

EMPLOYMENT STANDARDS TRIBUNAL

An appeal
pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

Xue Qin

- of a Determination issued by -

The Director of Employment Standards

PANEL: Carol L. Roberts

FILE NO.: 2023/164

DATE OF DECISION: May 15, 2024

DECISION

SUBMISSIONS

Andrew Leung	counsel for Xue Qin
Birong He	on her own behalf
Diana Patterson	delegate of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Xue Qin (“Ms. Qin” or “Appellant”), a director of Kerrisdale Laser & Skin Care. Ltd. (“Employer”), of a decision of a delegate of the Director of Employment Standards (“Director”) made September 25, 2023 (“Personal Determination”).
2. Three former employees (collectively, “Employees”) of the Employer filed a complaint with the Director alleging that the Employer had contravened the *Employment Standards Act* (“ESA”) in failing to pay wages owed.
3. On August 4, 2023, the Director issued a determination (“Corporate Determination”) determining that the Employer had contravened the *ESA* and finding that the Employer owed the Employees wages and interest in the total amount of \$21,161.18. The Director also imposed administrative penalties in the amount of \$3,500.00 for contraventions of the *ESA*.
4. The Corporate Determination, which included a notice to directors and officers explaining their personal liability under the *ESA*, was sent to the Employer with copies to the directors and officers. The appeal period for the Corporate Determination expired on August 28, 2023, for service by email and September 11, 2023, for service by registered/ordinary mail.
5. The Corporate Determination was not appealed, and the Director issued the Personal Determination which is the subject of this appeal.
6. A corporate registry search conducted on February 22, 2022, with a currency date of November 17, 2021, demonstrated that the Employer was incorporated on December 26, 2011. A Notice of Change of Directors filed January 19, 2023, indicated that Xue Qin became a director of the Employer on August 18, 2022.
7. The Director determined, on the basis of the corporate registry information, that Xue Qin was a director of the Employer between August 18, 2022, and December 20, 2022, when the Employees’ wages were owed and should have been paid. The Director noted Ms. Qin’s argument, through her counsel, that she did not consent to being appointed as a director of the Employer, and that she was seeking an order for her name to be removed from the corporate registry. No order had been obtained at the time the Personal Determination was made, and the Director’s delegate found that no additional evidence had been provided to demonstrate that Ms. Qin should not be considered a director.

8. In the absence of any other evidence, the Director's delegate relied on the corporate registry results and found that Ms. Qin was a director of the Employer and personally liable for up to two months' unpaid wages for each of the Employees, pursuant to section 96 of the *ESA*.
9. The Director calculated Ms. Qin's liability for the unpaid wages and interest to be \$10,153.63.
10. The Director determined that there was insufficient evidence to determine that Ms. Qin authorized, permitted, or acquiesced in the contravention and was therefore not personally liable to pay the two administrative penalties pursuant to section 98(2) of the *ESA*.
11. Ms. Qin appeals the Determination on the grounds that the Director erred in law and that evidence has become available that was not available at the time the Determination was being made. The appeal was filed on October 30, 2023, and counsel sought an extension of time to January 2, 2024, in which to perfect the appeal. The Tribunal granted the request for an extension.
12. Section 114 of the *ESA* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria. After reviewing the appeal submissions, I sought submissions from the Director and the Employees. One of the former employees made a submission.
13. This decision is based on the section 112(5) "record" that was before the delegate at the time the Personal Determination was made, the submissions of the parties including the new evidence, and the Reasons for the Determination.

ISSUE

14. Whether the Employer has established grounds for interfering with the Director's decision.

ARGUMENT

15. Ms. Qin says that the Annual Report for the Employer filed April 9, 2021, identified Dongmei Shi as the director and sole shareholder of the company, and Guangyao Hu as the CFO. She further states that Ms. Shi and Mr. Hu are married to each other.
16. Ms. Qin says that in the summer of 2022 she was introduced to Ms. Shi and the company by a mutual friend and that Ms. Shi persuaded her to invest in the company as a shareholder in exchange for 51% of the shares of the company on the condition that Ms. Shi continue to operate the business as the sole director of the company. According to Ms. Qin, Ms. Shi agreed. Ms. Shi sold 51% of her shares to Ms. Qin, as evidenced by a purchase and sale agreement. Ms. Qin says that she did not ever agree to act as a director, and that she was never validly appointed as a director.
17. Ms. Qin says that, beginning in December 2022, she was unable to contact Ms. Shi. When advised of the Employment Standards complaint in January 2023, Ms. Qin's husband went to the Employer's place of business to locate the 'corporate book,' but was unable to do so. The Landlord terminated the Employer's lease for non-payment of rent on or about January 27, 2023.

18. On October 27, 2023, Ms. Qin’s counsel filed a petition in the Supreme Court of British Columbia seeking a declaration that she is not, and was not ever, a director of the corporate employer. Ms. Qin asserted that she was the unfortunate victim of a scam operated by Ms. Shi and Mr. Hu. Ms. Qin contends that she is unable to access the corporate records, despite obtaining an Order from the BC Registry pursuant to section 50 of the *Business Corporations Act* requiring the company to provide records under section 42 of that *Act* to the Registrar.
19. On December 7, 2023, the Supreme Court determined that Ms. Qin did not consent to being a director of the Company, had not acted as a director of the Company, and that she had not been elected as a director of the company as of August 18, 2022. The Court ordered that the Company remove and destroy all references in the corporate records referring to Ms. Qin as a director no later than 1700 PST December 22, 2023, and that the Company file a notice of a change of directors with the BC Registry removing Ms. Qin as a director no later than 1700 PST on December 22, 2023.
20. Ms. Qin contends that, based on this new evidence, the Determination against her should be cancelled on the basis that she was not a director of the Employer at the time the wages of the Employees were earned.
21. Ms. Qin further argues that as she was never a director of the Employer, she had no standing to file an appeal of the Corporate Determination.
22. The Director’s delegate does not contest the appeal considering the new evidence. The Director’s delegate says that, had the new information been provided within the time limit in which to do so, the Personal Determination would have been cancelled.
23. Birong He stated that she had already provided substantial evidence and hoped for a speedy decision.

ANALYSIS

24. Section 112(1) of the *ESA* provides that a person may appeal a determination on 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.
25. In *Re Merilus Technologies* (BC EST #D171/03), the Tribunal established the following four-part test for admitting new 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.

26. I am satisfied that the Appellant has satisfied the test for new evidence. The record indicates that the Appellant's counsel informed the Director's delegate that he would be seeking the Supreme Court Order, which was ultimately submitted on appeal, but it was not provided by the deadline imposed by the Director's delegate. I also find that the new evidence is both credible and reliable, and that it would have led the Director to a different conclusion. Indeed, the Director's delegate conceded that point in responding to the appeal submissions.
27. Section 96(1) of the *ESA* provides that 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.
28. When an individual is recorded as a director of the Company in the records maintained by the Registrar of Companies, there is a presumption that the individual is a director of that company, a presumption on which the Director may rely to determine officer and director status. However, that presumption may be rebutted by credible and cogent evidence that the Registrar's records are inaccurate. (*Michalkovic*, BC EST # RD047/01)
29. I find, based on the new evidence, that the Appellant was improperly identified as a director of the Employer in the Registrar's records.

ORDER

30. Pursuant to section 115(1)(a) of the *ESA*, I allow the appeal and cancel the Personal Determination.

Carol L. Roberts
Member
Employment Standards Tribunal