

An appeal

- by -

Xiangdong Zheng, also known as David Zheng, a Director of
Mr. David Help You Enterprises Ltd.
("Mr. Zheng")

- 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.: 2012A/103

DATE OF DECISION: November 1, 2012

DECISION

SUBMISSIONS

Xiangdong Zheng also known as David Zheng on his own behalf, a Director of Mr. David Help You Enterprises Ltd.

Kristine Booth on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) brought by Xiangdong Zheng, also known as David Zheng (“Mr. Zheng”), of a section 96 determination that was issued on August 30, 2012, (the “Section 96 Determination”) by a delegate of the Director of Employment Standards (the “Director”). The Section 96 Determination concluded that Mr. Zheng was a director of Mr. David Help You Enterprises Ltd. (“DHY”), an employer found to have contravened provisions of the *Act*, at the time wages earned were owed or should have been paid, and as such was personally liable under section 96 of the *Act* for an amount of \$1,907.26.
2. In this appeal, Mr. Zheng says that the Director failed to observe the principles of natural justice in making the Section 96 Determination and new evidence has become available that was not available at the time the Section 96 Determination was being made. He seeks to have the Tribunal refer the matter back to the Director and have the Section 96 Determination varied or changed.
3. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated in the *Act* (s. 103) and Rule 8 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. Having reviewed the appeal, the submissions and the materials submitted by the parties, including the section 112(5) “record” filed by the Director, in my view, this appeal can be decided based on the material in the file. If I am satisfied that the appeal has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Tribunal will invite the Complainant and the Director to file a reply to the merits of the appeal. However, if the appeal is not meritorious or there is no prospect that it will succeed, it will be dismissed under section 114 of the *Act*.

ISSUE

4. The issues in this appeal are twofold, namely:
 - (i). Did the Director fail to observe the principles of natural justice in making the Section 96 Determination?
 - (ii). Is there new evidence that has become available that was not available at the time of the Section 96 Determination and does this new evidence warrant a change or variation of the Section 96 Determination or a referral back to the Director?
5. On August 23, 2011, Yi Zhang (the “Complainant”) filed a complaint with the Director alleging that DHY had contravened the *Act* in failing to pay him wages earned between July 16, 2011, and August 4, 2011, and in failing to pay him a cell phone allowance (the “Complaint”). Following an investigation, on June 27, 2012, the Director issued her determination (the “Corporate Determination”) concluding that DHY contravened sections 17 (wages), 18 (wages), 21 (business costs), 36 (hours free from work), 40 (overtime), 45 (statutory

holiday pay), and 58 (annual vacation pay) of the *Act*. The Director's delegate determined that the Complainant was entitled to wages and accrued interest in the total amount of \$1,903.76. The Director also imposed five (5) administrative penalties in the amount of \$500.00 each for DHY's contraventions of sections 17, 18, 21 and 40 of the *Act*, as well as section 46 of the *Employment Standards Regulation* (the "Regulation").

6. The Corporate Determination, which included a notice to the directors and officers explaining their personal liability under section 96 of the *Act* was sent to DHY, with copies to its registered and records office and to Mr. Zheng as a director of DHY. The appeal period for the Corporate Determination expired on August 7, 2012. Subsequently, on August 23, 2012, the Director sent DHY and Mr. Zheng a letter threatening collections proceedings that alerted Mr. Zheng that a determination had been made against DHY and it was subsequently, on September 14, 2012, in excess of one (1) month after the expiry of the appeal date when DHY filed its late appeal. This Tribunal, in BC EST # D117/12, dated November 1, 2012, dismissed DHY's application to extend the time for filing an appeal.
7. However, well in advance of the Corporate Determination and the dismissal or denial of DHY's application to extend the time for filing its appeal of the Corporate Determination, the Director, on August 24, 2011, conducted an online corporate search of DHY. The corporate search revealed DHY was incorporated on November 17, 2010, with Mr. Zheng listed as its director. The latter was also a Director of DHY between May 24, 2011, and August 11, 2011, when the Complainant's wages were earned or should have been paid. Relying upon this information, the Director went on to issue the Section 96 Determination on August 30, 2012, holding Mr. Zheng personally liable for up to two (2) months of the Complainant's unpaid wages. Since the amount \$1,903.76 inclusive of interest found to be owing to the Complainant in the Corporate Determination was less than two (2) months of the Complainant's wages, the Director ordered, in the Section 96 Determination, that Mr. Zheng was personally liable for the full amount plus any accrued interest.
8. The Director did not hold Mr. Zheng liable for any administrative penalties levied against DHY in the Corporate Determination because the Director found that there was not sufficient evidence that Mr. Zheng authorized, permitted or otherwise acquiesced in the contraventions of DHY.

SUBMISSIONS OF MR. ZHENG

9. Mr. Zheng has produced the exact same documents he produced in the late appeal of the Corporate Determination, which documents, with the exception of one, were all documents in the Director's section 112(5) "record" and which the Director addressed in the Corporate Determination. All of these documents go to the merits of the Corporate Determination, and Mr. Zheng relies upon these documents to reiterate the arguments he made during the investigation of the Complaint. More particularly, he re-argues that the Complainant did not pass probationary employment with DHY and "thefted" monies belonging to DHY. He also contends that the Complainant damaged DHY's vehicle and did not return keys to two (2) of DHY's vehicles. These are both arguments, which he advanced in the appeal of the Corporate Determination and, prior to that, during the investigation of the Complaint.
10. I also note in Mr. Zheng's submissions that he goes on to suggest that the Complainant was in a contractor-type relationship with DHY and not in an employment relationship because Mr. Zheng claims that the Complainant was free to work for other moving or delivery companies. Mr. Zheng also goes on to describe his understanding of how the moving industry operates and, in particular, how the industry engages workers. More specifically, he contends that workers working in the industry do not get paid any overtime, statutory holidays, vacation pay or any business costs. Therefore, he submits the Complainant was not entitled to the amounts awarded in the Corporate Determination.

11. As in the appeal of the Corporate Determination, Mr. Zheng reviews details of the Small Claims Court action, which the Complainant purportedly commenced against DHY. Mr. Zheng states that the Complainant rejected an offer made to him at the settlement conference in the small claim proceeding and, based on lies, the Complainant advanced his Employment Standards claim. He reiterates the terms of the settlement discussed at the settlement conference and, based on what DHY offered the Complainant at the settlement conference, Mr. Zheng offers the Complainant, after all offsets, an amount of \$210.00.
12. I note that in none of his submissions Mr. Zheng denies he was a director of DHY at the material time when wages owed to the Complainant were earned. All of Mr. Zheng's submissions dispute the claims of the Complainant against DHY.

ANALYSIS

13. It should be noted that a person challenging a director/officer determination is limited to arguing those issues that arise under section 96 of the *Act*, namely:
- (i) Whether the person was a director/officer when the wages were earned or should have been paid;
 - (ii) Whether the amount of the liability imposed is within the limit for which a director/officer may be found personally liable; and
 - (iii) Whether circumstances exist that would relieve the director/officer from personal liability under subsection 96(2).¹
14. The director/officer is precluded from arguing the corporate liability. (see *Kerry Steineman, Director/Officer of Pacific Western Vinyl Windows & Doors Ltd.*, BC EST # D180/96). Therefore, any arguments that question or raise the matter of the correctness of the corporate determination may not be raised in an appeal of a section 96 determination.
15. In this case, therefore, Mr. Zheng may not challenge, in his appeal of the Section 96 Determination, the correctness of the Corporate Determination. The time for appealing the Corporate Determination has passed and, as indicated, this Tribunal rejected DHY's late filed appeal of the Corporate Determination by refusing to extend the time to appeal the Corporate Determination.
16. Furthermore, Mr. Zheng may not raise the issue of the status of the Complainant with DHY at this stage in this appeal. The time to do so was in the investigation of the Complaint against DHY.
17. Having said this, I note that Mr. Zheng has not advanced any argument on any of the issues that may arise under section 96. He does not dispute or question that he was listed as a director of DHY at the time the wages of the Complainant were earned and should have been paid. The Section 96 Determination against Mr. Zheng also indicates the amount of liability imposed on him under section 96 was within the limit of

¹ 96 (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.

personal liability (two months). Furthermore, Mr. Zheng has not raised any issue or adduced any evidence that would indicate circumstances that might exempt him from personal liability under section 96(2).

18. With respect to the natural justice ground of appeal, it should be noted that a party alleging a denial of natural justice must provide some evidence in support of that allegation (see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99). In this case, there is ample evidence in the section 112(5) “record” showing that the Director made sufficient or reasonable efforts to afford DHY and Mr. Zheng knowledge of the particulars of the Complaint and afforded DHY an opportunity to make submissions in response, and the latter indeed made submissions in response. I find that Mr. Zheng’s natural justice ground of appeal cannot stand, as it is nothing more than a bold assertion without any evidentiary basis.
19. With respect to the new evidence ground of appeal, similarly, I do not find anything in Mr. Zheng’s submissions that would remotely resemble new evidence or pass the strict fresh evidence test articulated by the Tribunal in *Re: Davies et al (Merilus Technologies Inc.)* (BC EST # D171/03). In the latter decision, the Tribunal adopted the following four-fold test applied in civil courts for admitting fresh evidence on appeal:
 - (a) The evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - (b) The evidence must be relevant to a material issue arising from the complaint;
 - (c) The evidence must be credible in the sense that it is reasonably capable of belief; and
 - (d) The evidence must have high potential 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 the material issue.
20. I find the submissions of Mr. Zheng delineated earlier constitute no more than a re-argument of the submissions he previously made in the investigation of the Complaint against DHY and which the delegate fully considered in arriving at her decision in the Corporate Determination. Mr. Zheng, incidentally, made similar submissions and argument in the late appeal of the Corporate Determination.
21. Having said this, I reiterate that an appeal of the Section 96 Determination is not an opportunity to contest the merits of the Corporate Determination nor reargue them. It is however an opportunity to argue issues that arise under section 96 of the *Act*, if indeed they exist. In this case, Mr. Zheng has not raised any relevant issues under Section 96.

ORDER

22. Pursuant to section 114(f) of the *Act*, I dismiss the appeal of the Section 96 Determination made on August 30, 2012, against Xiangdong Zheng, also known as David Zheng, a Director of Mr. David Help You Enterprises Ltd.

Shafik Bhalloo
Member
Employment Standards Tribunal