

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act, R.S.B.C. 1996, c. 113

- by -

Terry Pasiuk, Graeme Go, Directors/Officers of Pacific Office & Business
Systems Inc. operating as Pacific Office 'N Things, and Pacific Office & Business
Systems Inc. operating as Pacific Office 'N Things
(the "Employer" or "Pacific")

- of Determinations Issued by -

The Director Of Employment Standards
(The "Director")

ADJUDICATOR: Ib S. Petersen

FILE NOS.: 98/221; 98/222; 98/232; 98/233;
98/234; 98/235; and 98/243

DATE OF DECISION: August 20, 1998

DECISION

APPEARANCES/SUBMISSIONS

Terry Pasiuk	on behalf of himself
Graeme Go	on behalf of himself
James J. Klassen	on behalf of Pacific
Warren Scotter	on behalf of himself
William Wong	on behalf of himself
Wayne Mackie	on behalf of the Director of Employment Standards

OVERVIEW

This decision concerns several appeals by Terry Pasiuk (“Pasiuk”), Graeme Go (“Go”), and Pacific, respectively, pursuant to Section 112 of the Employment Standards *Act* (the “*Act*”), against a number of Determinations of the Director of Employment Standards (the “Director”) issued as follows:

- March 19, 1998 against Pasiuk, as a director of Pacific, for \$773.18 to Warren Scotter (“Scotter”)
- March 19, 1998 against Pacific, for \$773.18 to Warren Scotter
- March 19, 1998 against Go, as a director of Pacific, for \$773.18 to Warren Scotter (“Scotter”)
- March 27, 1998 against Pasiuk, as a director of Pacific, for \$1,926.95 to William Wong (“Wong”)
- March 27, 1998 against Pacific, for \$1,926.95 to Wong;
- March 27, 1998 against Go, as a director of Pacific, for \$1,926.95 to Wong

Pasiuk, Go and Pacific argue the Determinations are wrong and seek to set them aside. In my view, the Determinations must be set aside for the reasons set out below.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether the Tribunal should vary, confirm or cancel the Determinations. In my view, this turns on whether the delegate properly sought to obtain information with respect to the complaints from Pacific before issuing the Determinations.

FACTS

The facts set out in the Determinations by be characterized as sketchy and provide little information as to the basis for the Determinations. The Determinations are the result of complaints made to the Employment Standards Branch by Scotter and Wong. Based on the submissions and the documents attached to them, the following provides some factual parameters with respect to the complaints and the Determinations.

Scotter commenced employment with Pacific on April 7 or 10, 1997 as a commissioned sales person. There is no dispute that he was an employee. On May 2, 1997, he became a store manager, a position he held until his resignation on June 19, 1997. As a manager, Go says Scotter was paid \$1,800.00 per month plus commissions. Pasiuk, on the other hand, says he was paid an \$1,800.00 advance against commissions at that time and, when he was a sales person, \$600,000.00 against commissions. Scotter says that the “wage has been difficult to figure out since Graeme Go’s attempt was to pay on commission without a base rate of pay. But when I was store manager, the pay was \$1,800.00 per month based on 40 hour work weeks.” It is unclear what the wages were prior to the appointment as store manager.

Wong alleges that he started working with Pacific in August 1997 and that his last day was January 31, 1998. There is no agreement as to whether he was an employee of Pacific. Wong was remunerated on a commission basis, paid on a monthly basis. He seeks to be remunerated for Cantel activations sold by him in January 1998.

According to the receiver, Barnes & Kissack Inc., Pacific went into receivership on February 20, 1998, As of March 17, 1998, Go was both an officer and director. he was the president of the Employer. It does not appear to be in dispute that he was both an officer and director at the material times. Pasiuk was an officer, the secretary, at the material times but no longer a director as of November 24, 1997, when he resigned. There does not appear to be any dispute with respect to these facts.

In his complaint to the Employment Standards Branch, dated December 10, 1997, Scotter alleged that 8 hours of training he had received between March 25 and April 2, before he commenced employment with Pacific on April 7, 1997, was work he should have been paid for. He also claimed for 40 hours of sales work between April 7 and 15, and 14 hours of training related to his position between April 8 and May 7, 1997. Scotter alleged that his participation in the training was mandatory. According to the Record of Employment, Scotter’s first day of employment was April 10, 1997 and the last day June 19, 1997. The Employer disputes that the start date was April 7 and that the training was mandatory.

On January 22, 1998, the delegate wrote to Pacific, attention Go, requesting information with respect to Scotter for regular wages and overtime. The letter was not sent by registered mail.

On February 27, 1998, the delegate sent a demand for employer records related to Scotter and Wong to the receiver, Barnes & Kissack Inc., by registered mail. As well, he had a telephone call with the receiver on March 5, 1998. In response, the receiver, wrote the delegate on March 9:

“As you are aware Barnes & Kissack Inc. was appointed Receiver of Pacific Office & Business Systems Inc. (“Pacific”) on February 20, 1998. Accordingly, we have in our control certain records of Pacific. We were not the employer. We have offered you access to same. However, you declined indicating that the claimant, Warren Scotter (sic.), had provided you with records and your Demand for Employer Records was issued to allow the Company and the Director(s) an opportunity to issue the Demand to Barnes & Kissack Inc. for that purpose. You agreed to re-issue the Demand to the Company and the Director(s) directly.”
(emphasis added)

The delegate does not dispute the contents of this letter.

On March 5, 1998, the delegate wrote to Go regarding the Scotter complaint. In the letter, the delegate referred to a previous letter dated January 22, 1998, requesting “either payment of the claims or copies of your payroll records. I received neither.” The delegate states that he had contacted the receiver. The receiver had replied that it could not retrieve the payroll records due to unfamiliarity with the records. He warned that without employer records, he would not proceed on the basis of Scotter’s records and mentioned the liability of directors for unpaid wages under the *Act*. The letter, sent to Go’s address as per the corporate registry, was not sent registered mail. It does not appear that the delegate wrote to Go with respect to Wong’s complaint. Moreover, it does not appear that the delegate re-issued the demand for records to either Pacific or the officer/directors.

The delegate issue a Determination on March 19, 1998 with respect to Scotter against Pasiuk, Go and Pacific. Based on the complaint by Scotter that Pacific did not pay his regular wages for the periods March 25 to April 2, 1997, and April 7 to 15, 1997, and overtime wages for the period March 25 to April 7, 1997, the delegate found that Scotter was entitled to \$773.18 (Sections 18 and 40 of the *Act*). This calculation of wages appears to be based on a monthly salary of \$1800.00 and not the earnings at the time (which are not clear to me). In short, the delegate used the same amount to calculate amounts owing before and after Scotter’s appointment as store manager. In the Determinations, the delegate noted that Pacific was put into receivership; that the receiver had referred the matter to Go, the president of Pacific; and that Go had failed to respond to a request for payroll information and the delegate, therefore, had based his Determination on Scotter’s information (which does not appear complete, for example, with respect to the earnings). The Determination against Pacific set out Scotter’s allegations and continued under the heading “reasons”:

“I have completed my investigation into these allegations. The investigation revealed that the company was put into receivership by a creditor and the Receiver, Barnes & Kissack Inc., asked that the matter be referred to the company president, Mr. Graeme Go. Subsequently, Mr. Go failed to respond to a request to provide payroll records. As a consequence, this determination is based on the records of the complainant.”

The Determinations against Pasiuk and Go stated (in part):

“I have investigated a complaint filed under the *Employment Standards Act* by your former employee, Warren E. Scotter.

As a result of the investigation a Determination dated March 19, 1998 has been issued against Pacific Office ‘N Things ordering a payment of wages totalling \$773.18.

Section 96 of the *Employment Standards Act* states that a person who was a director or officer of a company while wages were earned or should have been paid is personally liable for those unpaid wages in amounts of up to 2 months’ wages for each employee.

...

Mr. Scotter’s wages were \$1,800.00 per month; consequently, the full amount is owing.”

On March 25, 1998, Go wrote to the delegate concerning Scotter and Wong. He denied that Pacific owed any amount on account of regular wages or overtime. Scotter was a full time employee who did not work overtime as the store where he worked was never open outside business hours. As well, he denied that Wong was an employee. In the letter, Go explained that he had moved away from the lower mainland and that it had been difficult to get anything out of the receivers.

The corporate Determination with respect to Wong concluded that Pacific did not pay his full wages *i.e.*, commissions on sales. This Determination was issued on March 27, 1997 and is similar to the Scotter Determination, though in a higher amount, \$1,926.95 (Section 18 of the *Act*).

Subsequently, Pacific, Go and Pasiuk filed an appeal.

ARGUMENTS

Counsel for Pacific argues that no amounts are owing to Scotter and Wong. The Determinations were made in the absence of a reply from Pacific because it had gone into bankruptcy and Go had moved and did not receive a copy of the “notification related to the claim” until after the Determination had been made. Pacific denies any unpaid obligation and wishes to have the opportunity to receive and respond to the claims. Pacific also denies that Wong was an employee and says that the relationship was “purely contractual”.

Go does not deny that Scotter attended training sessions. However, these were not mandatory though he states that he was concerned about the store losing money and “asked Warren to get some selling skills.” The attendance was voluntary. William Wong was not an employee of Pacific. He was a Cantel sub-agent operating out of Pacific’s premises. Go alleges that Wong was an agent or employee of BC Mobility. Wong did not sell Pacific’s telephones, he utilized Pacific to activate telephones. Pacific acted a middleman and Wong did not get paid unless and until Cantel paid.

Pasiuk appeals the Scotter and Wong Determinations both in his capacity as an officer/director and on behalf of Pacific. He does so on the basis that Scotter’s first day of employment was April 10, 1997 (and, I assume, therefore, that the argument is that no wages could be owing per the period before that time). Scotter was hired on the basis of commissions only. Moreover, there was no requirement that Scotter take any training after hours. Scotter became store manager on May 2, a position he held until the termination of his employment (resignation) on June 19, 1997. In that position he was paid an \$1,800.00 per month advance against commissions. Pasiuk claims that Scotter actually owes Pacific money. Finally, Pasiuk argues that he was not aware of the complaint until he was served personally. He acted as a director for a minority shareholder without management control or involvement. Go was the majority shareholder and exercised total control. With respect to the Wong Determination, Pasiuk argues that he resigned as a director of Pacific on November 24, 1997.

Scotter argues that he started working full time for Pacific on April 7, 1997. He states that the training after hours was mandatory. The employer must pay minimum wage if commissions are below minimum wage.

Wong argues that he was an employee of Pacific and denies being an employee of BC Tel Mobility. He was an outside sales representative between August 1997 and January 31, 1998. He says payments were made by Cantel to Pacific for the activation sold by him.

ANALYSIS

Section 96 of the *Act* provides (in part):

96(1) A person who was a director or officer of a corporation at the time wages of an employee were earned or should have been paid is personally liable for up to 2 months' unpaid wages for each employee.

Section 96 of the *Act* provides for personal liability for corporate directors and officers. They may be liable for up to two months' unpaid wages for each employee, if they were directors or officers at the time the wages were earned or should have been paid. In other words, the issues that arise under Section 96 are limited, including, whether a person was a director/officer at the material time, or whether the amount of personal liability was calculated correctly (see, for example, *Pacific Western Vinyl Windows & Doors Ltd.*, BCEST #D180/96). In my view, the *Act* is quite clear. There is no requirement that a person be both an officer and director, it is sufficient if a person is either a director or an officer. Similarly, the *Act* does not distinguish between directors appointed by majority or minority shareholders.

However, I need not decide the merits of the complaints, *i.e.*, wages, employee status, etc., or whether it is open for Go and Pasiuk, as officers/directors, to argue the merits of the claims on behalf of Pacific which, in any event, filed an appeal on its own (through without much detail). In my view the Determinations must be set aside because they were made without seeking information and records from the Employer, Pacific. In this case, the liability of the officers/directors flow from the corporate Determinations. The delegate made the Determinations following "investigations" into complaints against Pacific. The basis for the claim against the officers/directors is the result of this investigation.

Pacific says that the Determinations were made in the absence of a reply from Pacific because it had gone into bankruptcy and Go had moved and did not receive a copy of the "notification related to the claim" until after the Determination had been made. Pasiuk says that he did not know of the complaints until served personally with the Determinations. The delegate does not respond to this.

From the facts, as far as I have been able to ascertain, the delegate is not in a position to prove that his requests for information and records reached the Employer before he made the Determinations. Part 10 of the *Act* deals with complaints, investigations and determinations. Section 77 of the *Act* provides that if an investigation is conducted, the Director must make reasonable efforts to give a person under investigation an opportunity to respond. That is in accordance with fundamental principles of natural justice.

The *Act* provides certain mechanisms to assist the Director in her investigations. For example, Section 122 of the *Act* provides (in part):

96(1) A determination or demand that is required to be served on a person under this *Act* is deemed to have been served if

(a) served on the person, or

(b) sent by registered mail to the person's last known address.

The delegate did not serve a demand for records on either Pacific (or, in any event, the directors/officers) in accordance with the *Act*. Neither the letter sent to Pacific on January 22, 1998 nor that sent to Go on March 5, 1998, were not sent by registered mail. There are various other methods of contacting a corporate entity, for example through its registered and records office. This was not done. Moreover, in this case, the delegate contacted the receiver and was offered access to the records. The letter from the receiver, set out above, indicates that the delegate declined the offer. The delegate does not deny this. Finally, the delegate agreed to re-issue the demand to the Employer and the directors. He did not do so. In short, in the circumstances, the delegate did not make reasonable efforts to allow the Employer an opportunity to respond.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determinations in this matter, dated March 19 and 27, 1998 be referred back to the Director.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal