

An appeal

- by -

William Smith, a Director or Officer of World Hockey Association Corp.
(“Smith”)

- 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: David B. Stevenson

FILE No.: 2007A/131

DATE OF DECISION: January 16, 2008

DECISION

SUBMISSIONS

Simon Kent	on behalf of William Smith
Amanda Clark Welder	on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by William Smith, a Director or Officer of World Hockey Association Corp. (“Smith”) of a Determination that was issued on September 21, 2007 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Smith was a director/officer of World Hockey Association Corp. (“WHA”), an employer found to have contravened provisions of the *Act*, and was personally liable under Section 96 of the *Act* for an amount of \$18,631.86.
2. The Determination also found Smith personally liable, under Section 98 of the *Act*, for \$2000.00 in administrative penalties imposed on WHA in the corporate Determination. This part of the Determination has not been challenged except in the context of whether the Director erred in law by including amounts found owing under Section 8 and 21 as part of Smith’s personal liability under Section 96.
3. In this appeal, Smith challenges the Determination on each of the grounds set out in Section 112 of the *Act*, although the reason for appeal address only whether the Director erred in finding Smith personally liable for amounts found owing under Sections 8 and 21 of the *Act* in the Determination issued against WHA on April 25, 2007 (the “corporate Determination”).
4. Smith does not seek an oral hearing on the appeal.
5. The Tribunal has a discretion whether to hold a hearing on an appeal and if a hearing is considered necessary, may hold any combination of written, electronic and oral hearings: see Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s. 103), Rule 16 of the Tribunal’s Rules of Practice and Procedure and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575. In this case, the Tribunal has reviewed the appeal, the submissions and the material submitted by all of the parties, including the Section 112 (5) record filed by the Director, and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

6. The issue in this appeal is whether the Director erred in calculating the amounts for which Smith was personally liable as a director/officer of WHA.

THE FACTS

7. Smith does not challenge the finding that he was a director/officer of WHA.
8. On April 25, 2007, the Director issued a Determination against WHA (the “corporate Determination”) in favour of four employees in the amount of \$20,637.66. The Director also issued administrative penalties in the amount of \$2000.00. The Determination included the amount of \$5,172.67 payable to Kenneth Southwick in respect of a contravention by WHA of Section 8 of the *Act*. That amount was comprised of out of pocket expenses incurred by Mr. Southwick, and which the Director found to be related to the contravention, and one months’ wages.
9. The amount for which Smith was found to be personally liable to Mr. Southwick under Section 96 is \$7,899.12, an amount representing two months’ wages (salary and statutory holiday pay) and interest on that amount under Section 88.
10. The amounts attributable to a contravention of Section 21 of the *Act* total \$59.00.

ARGUMENT

11. The argument made by Smith is that personal liability imposed on a director/officer under the Act must be established by reference to “normal” wages, which means wages that are earned by an employee over time and which are reasonably reflective of the employee’s typical, regular or usual wages.
12. This argument is based on the decision of the Tribunal in *Raymond Man Wah Lee and another, Directors/Officers of C-O-E Posscan Systems Inc.*, BC EST #D158/00, which was referred to in *Re Interior Pacific Flights Systems Ltd.*, BC EST #D130/03.
13. The Director submits that Smith’s argument misconceives the question being addressed in the above two decisions, which was the amount represented by the term “two months’ unpaid wages” where the employee’s wage included commissions. In those cases, the Tribunal said “two months’ unpaid wages” should reflect the employee’s regular or normal wages over a two month period. The Director says that in this case, there can be no question about that amount: Mr. Southwick’s regular, or normal, monthly wage was \$3600.00 plus statutory holiday pay. That amount over two months is \$7,488.00.
14. The Director says the decisions relied on by Smith do not say that a director/officer is personally liable only for “normal” wages. The Director says the liability of a director/officer is clear on a plain reading of subsection 96(1) and that the definition of wages in section 1 includes amounts that are required to be paid in accordance with a Determination. Additionally, the Director says amounts payable under Sections 8 and 21 are not included in subsection 96(2) which sets out wages for which a director/officer is personally liable.
15. The Director submits the same reasoning in respect of the argument by Smith concerning the amounts found owing to two other complainants, Lacey Shenton and Jennifer Tran, under Section 21 of the *Act*.

ANALYSIS

16. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

112. (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of 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 made.

17. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to show an error in the Determination under one of the statutory grounds.

18. The liability of a director/officer is set out in subsection 96(1) of the *Act*, which reads:

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 two months' unpaid wages for each employee.

19. I agree with the submission of the Director that the decisions referred to by Smith do not say the liability of a director/officer is only for “normal” wages. The statute clearly says the personal liability of a director or officer is for “*wages of an employee of the corporation that were earned or should have been paid*” while that person was a director or officer. What are wages for which a director or officer may be held personally liable must be determined with reference to the definition of wages in Section 1. The phrase “up to two months’ wages” only delineates the extent of the personal liability. This approach is consistent with the conclusion of the Tribunal in *Tracey Docherty*, BCEST #D248/98 and several decisions which have followed the reasoning in *Docherty*, where the following was said about the statutory effect the provision:

In my view, section 96 creates an unpaid wage liability “ceiling” based on an employee’s monthly wage. Accordingly, if an employee’s “regular wage” (see section 1) was \$2,000 per month, the unpaid wage liability of a director or officer for that employee would be the lesser of \$4,000 (*i.e.*, 2 x \$2,000 per month) or the actual amount of the employee’s unpaid wages.

...a corporate officer of director may be held personally liable for employees’ unpaid wages, but such liability cannot exceed the equivalent of two months’ wages per employee.

(at page 4)

20. In sum, I am not persuaded there is any error of law in the Determination. I do not accept the proposition that the liability of a director/officer under Section 96 must be established with reference to normal wages.

21. While the appeal form has identified other grounds for appeal than error of law, the reasons for appeal have not advanced any argument relating to any grounds other than error of law.
22. The other matters raised in the appeal are requests for clarification of the aspects of the corporate Determination. They have been answered by the Director in the reply to this appeal, but I find any concerns relating to those amounts to be unrelated to the issue of the personal liability of Smith under Section 96. The amounts about which Smith sought clarification are wages under the *Act* and as such can comprise part of his personal liability up to the wage liability “ceiling”.
23. The appeal requested a stay of the Determination, but that request was not pursued and, in any event, would not be granted.
24. The appeal is dismissed.

ORDER

25. Pursuant to Section 115 of the *Act*, I order the Determination dated September 21, 2007 be confirmed in the total amount of \$20,631.86.

David B. Stevenson
Member
Employment Standards Tribunal