

An appeal

- by -

Hung Chau, a Director or Officer of Peony Seafood Restaurant Ltd.  
operating as PS Chinese Restaurant  
("Chau")

- 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*

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 2001/290

**DATE OF DECISION:** June 26, 2001

## DECISION

### OVERVIEW

This is an appeal filed by Hung Chau (“Chau”) pursuant to section 112 of the Employment Standards Act (the “Act”). Ms. Chau appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on March 29th, 2001 under file number ER102-776 (the “Determination”). The Determination was issued against Ms. Chau in accordance with the provisions of section 96(1) of the Act which states that:

#### **Corporate officer’s liability for unpaid wages**

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.

The Director’s delegate determined that Ms. Chau, as a director and officer of Peony Seafood Restaurant Ltd. operating as PS Chinese Restaurant (“Peony”), was liable for \$1,319.97 representing unpaid regular wages, one week’s wages as compensation for length of service, vacation pay and section 88 interest owed to a former Peony employee, namely, Man Kuen Wong (“Wong”).

By way of a letter dated June 5th, 2001 the parties were advised by the Tribunal’s Vice-Chair that this appeal would be adjudicated based on the parties’ written submissions and that an oral hearing would not be held (see section 107 of the Act and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). Ms. Chau did not file any submission other than her notice of appeal--which appears to have been prepared with the assistance of her legal counsel--to which were attached some additional documents. I also have before me a submission, dated May 1st, 2001, from the Director’s delegate. Mr. Wong did not file a submission with the Tribunal.

### ISSUES ON APPEAL

Ms. Chau’s reasons for appeal are reproduced, in full, below:

“The company was sold to Jing Li and Sui Wen Lang on July 17, 2000. The employee was working for the new owners/directors. Hung Chau and Kam Pang Cheung resigned for [sic] directorship on the same day. All the documents were sent to the Purchaser’s solicitor’s office on the same day. However, the Purchaser’s lawyer did not register the change of directors until this year.”

## FACTS

Mr. Wong was employed by Peony as a “sales associate” at the restaurant, earning the minimum wage, from August 30th, 2000 to January 24th, 2001 which latter date was the last day of regular business operations.

By way of a share purchase agreement dated July 17th, 2000, Ms. Chau and Kam Pang Cheung agreed to transfer their 100 shares (the entire complement of issued and outstanding common shares) in Peony to Jing Li and Sui Wen Lang for a total purchase price of \$55,000. The closing date for the share purchase and sale was July 21st, 2000. Under clause 5.1(c) of the agreement, Ms. Chau and Kam Pang Cheung were obliged to deliver to the purchasers, on the closing date, “resignations of the Vendors from all directorship positions and offices held in the Corporation”.

On July 17th, 2000, the solicitor for the vendors (Ms. Chau and Kam Pang Cheung) wrote to the purchasers’ solicitor enclosing, inter alia, executed director’s resignations from both Ms. Chau and Kam Pang Cheung. There is nothing before me to document that Ms. Chau (or, for that matter, Mr. Cheung), resigned any office they may have held in Peony.

In any event, it would appear that a new Notice of Directors was prepared on July 17th, 2000 indicating that Ms. Chau and Mr. Cheung ceased to be Peony directors as of that date. However, it would also appear that this latter Notice was not immediately filed with the Registrar of Companies. Indeed, a BC OnLine registry search conducted on February 6th, 2001 showed that as of January 25th, 2001 (i.e., the day after Mr. Wong’s last shift), Ms. Chau remained a Peony corporate director (along with Cheung). Contrary to the information set out in the Determination, this search did not list Ms. Chau as an officer--Cheung (president) and Linda Hung (secretary) were the only named officers. A subsequent BC OnLine search conducted on April 30th, 2001 shows that as of April 19th, 2001, Ms. Chau was no longer listed as a Peony director. There is a copy of letter before me from the purchasers’ solicitor to the vendors’ solicitor which suggests that the former did not file the amended Notice of Directors until on, or shortly after, January 26th, 2001.

To summarize, the material before me shows that, contrary to the finding set out in the Determination, Ms. Chau never was a Peony officer. Ms. Chau was a Peony director but resigned her directorship as part and parcel of a share purchase agreement in mid-July, 2000--well before the crystallization of Wong’s unpaid wage claim. Ms. Chau’s executed resignation was forwarded to the purchasers’ solicitor but, for whatever reason, a timely filing was not made with the Registrar of Companies. The Registrar’s records were rectified by no later than April 19th, 2001 and the purchasers’ solicitor suggests that the actual filing took place in late January 2001.

## ANALYSIS

It would appear from the material before me that Ms. Chau was not as diligent as she perhaps ought to have been in terms of responding to the delegate's request for information prior to the issuance of the Determination. However, the delegate's statutory authority to issue a section 96 determination against an individual is predicated on the particular person holding the status of a corporate officer or director.

Corporate records create a rebuttable presumption that a person named therein as a director or officer actually holds such a status (*David Wilinofsky and Ron J. Wilinofsky* BC EST. # D106/99). As observed by the reconsideration panel in *The Director of Employment Standards* BC EST # RD047/01):

“...the Director of Employment Standards may presumptively rely on those corporate records to establish director or officer status...

[and then] it is open to the person...to prove on the balance of probabilities that the company records are *inaccurate*, for example, because the person resigned and the documents were not properly processed, a person is not properly appointed etc.

I am satisfied, on the balance of probabilities, that the corporate records relied on by the delegate were inaccurate inasmuch as Ms. Chau resigned her directorship (as noted, she apparently never was formally appointed to be a corporate *officer*) in mid-July 2000 but for some reason--possibly an oversight by the purchasers' solicitor--her resignation was not properly recorded with the Registrar of Companies. There is no evidence before me that Ms. Chau--during the period in question--carried out the functions of a corporate officer which would trigger personal liability under the “*Penner and Hauff*” (see BC EST # D371/96) line of authorities. I might add that it would appear that Peony's internal corporate records did show that Ms. Chau ceased to be a director as of July 17th, 2000.

Finally, I wish to make it clear that the delegate, in my view, acted entirely appropriately in issuing a section 96 determination against Ms. Chau. To the extent that Ms. Chau has suffered any inconvenience or expense in pursuing this appeal, I can only note that had she been more forthcoming to the delegate from the outset, a section 96 Determination might never have been issued against her.

As I previously noted, the delegate relied on the Registrar of Companies' records and thus did not find it necessary to investigate whether Ms. Chau might be liable under section 96(1) by reason of the so-called “functional test”. Although I propose to cancel the Determination, my order should not be taken as a prohibition of any further investigation by the delegate to determine if Ms. Chau might be held personally liable under the “functional test”.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination be cancelled.

The question of whether or not Ms. Chau might be personally liable under section 96(1) because, during the material time period, she carried out the functions of a corporate officer, is referred back to the Director of Employment Standards for whatever further investigation the Director considers to be appropriate.

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**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**