

An appeal

- by -

Michael Brett
("Brett")

- 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

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2004A/176

DATE OF DECISION: January 4, 2005

DECISION

SUBMISSIONS

Adele L. Burchart	Legal Counsel for Michael Brett
Darren Caulfield	on his own behalf
Bryan E. King	on his own behalf
Rod Bianchini	for the Director of Employment Standards

INTRODUCTION

This is an appeal filed by Michael Brett (“Brett”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”). Mr. Brett appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on September 5th, 2003 pursuant to which he was ordered to pay the sum of \$14,919.24 on account of unpaid wages and interest owed to eight former employees of a firm known as Child Link Services Inc. (the “Determination”).

The Determination was issued against Mr. Brett pursuant to section 96(1) of the *Act* on the basis that he was “personally liable for up to 2 months’ unpaid wages for each employee” of Child Link Services Inc. (“Child Link”), a firm of which he was, so says the Director, a director and officer when the employees’ wages claims crystallized.

This appeal is being adjudicated based on the parties’ written submissions since I am of the view that an oral hearing is not required in this case (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575).

I have before me Mr. Brett’s original appeal documents, the section 112(5) record, and written submissions from Mr. Brett’s legal counsel (November 29th, 2004), the Director’s delegate (November 10th, 2004) and from two of the respondent employees (Darren Caulfield, October 29th, 2004; Bryan King, November 17th, 2004).

I should note that Mr. King’s submission concerns Mr. Brett’s status with a separate firm, Childline Identification Services Inc. and, accordingly, does not address the issues that are before me in these proceedings. Mr. Caulfield, by way of his submission, wholly supports Mr. Brett’s appeal.

ISSUES ON APPEAL

Mr. Brett’s appeal is based on the grounds that the Director’s delegate erred in law [section 112(1)(a)] and failed to observe the principles of natural justice in making the Determination [section 112(1)(b)]. Mr. Brett seeks an order from the Tribunal cancelling the Determination.

Although Mr. Brett advances several separate assertions, the main thrust of his appeal is that the Director's delegate erred in determining that Brett was a director and/or officer of Child Link when the employees' unpaid wage claims crystallized.

PREVIOUS PROCEEDINGS

The Proceedings Against the Corporate Employer

On either March 13th or 31st, 2003 (both dates are mentioned in the material before me and I am unable to determine which date is accurate) a determination was apparently issued against two firms, namely, Child Link and Childline Identification Services Inc. ("Childline"), on the basis that the two firms were "associated corporations" as defined in section 95 of the *Act*. The section 95 determination ordered both firms to pay, jointly and separately (severally), the sum of \$19,665.58 on account of unpaid wages and interest owed to eight former employees of one or both of the two firms.

This latter section 95 determination was appealed to the Tribunal. On July 8th, 2003 the Tribunal issued reasons for decision dismissing the appeal as it related to Child Link, however, the section 95 declaration that the two firms were "associated corporations" was referred back to the Director for further investigation (see B.C.E.S.T. Decision No. D219/03). On the basis of the material before me, it is not clear what, if anything, has subsequently transpired with respect to that latter "referral back" order.

The Section 96 Determination

As detailed in the Determination now under appeal, since the amount of the corporate determination remained wholly outstanding, the Director issued a second determination in favour of the same eight employees against Mr. Brett pursuant to section 96(1) of the *Act*:

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.

Order Extending the Appeal Period

Mr. Brett appealed the section 96 Determination issued against him, however, that appeal was untimely. The appeal period, calculated in accordance with in section 112(3)(a) of the *Act*, expired on October 14th, 2003 at 4:30 P.M. A notice to this latter effect is set out at the bottom of the fourth page of the Determination. Legal counsel for Mr. Brett filed an appeal on Mr. Brett's behalf on July 16th, 2004 along with a concurrent application to extend the appeal period pursuant to section 109(1)(b) of the *Act*.

Tribunal Member John Orr adjudicated the section 109(1)(b) application. By way of a written a decision issued on September 9th, 2004 Member Orr extended the appeal period. Member Orr was not satisfied, based on the material before him, that the section 96 Determination was sent by registered mail to a known address of Mr. Brett. The original registered envelope containing the section 96 Determination was returned to the Employment Standards Branch marked "unclaimed". Further, Member Orr was also satisfied that Mr. Brett had a presumptively meritorious ground for challenging the section 96 Determination, namely, that he was no longer an officer or director of Child Link when the employees'

unpaid wage claims crystallized since he ceased to be a Child Link officer or director as of April 24th, 2000.

ANALYSIS

I propose to first address the natural justice issue and then turn to what I consider to be the more significant ground of appeal, namely, the matter of Mr. Brett's status when the former employees' wage claims crystallized.

Natural Justice

Although not specifically pleaded, in essence, Mr. Brett's legal counsel asserts that the Determination was issued against Mr. Brett without due regard for section 77 of the *Act*. This latter provision states that the Director must give a person who is under investigation a reasonable opportunity to respond to any allegations advanced against them.

Counsel for Mr. Brett says that if Mr. Brett (or his counsel) had been informed about the Director's intention to proceed against Mr. Brett under section 96(1) of the *Act*, Mr. Brett would have advanced the position that he was not a Child Link director or officer when the employees' wages were earned or should have been paid.

The Director's delegate, in his November 10th submission, does not address the natural justice issue. However, in his August 16th, 2004 submission filed with the Tribunal in response to Mr. Brett's application to extend the appeal period, the delegate specifically deals with Mr. Brett's assertion that he was not aware that the Director was contemplating issuing a section 96 determination. In my view, the delegate's assertions with respect to this latter matter--which have not been contradicted by Mr. Brett--clearly establish that there was sufficient compliance with section 77 of the *Act*.

Further, and in any event, Mr. Brett has now been given a full and fair opportunity to present argument vis-à-vis his status with Child Link and, accordingly, if there was an earlier failure by the Director to comply with section 77 (and, as noted, I am not satisfied that such was the case), that procedural failing has been cured by the present appeal proceedings before the Tribunal.

Errors of Law

The Director's delegate and counsel for Mr. Brett both agree that the eight employees' wages were earned during the period from February 24th to July 12th, 2002.

As detailed in the Determination, the Director's delegate proceeded against Mr. Brett under section 96(1) based on a BC On-Line search of the Registrar of Companies' records. The Determination refers to a search dated January 7th, 2003, however, the only search record before me is dated March 6th, 2003 (this record is appended to the delegate's November 10th submission).

This latter search record indicates that as of February 27th, 2003, Child Link Services Inc. was not in good standing with the Registrar and that "dissolution proceedings" had been commenced presumably because the company had not filed an annual report since November 6th, 1999. This search record also identifies Mr. Brett as one of three principals of the company and that he held the office of President; Mr. Brett is *not* identified as a corporate director in the search record.

Is Brett personally liable as a corporate Director?

Mr. Brett concedes that he was a director of Child Link at one time but that he resigned his directorship as of April 24th, 2000. This latter assertion is consistent with the only corporate search record that is in evidence before me. I also have before me a “Form 8/9” indicating that Mr. Brett has ceased to be a director of Child Link; this form was filed with the Registrar of Companies on May 16th, 2000.

Accordingly, since the Determination was apparently issued against Mr. Brett solely because a Registrar of Companies’ search record allegedly indicated Mr. Brett was a Child Link “director”, the Determination is, on its face, clearly incorrect and must be varied (at least to that extent).

I note that there is nothing in the Determination indicating that the Director’s delegate proceeded against Mr. Brett on the basis that he carried out the “functions” of a corporate director during the relevant time period (see *Penner and Hauff*, B.C.E.S.T. Decision No. D371/96). In finding Mr. Brett personally liable for the employees’ unpaid wages, the Director’s delegate relied exclusively on the corporate search record.

Is Brett personally liable as a corporate Officer?

As noted above, the Determination was also issued against Mr. Brett on the basis that he was identified as a corporate officer (namely, president) in the search record. Counsel for Mr. Brett asserts that Mr. Brett “ceased to be an officer in April 2002” and that he formally resigned his office on May 23rd, 2002. I have before me a letter dated May 23rd, 2002 addressed to Child Link and signed by Mr. Brett in which he references a “verbal agreement of April 20, 2002”. The May 23rd letter continues: “...I hereby submit to you my official notice of resignation. Due to my current personal situation I am unable to continue working for Child Link Services Inc. in any capacity”.

The Director’s delegate’s November 10th submission only addresses the matter of Mr. Brett’s status as a *director*; it does not address Mr. Brett’s position as an *officer*. The delegate’s November 10th submission is, in some sense, an *ex post facto* attempt to shore up the Determination by suggesting that Mr. Brett continued to function as a corporate director even after he formally resigned his directorship. Mr. Brett, for his part, apparently denies many of the assertions made by the delegate in his November 10th submission. However, I need not resolve this factual dispute since, as I previously noted, *the Director’s delegate never proceeded against Mr. Brett on the basis that he functioned as a corporate director*; as I read the Determination, the delegate relied solely and exclusively on a corporate search record.

As for Mr. Brett’s status as an officer, regardless of whatever agreement might have been reached on April 20th, 2002, I am not satisfied that Mr. Brett’s status as an officer ended prior to May 23rd, 2002. Although Mr. Brett’s legal counsel states, in her November 29th, 2004 Reply Submission (para. 9), that “Mr. Brett was fired/quit in or about February 2002 after a confrontation over not being paid”, Mr. Brett’s May 23rd, 2002 resignation letter states that he was “unable to *continue working*”--an assertion that clearly suggests Mr. Brett considered himself to be an employee immediately prior to submitting his resignation.

The Registrar of Companies’ official records raise a rebuttable presumption that Mr. Brett was a corporate officer as of February 27th, 2003 [see *Director of Employment Standards (Michalkovic)*, B.C.E.S.T. Decision No. RD047/01]. This latter presumption has been partially rebutted by Mr. Brett. I am satisfied that he ceased to be a corporate officer of Child Link Services Inc. as of May 23rd, 2002.

Mr. Brett and the Director's delegate both agree that the eight employees' unpaid wage claims crystallized during the period February 24th to July 12th, 2002. Mr. Brett is not, therefore, liable for any unpaid wages that were earned after May 23rd, 2002, however, he is liable for all wages that were earned or payable during the period from February 24th to May 23rd, 2002 subject to the statutory 2-month liability ceiling and any other section 96(2) defence that may be applicable.

I am unable to determine, given that there is no payroll information before me, the actual amount of Mr. Brett's personal liability to each of the eight individual employees. Accordingly, I am referring that latter matter back to the Director so that the employees' individual entitlements as against Mr. Brett may be calculated.

ORDER

Pursuant to section 115(1)(a) of the *Act*, I order that the Determination be varied by deleting any and all references to Mr. Michael Brett being liable for unpaid wages as a result of his alleged status as a *director* of Child Link Services Inc.

Further, the Determination is also varied to indicate that Mr. Brett is only liable, in his capacity as a *corporate officer*, for any unpaid wages that were earned by, or became payable to, any of the eight employees named in the Determination during the period from February 24th to May 23rd, 2002 inclusive.

Pursuant to section 115(1)(b) of the *Act*, I am referring the matter of the employees' unpaid wage entitlements as against Mr. Brett back to the Director so that the employees' individual entitlements may be calculated in accordance with the findings and directions set out in these reasons for decision.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal