, or because they were in some way duly diligent, is simply wrong. If the legislature had intended to confer that power on this Tribunal it would have expressly made provision. It has not done so. It follows that the Tribunal does not have this power.

NEW EVIDENCE ISSUE REVISITED

87. I find that the new evidence is not evidence that should be admitted because it does not meet the Due Diligence Requirement, the Relevancy Requirement or the Probative Value Requirement. In light of the interpretation of section 96 above, it is my opinion that evidence would not, in any event, assist the Appellants.

ERROR OF LAW

88. The second error of law alleged is that the Delegate erred in considering wages that became due or were earned after the transfer of the business to a third party. This would only apply to wages earned after the date of transfer, as the liability of directors under section 96 is for "...wages of an employee of the corporation [that] were earned or should have been paid..."
89. In an affidavit dated September 19, 2005, Jiang deposes that Great China and Allied Pioneers assumed control of Grand East in early June, 2005. In the submission received counsel asserts that any wages earned after June 7, 2005 should not be liabilities of Jiang and Liu. I will assume that counsel is correct that any wages after June 7, 2005 should not be for the account of Jiang and Liu.
90. I have reviewed all of the individual calculations of wages owing for all of the employees. There is only one employee whose employment *apparently* extended beyond June 7, 2005 and that is Ting Cao ("Cao"). All other employees are indicated as having their last day of employment as June 5 or June 6, 2005 and indeed the evidence is that Grand East ceased operating on June 5.
91. A review of Cao's complaint indicates that she claimed unpaid regular wages for the period June 1 to June 6, 2005, unpaid overtime for the period February 1 to June 6, 2006 and holiday pay for two specific dates, March 25 and May 23, 2005. Annual vacation pay is claimed for the period February 1, 2005 to June 12, 2005.
92. The June 12, 2005, date appears to be based on the fact that Cao was paid salary and the pay period ended June 12, 2005. Vacation pay, of course, is only calculable based on wages and the evidence indicates that there is no claim for wages beyond June 6, 2005.

93. In my opinion the only reasonable inference is that the claim for wages is for the period ending June 6, 2005, and the wages on which vacation pay is calculable under section 58 ceases June 6, 2005. Thus, the claim for vacation pay is for the period of work that ended on or before June 6, 2005.
94. In the circumstances, in my view, even if the transfer of the assets of Grand East was effective and occurred on June 7, 2005, and the evidence presented in this appeal could properly be considered, all of the claims for wages arise for periods that preceded that date. In the circumstances there are no wages claimed for periods where wages were earned after that date.
95. In my opinion there is no error of law shown in the Determinations appealed.

ORDER

96. The appeals are dismissed and pursuant to Section 115 of the *Act*, the Determinations of the Director are confirmed.

John Savage
Member
Employment Standards Tribunal