

An appeal

- by -

Ka Chun Yip, a Director and Officer of Sharp Contacts Trading Co. Ltd.
(“Mr. Yip”)

- 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.: 2016A/51

DATE OF DECISION: June 24, 2016

DECISION

SUBMISSIONS

Ka Chun Yip

on his own behalf as a Director and Officer of Sharp
Contacts Trading Co. Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Ka Chun Yip (“Mr. Yip”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 2, 2016.
2. The Determination found Mr. Yip was a director and officer of Sharp Contacts Trading Co. Ltd. (“Sharp Contacts”), an employer found to have contravened provisions of the *Act*, at the time wages were earned or should have been paid to Ka Yu Gary Tse (“Mr. Tse”) and as such was personally liable under section 96 of the *Act* for wages in the amount of \$3,775.75.
3. This appeal is grounded in an assertion that the Director erred in law in making the Determination. Mr. Yip seeks to have the Determination remitted to the Director. This appeal was filed with an appeal of a Determination issued against Sharp Contacts (the “Corporate Determination”).
4. The appeal does not meet the statutory requirements for an appeal set out in section 112(2) of the *Act*, as the appeal delivered to the Tribunal did not include the Director’s written reasons for the Determination. In correspondence dated April 14, 2016, the Tribunal instructed Mr. Yip to deliver a copy of the written reasons to the Tribunal by April 28, 2016. A further request was addressed to Mr. Yip on April 29, 2016. Mr. Yip has not complied with those instructions.
5. In correspondence dated April 14, 2016, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and, following such review, all or part of the appeal might be dismissed.
6. Mr. Tse has filed an unsolicited submission which will not be considered at this stage of the process.
7. The section 112(5) record (the “record”) has been provided to the Tribunal by the Director and a copy has been delivered to Mr. Yip, who has been provided with the opportunity to object to its completeness. While Mr. Yip has delivered some additional attachments to his appeal, no objection to the completeness of the record has been received and, accordingly, the Tribunal accepts it as being a complete record of the material that was before the Director when the Determination was made.
8. 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 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 other material allowed by the Tribunal to be added to the record. 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 that 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.*

9. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Director and Mr. Tse 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) of the *Act*, it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal can succeed.

ISSUE

10. The issue at this stage of the proceeding is whether the appeal should be dismissed under section 114 of the *Act*.

THE FACTS

11. The facts relating to this appeal are brief.
12. Mr. Tse filed a complaint alleging Sharp Contacts had contravened the *Act* by failing to pay him all wages owed. The Director investigated the complaint, conducted a complaint hearing and, on December 9, 2015, issued a Determination against Sharp Contacts which found Sharp Contacts liable for wages to Mr. Tse in the amount of \$12,686.72. The Director also imposed administrative penalties on Sharp Contacts in the amount of \$1,500.00.
13. The Corporate Determination was sent to Mr. Yip by registered mail to the address recorded for him in the corporate records of Sharp Contacts. A copy was also sent to Sharp Contacts at their registered office and business address, which is the same address as for Mr. Yip.
14. The appeal by Sharp Contacts of the Corporate Determination has been dismissed: see *Sharp Contacts*, BC EST # D089/16.
15. A BC On-line: Registrar of Companies corporate search conducted by the Director on August 5, 2015, indicated Sharp Contacts was incorporated on April 25, 2008, and Mr. Yip was listed as the sole director and officer. The search confirmed Mr. Yip was a director and officer of Sharp Contacts during the period Mr. Tse's wages were earned or should have been paid.
16. Based on the information acquired and the findings made, the Director concluded Mr. Yip was liable under section 96 of the *Act* for the amount set out in the Determination. Mr. Yip was not found liable for the administrative penalties imposed on Sharp Contacts in the Corporate Determination.

ARGUMENT

17. The appeal does not directly address Mr. Yip's personal liability as a director and officer of Sharp Contacts under section 96 of the *Act*, but rather makes the identical arguments that were made in the appeal of the Corporate Determination. For the reasons set out later in this decision, it is unnecessary to address those arguments in this appeal.
18. Mr. Yip does not challenge the Director's finding that he was a director and officer of Sharp Contacts when the wages of Mr. Tse were earned or should have been paid; nor does he argue the amount found owing to Mr. Tse exceeds the limit for personal liability of a corporate director or officer under section 96 of the *Act* or that the circumstances described in subsection 96(2) apply to relieve him from personal liability.

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. Mr. Yip has failed to meet the requirements of section 112(2) of the *Act*. Section 114(1)(h) of the *Act* allows an appeal to be dismissed without a hearing of any kind for such a delinquency. Even if I were inclined to overlook the complete lack of any merit to the appeal, I would still dismiss this appeal for the failure of Mr. Yip to meet the statutory requirements for delivering an appeal. The complete lack of any effort to satisfy the statutory requirements, even after having been instructed by the Tribunal to do so, militates significantly against relieving Mr. Yip of this omission.
21. There are two reasons why this appeal must be summarily dismissed. The first relates to the effect of the decision of the appeal of the Corporate Determination. The second relates to the allowable scope of an appeal of a Determination issued under section 96 of the *Act*. The first two reasons are related.
22. On the first matter, I have already noted this appeal is a mirror of the appeal of the Corporate Determination. That appeal has been dismissed.
23. Second, 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.
24. In other words, Mr. Yip is bound by both the Corporate Determination and the result of the appeal of the Corporate Determination.

25. There is no argument in this appeal addressing any of those matters that may be raised by Mr. Yip concerning his liability under section 96 of the *Act* and, consequently, no basis for altering the Director's finding on Mr. Yip's personal liability under that provision.
26. Based on the above, this appeal is dismissed under section 114 of the *Act*; the purposes and objects of the *Act* are not served by requiring the other parties to respond to it.

ORDER

27. Pursuant to section 115 of the *Act*, I order the Determination dated March 2, 2016, be confirmed in the amount of \$3,775.75, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal