



An appeal

- by -

Albert Count Fairclough, a Director or Officer of A F Carpet Services Ltd. and
Fair Commercial Sales Ltd. both in bankruptcy, companies associated
pursuant to section 95 of the Employment Standards Act
(the "appellant")

- 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.: 2000/703

DATE OF DECISION: January 22, 2001

DECISION

OVERVIEW

This is an appeal brought by Albert Count Fairclough (the “appellant”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on September 21, 2000 under file number ER#000-563 (the “Determination”). This Determination, the notice of appeal and written submissions filed in support of this appeal are all essentially identical to the determination and appeal documents filed in *Charlene Fairclough* (BC EST File No. 2000/702); my reasons for decision in the *Charlene Fairclough* appeal are being issued concurrently under BC EST Decision #D001/01.

The Determination now under appeal was issued against the appellant in accordance with the provisions of Section 96(1) of the *Act* which states that a person who was a corporate officer or director when wages “were earned or should have been paid is personally liable for up to 2 months’ unpaid wages for each employee”.

This appeal is being adjudicated based on the parties’ written submissions.

Background facts

The essential facts are set out in my decision in the *Charlene Fairclough* appeal; accordingly, I will only briefly summarize the key facts. On March 2nd, 2000 a Director’s delegate issued a determination against Fair Commercial Sales Ltd., Sharab Developments Ltd., and A F Carpet Services Ltd. (the “Corporate Determination”) pursuant to which all three corporations were declared to be “associated corporations” (see section 95) and, accordingly, jointly and severally liable for the unpaid wages of four former employees. The former employees’ claims, including interest, totalled \$16,275.86. All three corporations are now bankrupt and Deloitte & Touche Inc. has been appointed the bankruptcy trustee.

The Corporate Determination was unsuccessfully appealed to the Tribunal – see BC EST Decision #D209/00. In my written reasons, I noted that since the appeal had not been filed by the corporate appellants’ bankruptcy trustee (although the trustee was well aware of the Corporate Determination), the appeal was not properly before the Tribunal and, in any event, there was nothing in the material before me to suggest that the section 95 declaration was inappropriate or that the four employees’ unpaid wage claims had be incorrectly determined.

By way of the Determination now before me, the Director found that the appellant was a director or officer of A F Carpet Services Ltd. and Fair Commercial Sales ltd. when the unpaid wage claims of the four complainant employees crystallized. Although the Director filed proofs of claim in the bankruptcy proceedings on behalf of the four complainant

employees, their unpaid wages remained wholly unpaid as of September 21st, 2000 and thus the Determination now under appeal was issued pursuant to section 96(1) of the *Act*. The delegate calculated the complainants' unpaid wage entitlements as follows [including interest but excluding any compensation for length of service – see section 96(2)(a)]:

• Stanley Woo:	\$2,375.86
• David Smith:	\$4,350.21
• Rolando Francisco:	\$ 16.49
• Hamid Mirtabatabaee:	<u>\$ 445.77</u>
Total Payable =	<u>\$7,188.32</u>

ISSUES ON APPEAL

The appellant, in a one-page letter to the Tribunal dated October 10th, 2000 and appended to his appeal form, set out five separately numbered “reasons” for appealing the Determination. I have also considered the additional “reasons” set out in the appellant’s only other written submission to the Tribunal, a one-page letter dated November 10th, 2000. These various “reasons” may be summarized as follows:

- the Director should not have issued a section 96 determination since the former employees’ unpaid wage claims can be satisfied from the assets of the bankrupt corporations and, in any event, the section 96 determination is procedurally irregular;
- the unpaid wage claims of the four complainants were incorrectly determined;
- the Director failed, in effect, to comply with section 77 of the *Act* (right of response of a person under investigation); and
- one of the four complainants, namely, David Smith, did not work for either A F Carpet Services Ltd. or Fair Commercial Sales Ltd.

I propose to address each of these reasons in turn.

ANALYSIS

Appropriateness of a section 96 determination

In my view, there is nothing improper in issuing a section 96 determination against corporate officers or directors following the bankruptcy of a corporate employer. Indeed, a fundamental purpose of section 96 is to address that very scenario. However, in the event of bankruptcy, directors and officers are not liable for individual or group termination pay [see section 96(2)(a)]. If there are sufficient corporate assets to satisfy the former employees’ unpaid wage claims—after, of course, accounting for the claims of secured and preferred

creditors—then any director or officer who has paid out such a wage claim can seek reimbursement from the corporate assets. Nevertheless, a section 96 determination may be properly issued irrespective of whether the corporate assets are sufficient (or insufficient) to satisfy the former employees' unpaid wage claims. Of course, a section 96 determination can only be properly issued if there are wages owed to one or more of the corporation's employees and, thus, corporate officers and directors must be vigilant to ensure that employees' wages are paid in a timely fashion otherwise they run the risk of personal liability.

It should also be remembered, however, that a bankrupt firm, *by definition*, does not have sufficient assets to satisfy the claims of all of its creditors (including unpaid wage claims) and thus one is hardpressed to give the appellant's first ground of appeal (*i.e.*, that the complainants' unpaid wages could have been satisfied through the sale of corporate assets) much credence—certainly there is no evidence before me to support the appellant's assertion in this regard.

The correctness of the delegate's calculations

The question of the correctness of the delegate's calculations of the four complainants' unpaid wage entitlements is not properly before me. That issue could have been addressed in an appeal of the Corporate Determination, however, the bankruptcy trustee chose not to appeal the Corporate Determination and, so far as I can gather, accepted the proofs of claim filed by the Director's delegate on behalf of the four complainants as accurate. If the appellant is of the view that the trustee erred in accepting the former employees' proofs of claim, that is a matter that the appellant must address in the bankruptcy proceedings.

I might add that, in any event, there is no evidence before me (say, in the form of payroll records) that would call into question the delegate's calculations with respect to the former employees' unpaid wage claims. Further, there is nothing before me to suggest that the appellant is entitled to the benefit of any of the section 96(2) defences or that the Determination exceeds the 2-month unpaid wage liability ceiling.

Section 77

The appellant says that he was “not contacted” by the Employment Standards Branch and that he “had no input into their investigation”. Section 77 of the *Act* states that the Director “must make reasonable efforts to give a person under investigation an opportunity to respond”. The evidence before me discloses that the appellant was very much aware of the delegate's investigation. Indeed, the appellant purported to appeal the Corporate Determination in his own right and thus was well aware of the Delegate's investigation at least some 6 months prior to the issuance of the Determination.

The complainants' employer

The appellant does not deny that he was a director or officer of A F Carpet Services Ltd. and Fair Commercial Sales Ltd. when the complainants' unpaid wage claims crystallized. He

does say, however, that David Smith was not employed by either of these two firms. Nevertheless, even if that is so (and I make no finding in that regard), since all three firms were declared to be “associated corporations” under section 95 of the *Act*, all three are considered to be a single employer for purposes of the *Act* and thus are jointly and severally liable for the unpaid wages of any employee of any one of the three firms. Since all three firms are a single employer for purposes of the *Act*, a director or officer of any one of the three firms is similarly liable under section 96(1) for up to 2 months’ unpaid wages (subject to any applicable statutory defences) owed to any employee of the “associated” firms.

It follows from the foregoing that this appeal must be dismissed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of \$7,188.32 together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance

KENNETH WM. THORNICROFT

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