

An appeal

- by -

Danny Chi Sum Lo, a Director or Officer of Hugo Restaurant Ltd.

- 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: Yuki Matsuno

FILE No.: 2008A/65

DATE OF DECISION: September 8, 2008

DECISION

SUBMISSIONS

Danny Chi Sum Lo and Phillip R. Lundrie for Danny Chi Sum Lo

Victor Lee for the Director of Employment Standards

OVERVIEW

1. Mr. Lo appeals a Determination of the Director of Employment Standards (the “Director”) issued May 16, 2008 (the “Determination”), pursuant to section 112 of the *Employment Standards Act* (the “Act”). The Determination was issued against Mr. Lo in his personal capacity as a director or officer of Hugo Restaurant Ltd. (“Hugo”).
2. A corporate determination had been issued against Hugo on October 26, 2007 (the “Corporate Determination”) after an investigation of complaints filed by thirteen of Hugo’s employees. The Corporate Determination was not appealed. According to the Determination, as at May 13, 2008, a search conducted with the Office of the Superintendent of Bankruptcy does not indicate that Hugo is subject to a bankruptcy or insolvency proceeding.
3. In the Determination, a delegate of the Director (the “Delegate”) found Mr. Lo, as a director or officer of Hugo, personally liable under section 96(1) of the Act for unpaid wages for ten of the thirteen employees. Mr. Lo was found to be liable for a total of \$11,601.17. The amounts owed to each employee do not exceed more than two months’ wages.
4. Mr. Lo indicates in his appeal submission that an oral hearing is necessary because “the circumstances of the case cannot be adequately explained by documents alone.” I have reviewed and considered Mr. Lo’s request. Given that a finding of credibility is not essential to the disposition of this appeal and no viva voce evidence is otherwise required, my view is that I am able to decide this appeal on the basis of the parties’ submissions and the Record. I have reviewed and carefully considered these documents in coming to my decision.

BACKGROUND

5. Hugo was incorporated on April 22, 2002. On March 21, 2007, Mr. Lo sold the company to Mr. Kim Ming Banny Pak (“Mr. Pak”). Mr. Lo also resigned as a Director/Officer on March 21, 2007, which is reflected in a Notice of Change of Directors (Form 10, Business Corporations Act). A letter titled “Notice of Change in Management of Hugo Restaurant Ltd. (The “Company”), written in the Chinese language, which gave news of the sale and resignation of Mr. Lo, was posted on the company bulletin board for all employees to see on March 21, 2007. On April 4, 2007, Mr. Pak issued another notice (again written in the Chinese language) confirming he was the new owner of the business and would continue to run the business and pay all the employees’ wages.

6. After the closure of Hugo Restaurant on or about April 23, 2007, thirteen employees of Hugo filed complaints against Hugo with the Employment Standards Branch for unpaid wages in the form of regular and overtime wages, vacation pay, statutory holiday pay, and compensation for length of service.
7. The Delegate issued the Corporate Determination against Hugo and assessed a total of \$37,768.82 in wages owing to the employees. An administrative penalty in the amount of \$500 was also imposed on the company. According to the Corporate Determination, as part of his investigation, the Delegate met in person with Mr. Pak on May 8, 2008; however, after that meeting, Mr. Pak “could no longer be contacted” – he did not return the Delegate’s phone calls, and some of the complainants told the Delegate that Mr. Pak had left the country.
8. On May 16, 2008, the Delegate issued two other determinations with respect to the Hugo employees’ complaints: the Determination against Mr. Lo and another determination against Mr. Pak in his personal capacity as a director or officer of Hugo, in the amount of \$25,577.51. The amount assessed to be owed by Mr. Lo in the Determination was calculated pursuant to section 96(1) by adding up the wages that became payable during the time Mr. Lo was a director or officer of Hugo, which was described in the Determination as being between January 15, 2005 and March 22, 2007.
9. Hugo’s landlord retained a bailiff to conduct a rent distress against Hugo and sell all of Hugo’s assets. The Employment Standards Branch received \$10,857.20 from the net proceeds of the sale, which was applied towards payment of the Corporate Determination against Hugo.
10. Mr. Lo takes issue with several aspects of the Determination. His main arguments are summarized below:
 1. He is absolved of liability under section 96(1) because he sold the company to Mr. Pak in consideration for Mr. Pak’s taking on responsibility for outstanding corporate debts, including outstanding wages; and because he resigned as a director and officer of Hugo on March 21, 2007.
 2. The Delegate failed to maintain contact with Mr. Pak after the meeting on May 8, 2008. If he had done so, Mr. Pak would have been held solely responsible for the employees’ wages.
11. Mr. Lo makes a third argument that I will deal with immediately. He says that he understands that the total price paid to the bailiff by the purchaser of Hugo’s assets pursuant to the rent distress sale was more than \$55,000 and Mr. Lo questions why the “extra” money was not paid to the Director to pay the employees’ wages. The Delegate points out that the bailiff remitted \$10,857.20 to the Employment Standards Branch which represented the net proceeds from the sale of Hugo’s assets. A Statement of Proceeds from Sale and a Bill of Sale from the bailiff provide evidence of the correctness of the amount remitted to Employment Standards. This information had been forwarded to Mr. Lo, who provides no evidence to back up his contention of additional monies arising out of the sale.
12. On his appeal form, Mr. Lo indicates that his grounds of appeal to be that the Director, represented by the Delegate, failed to observe the principles of natural justice in making the Determination; and that evidence has become available that was not available at the time the Determination was being made. One of his arguments is more properly characterized as a potential error of law, and I will consider it under that heading.

ISSUE

13. Did the Delegate err in law or fail to observe the principles of natural justice in making the Determination, or has new evidence become available that was not available at the time the Determination was being made?

ARGUMENT AND ANALYSIS

14. As the party bringing the appeal, the Employer has the burden of showing that the Determination is wrong and should be varied or cancelled.
15. Tribunal jurisprudence has established that determinations against individuals in their capacity as a director or officer of a corporation, such as the present Determination, can only be challenged on two bases: that the individual was not a director or an officer at the relevant time, or that the calculation of the director/officer's personal liability is incorrect (*Steinemann*, BCEST #180/96). Mr. Lo's arguments touch on both bases.

Error of Law

16. In order to prove that the Director erred in law, an appellant must show that the Director:
1. misinterpreted or misapplied a section of the *Act*;
 2. misapplied an applicable principle of general law;
 3. acted without any evidence;
 4. acted on a view of the facts which could not reasonably be entertained; or
 5. adopted a method of assessment which is wrong in principle.
17. (*Britco Structures Ltd.*, BC EST #D260/03, citing the test established by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia* (Assessor of Area #12 – Coquitlam), [1988] B.C.J. No. 2275 (B.C.C.A.)).
18. Was it an error of law for the Delegate to find Mr. Lo liable for past wages in spite of the fact that he sold the company and was removed from the company records as a director and officer as of March 21, 2007? I find that the Delegate did not err in law, except in one small respect.
19. Section 96(1) provides:
- 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.
20. This section applies to any person who was a director or officer of a corporation at the time wages of an employee were earned or should have been paid. The section applies regardless of the director/officer's subsequent status, e.g. whether he later quit or continued on as a director or officer. Mr. Lo does not deny that he was a director or officer of Hugo until March 21, 2007. The Delegate accounted for the fact that Mr. Lo ceased to be a director or officer in March 2007, and his application of the legislation to Mr. Lo's

situation is correct. The Delegate says in his submission that “[Mr.] Lo resigned as a director/officer on March 22, 2007 and is not liable for wages owed after that date. However, he is still liable for wages that were earned or should have been paid prior to his resignation.” The only error made by the Delegate was Mr. Lo’s resignation date. My review of the documents indicates that Mr. Lo resigned on March 21, 2007. There is no evidence in the Record that he was a director or officer on March 22, 2007. Therefore, Mr. Lo should not be held liable for any wages earned on March 22, 2007.

21. Mr. Lo also refers to a sale agreement between himself and Mr. Pak and said that the agreement provided for all liabilities with respect to employees’ wages to be transferred to Mr. Pak. Mr. Lo says the employees were informed of the agreement and no employee had any objection to Mr. Pak taking on the responsibility of paying wages. In response, the Delegate correctly relies on section 4 of the Act for the principle that no persons may contract out of the provisions of the Act:

4 The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements, not being an agreement referred to in section 3(2) or (4), has no effect.

22. When this section is applied to the present circumstances, the result is that Mr. Lo cannot rely on the fact of the sale agreement and his resignation as a director, the notices posted to the employees regarding the sale and the resignation, or the lack of employee objection, to absolve himself of section 96 liability. If Mr. Lo believes that Mr. Pak has not fulfilled the terms of their sale agreement (the details of which were not before the Delegate, nor before me), he may wish to pursue the matter in the courts.

23. This ground of appeal succeeds only to the extent that the amount that Mr. Lo owes in his personal capacity as director of officer of Hugo should be reduced by the amount of any wages earned by any of the employees on March 22, 2007.

Failure to Observe the Principles of Natural Justice

24. Mr. Lo’s argument that the Delegate failed to maintain contact with Mr. Pak (and, it is implied, as a result was forced to pursue Mr. Lo in his personal capacity) is an argument that may be understood to suggest a failure to observe the principles of natural justice. In order to successfully appeal on this ground, a person must prove a procedural defect, amounting to unfairness, in how the Director carried out the investigation or made the Determination. Such procedural defects include failing to inform a person of the case against him or her and not allowing a person an opportunity to respond to a complaint.

25. The Delegate points out in his submissions that Mr. Lo has not shown any procedural failures in the way in which the investigation was carried out and the Determination made. The Delegate also points out that the Director has issued a Determination against Mr. Pak for \$25,577.51, and says that the Director “will pursue claims against both Lo and Pak to recover all wages owed to the former employees.” There is nothing in the legislation that prohibits the Director from pursuing all avenues to collect wages that are outstanding to employees. In fact, it appears that section 96 is designed so that wages may be collected; as pointed out in *Corbett*, BCEST #D165/01, section 96 appears in Part 11 of the Act, which contain the “Enforcement” provisions. The Tribunal goes on to hold in *Corbett*:

The legislative intent of section 96 is to create a form of statutory “vicarious liability” on the part of directors/officers for unpaid wages but that liability is limited to 2 months’ wages per employee and is subject to other limitations and exemptions. . . . However, as I interpret section 96(1), the

Director is free to collect – say, from 6 separate directors – the full amount of the employees’ unpaid wage claims. The purpose of section 96 is to ensure that employees will recover at least some of their unpaid wages in the event their former corporate employer is unable to pay their wages in whole or in part.

26. Part of the liability found against Hugo in the Corporate Determination has been paid as a result of the bailiff sale of Hugo’s assets. In order to recover the rest of the wages, the Delegate has chosen to issue Determinations against Mr. Lo and Mr. Pak in their personal capacity as directors or officers. I see no procedural unfairness in the way in which the Determination was handled by the Delegate. The Delegate did not fail to observe the principles of natural justice.

New Evidence

27. Mr. Lo’s submissions do not indicate what new evidence has become available that was not available at the time of the Determination. The Delegate argues that no relevant new evidence has become available. I agree with the Delegate’s assessment; my review of the Record does not reveal any evidence that could be considered under this ground.

Result of Appeal

28. Mr. Lo’s appeal succeeds only to the extent that the amount of his personal liability should be varied to exclude any wages earned by any of the Hugo employees on March 22, 2007.

ORDER

29. Pursuant to Section 115 of the *Act*, I order that the amount payable in the Determination dated May 16, 2008 be varied to exclude any wages earned by any of the employees on March 22, 2007. The Determination is otherwise confirmed in the varied amount, together with any interest that has accrued under Section 88 of the *Act*.

Yuki Matsuno
Member
Employment Standards Tribunal