

An appeal

- by -

Shipei Zhou, a Director of PG Low Cost Towing and Auto Ltd.
(“Mr. Zhou”)

- 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/80

DATE OF DECISION: July 24, 2017

DECISION

SUBMISSIONS

Shipei Zhou on his own behalf, as a Director of PG Low Cost Towing and Auto Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Shipei Zhou (“Mr. Zhou”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 4, 2017.
2. The Determination found Mr. Zhou was a director of PG Low Cost Towing and Auto Ltd. (“PG Low Cost”), an employer found to have had contravened provisions of the *Act*, at the time wages were earned or should have been paid to Karl Johnson (“Mr. Johnson”), and as such was personally liable under section 96 of the *Act* for wages in the amount of \$2,609.51.
3. This appeal is grounded in evidence becoming available that was not available when the Determination was being made. Mr. Zhou seeks to have the Determination cancelled.
4. In correspondence dated June 13, 2017, the Tribunal, among other things, acknowledged having received the appeal, 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, that following such review, all or part of the appeal might be dismissed.
5. The record has been provided to the Tribunal by the Director and a copy has been delivered to Mr. Zhou, who has been given an opportunity to object to its completeness. There has been no such objection and, accordingly, the Tribunal accepts the record as being complete.
6. 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, my review of the material that was before the Director when the Determination was being made and any additional evidence allowed to be included in the appeal. 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.*

7. If satisfied the appeal or a part of it should not be dismissed under section 114(1) of the *Act*, the Director and Mr. Johnson 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

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

THE FACTS

9. The relevant facts are brief.
10. Mr. Johnson filed a complaint alleging PG Low Cost had contravened the *Act* by failing to pay him all wages owed. The Director investigated the complaint and, on April 13, 2017, issued a Determination against PG Low Cost (the “corporate determination”) finding it liable for wages to Mr. Johnson in the amount of \$5,658.28. The Director also imposed administrative penalties on PG Low Cost in the amount of \$2,000.00.
11. The corporate determination was delivered to Mr. Zhou by registered mail.
12. The statutory time period for filing an appeal of the corporate determination under the *Act* expired on May 23, 2017. No appeal of the corporate determination has been received by the Tribunal.
13. A BC Online Registrar of Companies search conducted by the Director on January 23, 2017, indicated PG Low Cost was incorporated on July 5, 2016, and Mr. Zhou was listed as a director. The search showed Mr. Zhou was a director of PG Low Cost during the period when Mr. Johnson’s wages were earned or should have been paid: September 6, 2016 to January 19, 2017.
14. Based on the information acquired and the findings made, the Director concluded Mr. Zhou was liable under section 96 of the *Act* for the amount set out in the Determination. Mr. Zhou was not found liable for the administrative penalties imposed on PG Low Cost in the corporate determination.
15. A later corporate search, conducted March 21, 2017, recorded that Mr. Zhou had ceased to be a director of PG Low Cost effective January 19, 2017.

ARGUMENT

16. Mr. Zhou takes pretty much the same position in this appeal as he did in response to the complaint, which is that, apart from agreeing in mid-2016, with the other recorded director of PG Low Cost, Timothy Scanlan, to acquire an interest in PG Low Cost and investing money into it, he had no control over the business, which was run by Timothy Scanlan and his son, Thomas Scanlan.

17. He says that in late January, 2017, he reached an agreement with the Scanlans to have him removed as a director of PG Low Cost, to purchase his shares and to pay him back for costs incurred relating to his acquisition of two trucks for the business. Mr. Zhou submits this agreement meant he was to have no financial liability for PG Low Cost.
18. Mr. Zhou has included with the appeal a recording of a discussion with Thomas Scanlan in which he says it was stated by Thomas Scanlan that Mr. Johnson was not an employee of PG Low Cost, but of Thomas Scanlan personally and that Thomas Scanlan was responsible for paying off the cost of the equipment that Mr. Zhou had purchased and for the money Mr. Zhou invested.

ANALYSIS

19. 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.*

20. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.
21. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.
22. The grounds of appeal listed above do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.
23. The onus is on the appellant, Mr. Zhou, to demonstrate that a ground of appeal they have identified on the Appeal Form is made out.
24. Mr. Zhou has grounded his appeal in evidence becoming available that was not available when the Determination was made. This ground of appeal is commonly described as the "new evidence" ground of appeal.
25. The Tribunal has discretion to accept or refuse new evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. New evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give

a person dissatisfied with the result of a Determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the Determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *Act*.

26. I have listened to the recording of the discussion between Thomas Scanlan and Mr. Zhou that has been included with the appeal. I am unable to accept and consider this information. There are three reasons for this decision.
27. First, 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 Steinemann, Director/Officer of Pacific Western Vinyl Windows & Doors Ltd.*, BC EST # D180/96.
28. In other words, Mr. Zhou is bound by the corporate determination. That has the consequence for Mr. Zhou of being bound by the finding that Mr. Johnson was an employee of PG Low Cost under the *Act* and, as the employer, PG Low Cost was responsible for the unpaid wages.
29. Second, and somewhat related to the first, the proposed new evidence does not address those issues to which a person challenging a determination issued under section 96 is limited to arguing. In that sense, the proposed new evidence is irrelevant to any material issue arising from the appeal.
30. And third, the proposed new evidence is not probative, in the sense that it might change the result of the corporate determination. Thomas Scanlan's view of Mr. Johnson's employment relationship cannot determine that question for the purposes of the *Act* or override the assessment by, and the conclusion of, the Director on that question. There is a substantial evidentiary basis for the finding of the Director that PG Low Cost was Mr. Johnson's employer and, based on a reasonable assessment of the evidence, there is no error on that matter. There was no suggestion at all in the material that Mr. Johnson was employed by Thomas Scanlan personally.
31. There is nothing in the appeal that shows the Director made any error in the Determination. The material in the record confirms Mr. Zhou was a director of PG Low Cost at the time wages were earned or should have been paid, that the liability imposed on him is within the limits for which a director may be found personally liable under section 96 and there are no circumstances that would relieve Mr. Zhou personal liability under the *Act*. I am not persuaded this appeal has any reasonable prospect of succeeding.
32. Mr. Zhou may have claims against the Scanlans in another forum for, among other things, the liability imposed on him under the *Act*, but an appeal under section 112 is not the appropriate process and the Tribunal is not the appropriate forum for pursuing those claims.
33. 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

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David B. Stevenson
Member
Employment Standards Tribunal