

An appeal

- by -

Wai Lam Chu, a director of 0980081 B.C. Ltd.  
carrying on business as Forum Gold Courts  
("Ms. Chu")

- 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.:** 2015A/76

**DATE OF DECISION:** August 12, 2015

## DECISION

### SUBMISSIONS

Ping Chan

on behalf of Wai Lam Chu, a director of 0980081 B.C. Ltd.  
carrying on business as Forum Gold Courts

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Wai Lam Chu (“Ms. Chu”), a director of 0980081 B.C. Ltd. carrying on business as Forum Gold Courts (“FGC”), has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on April 28, 2015 (the “Section 96 Determination”).
2. The Section 96 Determination concluded that Ms. Chu was a director of FGC, an employer found to have contravened provisions of the *Act* at the time wages owed were earned by, or should have been paid to, Chia Lun Chang, Yingsi He, Yan Fen Liang, Yao Qi Lin, Yu Guang Lin, Jenny Liu, Jin Hui Luo, Xiao Sheng Mai, Wen Jie Ma, Zhong Da Wu, Weimin Xie, Sarah Yeun and Xiao Lan Zhou (collectively, the “Complainants”), and, as such, was personally liable under section 96 of the *Act* for an amount of \$19,479.84, inclusive of accrued interest under section 88 of the *Act*.
3. In her appeal, Ms. Chu has invoked the “natural justice” and the “new evidence” grounds of appeal in sections 112(1)(b) and (c) of the *Act*, and asks the Employment Standards Tribunal (the “Tribunal”) to refer the matter back to the Director.
4. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. Therefore, I will assess the appeal based on a review of the Reasons for the Section 96 Determination (the “Reasons”); the Appeal Form; written submissions of Ping Chan (“Mr. Chan”) made on behalf of Ms. Chu; and the section 112(5) “record” that was before the delegate when the Section 96 Determination was being made (the “Record”). Pursuant to section 114 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 subsection 114(1). If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Complainants will, and the Director may, be invited to file further submissions. Conversely, if I find the appeal is not meritorious, I will dismiss it under section 114(1) of the *Act*.

### ISSUE

5. Is there any reasonable prospect that Ms. Chu’s appeal will succeed?

### THE FACTS

6. The Complainants each filed a complaint under section 74 of the *Act*, alleging that FGC contravened the *Act* by failing to pay them wages, overtime, and vacation pay (the “Complaints”).
7. The Director investigated the Complaints and, on April 24, 2015, issued a determination against FGC (the “corporate determination”), which found FGC liable for to the Complainants for wages in the total amount of \$19,479.84, inclusive of accrued interest. The Director also imposed an administrative penalty on FGC in the amount of \$1,000.00.

8. The corporate determination included a Notice to Directors and Officers of FGC, explaining their personal liability under the *Act*. The corporate determination was sent to FGC, with copies to the registered and records office and to the directors and officers. The time for filing an appeal of the corporate determination expired on June 1, 2015, without FGC filing an appeal.
9. On April 28, 2014, the delegate conducted a BC On-line: Registrar of Companies Corporation Search which showed that Ms. Chu was listed as a director of FGC. A further search conducted on April 1, 2015, indicates she was also a director between February 23, 2014, and April 21, 2014, when the Complainants' wages were earned or should have been paid. Consequently, and also because FGC had ceased operating, the delegate, on April 28, 2015, issued the Section 96 Determination against Ms. Chu. The Section 96 Determination held Ms. Chu personally liable for up to two (2) months' unpaid wages for each of the Complainants, which amount totalled \$19,479.84, inclusive of interest.
10. Since there was insufficient evidence to indicate that Ms. Chu authorized, permitted or acquiesced in the contravention of the *Act* by FGC, Ms. Chu was not found liable for any administrative penalties levied against FGC.

### **SUBMISSIONS ON BEHALF OF MS. CHU**

11. In his written submissions, Mr. Chan states that although the insurer of FGC failed to advance any monies to FGC or to Ms. Chu when FGC's business suffered "unexpected sewage backup disaster" and the restaurant was shut down "by Coastal Health due to health concerns in food preparing", Ms. Chu attempted to provide the Complainants with "salary advances". He states Ms. Chu paid one of the Complainants, Mr. Wen Jie Ma ("Mr. Ma"), \$10,000.00 in cash to distribute wages to each of the Complainants but Mr. Ma "took off with the entire \$10,000".
12. Mr. Chan further submits that Ms. Chu also paid another of the Complainants, Yu Guan Lin ("Mr. Lin"), \$1,800 in cash when the latter demanded Ms. Chu to pay him. Mr. Chan encloses, as an exhibit to his submissions, a receipt, allegedly signed by Mr. Lin on May 22, 2015, acknowledging payment of \$1,800.00 in full. The receipt is in Mandarin, and is translated by Mosaic Translation Services. However, I am not certain whether the signature attributed to Mr. Lin is, indeed, his signature, and whether Mr. Lin was paid any amount ordered under the Section 96 Determination.
13. Mr. Chan further submits that he was hired on June 1, 2015, as Acting General Manager of FGC "to handle this matter to reduce the confusion and complications of the wage settlement". He states that Ms. Chu is "recovering from illness now and wishes to apply for a fair hearing to this matter with the 13 claimants due to the discrepancies of the hours filed, meal deductions, and Statutory Holiday entitlements" [sic].
14. I also note that Mr. Chan invokes sections 1, 7, 11, and 24 of the *Charter of Rights and Freedoms* to argue that Ms. Chu "has the right to appear before the Employment Standards Tribunal for such an important Appeal".

### **ANALYSIS**

15. 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:
  - (i) Whether the person was a director when the wages were earned or should have been paid;
  - (ii) Whether the amount of liability imposed is within the limit for which a director may be found personally liable;

- (iii) Whether circumstances exist that would relieve the director from personal liability under subsection 96(2).
16. The director/officer is precluded from arguing the corporate liability in the appeal of a section 96 determination (see *Kerry Steinemann, Director/Officer of Pacific Western Vinyl Window & Doors Ltd.*, BC EST # D180/96). However, that is precisely what Mr. Chan is doing in his submissions on behalf of Ms. Chu, that is, he is questioning or raising the matter of the correctness of the corporate determination and wants the Tribunal to provide Ms. Chu an opportunity to “appear before the [Tribunal]” to be heard on those matters that were already determined in the corporate determination after the investigation of the Complaints was completed. The opportunity of FGC to deal with any “discrepancies” in the claims of the Complainants was during the investigation of the Complaints and before the corporate determination was made. If FGC did not agree with the correctness of the corporate determination, then it should have appealed the corporate determination in a timely fashion. An appeal of the Section 96 Determination is not the proper venue to challenge the corporate determination.
17. Having said this, I do not find any evidence in Mr. Chan’s submissions disputing any relevant findings of the delegate under section 96 of the *Act*. More particularly, Mr. Chan does not dispute that Ms. Chu was a director of FGC, and so listed in the corporate search of FGC at the time the wages of the Complainants were earned and should have been paid by FGC. Mr. Chan also does not dispute the amount of personal liability imposed on Ms. Chu, which amount is well within the limit of Ms. Chu’s personal liability as set out in section 96 of the *Act*. Mr. Chan also does not raise any issue, nor does he adduce any evidence, that indicates circumstances that might exempt Ms. Chu from personal liability under section 96(2) of the *Act*. Therefore, I find that Ms. Chu and her representative, Mr. Chan, have failed to establish any relevant basis for me to cancel the Section 96 Determination.
18. I also note that while Ms. Chu’s Appeal Form checks off the “natural justice” ground of appeal, there is no evidentiary basis to support that ground of appeal.
19. As for the “new evidence” ground of appeal, the alleged payments by Ms. Chu to Mr. Ma and to Mr. Lin are not relevant to any of the material issues that arise under section 96 of the *Act* and would not qualify under the stringent four-part test for admitting new evidence on appeal set out in *Re: Merilus Technologies Inc.* (BC EST # D171/03).
20. Lastly, Mr. Chan relies on the *Charter of Rights and Freedoms* to argue that Ms. Chu “has the right to appear before the Employment Standards Tribunal for such an important Appeal”. Pursuant to Section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 8 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic, telephone and in person hearings when it decides appeals. I do not find the matters raised in Ms. Chu’s appeal require an oral hearing. I find the appeal can be decided on the basis of a review and consideration of the materials now before me. I also add that an oral hearing is not necessarily a pre-condition to fairness (see *Baker v. Canada (Minister of Citizenship and Immigration)* (1999), 174 D.L.R. (4th) 193 (S.C.C.)).
21. In the result, I find that Ms. Chu’s appeal of the Section 96 Determination has no reasonable prospect of any success, and I dismiss it pursuant to section 114(1)(f) of the *Act*.

**ORDER**

22. Pursuant to section 115 of the *Act*, I order the Section 96 Determination, dated April 28, 2015, be confirmed in the amount of \$19,479.84, together with any interest that has accrued under section 88 of the *Act*.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**