

An appeal

- by -

Michael Mitton a Director or Officer of Allegro Café Ltd.
("Mitton")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2006A/6

DATE OF DECISION: March 7, 2006

DECISION

SUBMISSIONS

Michael Mitton	on his own behalf
Barbara Reese	on her own behalf
Ken MacLean	for the Director of Employment Standards

INTRODUCTION

1. This is an appeal filed by Michael Mitton (“Mitton”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Mr. Mitton appeals a Determination that was issued pursuant to section 96(1) of the *Act* (corporate director/officer personal liability for unpaid wages) by a delegate of the Director of Employment Standards (the “delegate”) on January 5th, 2006 (the “Section 96 Determination”).
2. The Director’s delegate determined that Mr. Mitton was a director and officer of Allegro Café Ltd. (Allegro) when wages were earned by, or should have been paid to, Ms. Barbara O. Reese (“Reese”). The Section 96 Determination, and accompanying Reasons for the Determination (“Reasons”)—the delegate’s Reasons are appended to the Determination—were issued as a result of the Director’s inability to collect Ms. Reese’s unpaid wages from Allegro.
3. In this latter regard, an oral evidentiary hearing was held on August 20th, 2004 concerning Allegro’s unpaid wage liability to Ms. Reese. On October 22nd, 2004, the delegate issued a Determination against Allegro in the amount of \$10,838.48 (the “Corporate Determination”). It should be noted that the Corporate Determination was issued following an evidentiary hearing attended by one of the two former Allegro principals (Matthew Walsh) as well as the two current principals (Aly Daya and Feroz Abdulah). The complaint hearing was originally convened on July 27th, 2004, however it was adjourned to August 20th, 2004 so that Mr. Mitton might also attend. When the hearing reconvened on August 20th, Mr. Walsh advised the delegate that Mr. Mitton was unable to attend the hearing since he “was suffering from arthritis”.
4. Although the Corporate Determination was served on Allegro’s registered and records office—and was also served on Allegro’s directors and officers (including Mr. Mitton)—Allegro never appealed the Determination. The statutory appeal period [see section 112(3)] expired on November 29th, 2004. Since the Director was unable to collect any monies on account of the Corporate Determination, a Section 96 Determination was issued against Mr. Mitton (determinations were also issued against Messrs. Daya and Abdulah). The amount payable under the Section 96 Determination is \$10,971.10 a figure that includes vacation pay (\$65.38), compensation for length of service (\$9,423.09) and section 88 interest (\$982.63).
5. In his Appeal Form, Mr. Mitton stated that he believed an oral appeal hearing was required in this case. However, despite being directed to do so, he did not explain why an oral hearing was required. I am not persuaded that an oral appeal hearing is called for in this case and accordingly I intend to adjudicate this appeal based solely on the parties’ written submissions. I might add that the Tribunal’s Vice-Chair, in a letter dated February 20th, 2006, advised the parties that this appeal would be adjudicated based on their written submissions.

6. In adjudicating this appeal I have considered the following material:
- Mr. Mitton’s original Appeal Form and attachments and a further undated submission filed February 13th, 2006;
 - Ms. Reese’s submission (and attachments) dated January 19th, 2006; and
 - The Director’s delegate’s submission dated January 11th, 2006;
- as well as the section 112(5) “record”, the Section 96 Determination and the delegate’s Reasons.

REASONS FOR APPEAL

7. Mr. Mitton is appealing the Determination on the ground that “evidence has become available that was not available at the time the Determination was being made” [section 112(1)(c)]. This ground of appeal is more fully particularized in a 1-paragraph attachment to his Appeal Form, however, the information set out in that document does not identify any “new evidence”—certainly, Mr. Mitton has not submitted any evidence that could not have been provided to the delegate prior to the Section 96 Determination being issued. Rather, Mr. Mitton’s appeal documents appear to raise a question of mixed law and fact [section 112(1)(a)].

THE PARTIES’ POSITIONS

Mr. Mitton

8. I previously noted that Mr. Mitton’s position was more fully particularized in a brief attachment to his Appeal Form; this latter document is reproduced, in full, below:

Barbara Reese was employed at Allegro Café from 1996. Barbara Reese went on sick leave [in] June 2003. Directors Mike Mitton and Matt Walsh sold Allegro Café [in] December 2003. With that sale the new owners took responsibility of all employees and were made aware of Ms. Reese[’s] sick leave and intent to come back. Ms Reese was told to contact the new owners when she was ready to return. What transpired from that point on is known only by the new owners and Ms. Reese. Ms. Reese was never terminated by either Matt Walsh or Mike Mitton. The liability is the responsibility of the new owners and not that of Mitton/Walsh.

9. In his later submission filed February 13th, Mr. Mitton reiterated his position that he is not liable for Ms. Reese’s compensation for length of service and also challenges the actual amount of her determined entitlement.

Ms. Reese

10. Ms. Reese claims that she was terminated on December 15th, 2003 when the business was sold. Ms. Reese says that since Mr. Mitton (and the now-deceased Mr. Walsh) were Allegro’s only directors and officers when she was terminated, Mr. Mitton’s liability is clear and uncontestable.
11. However, the above position is somewhat inconsistent with information set out in a letter dated January 30th, 2004 (filed, I presume, as part of the proceedings that resulted in the issuance of the Corporate Determination) that is appended to her January 19th, 2006 submission. Ms. Reese says she was formerly the Allegro Café’s chef and was involved in a motor vehicle accident in July 2003; she then went on

medical leave. She says that in November 2003, while still on medical leave, she was contacted by Mr. Mitton and told that the restaurant “was being sold and that the new owner would be taking on the original staff so I was still employed by the Allegro Café”. Ms. Reese also stated: “By the first week of January 2004 I did not hear from the new owner so I called to introduce myself and was told that they had never heard of me and that they have hired their own chef and I did not work for them.” This latter statement places her termination in early January 2004 rather than mid-December 2003.

The Director’s Delegate

12. In his January 11th, 2006 submission the Director’s delegate noted that certain findings were made in the reasons accompanying the Corporate Determination and that these findings cannot now be contested (see *Steinemann*, B.C.E.S.T. Decision No. D180/96). I have reviewed the delegate’s reasons accompanying the Corporate Determination and they contain, among other things, the following findings:

- Allegro was incorporated on August 16th, 1996;
- On September 1st, 2002 Mr. Walsh acquired 50% of Allegro’s shares and became one of the two principals along with Mr. Mitton;
- During the early hours of July 5th, 2003 Ms. Reese was involved in a motor vehicle accident when she was driving home from work; she then went on “sick leave” and both she and her employer expected she would be recalled when she fully recovered;
- Ms. Reese had not recovered and thus had not returned to work when Messrs. Mitton and Walsh agreed to sell their shares to Messrs. Daya and Abdulah; and
- Ms. Reese was continuously employed from August 1996 until she was terminated on or about December 15th, 2003.

FINDINGS AND ANALYSIS

13. I agree with the Director’s delegate that findings of fact made in the course of determining Allegro’s liability are binding on Mr. Mitton by reason of the related legal principles of *res judicata* and issue estoppel. Simply put, a corporate director or officer who was given the opportunity to appear and testify before the delegate in the proceedings against the corporate employer (and in this case, Mr. Mitton presumably allowed Mr. Walsh to speak on his and Allegro’s behalf) cannot challenge those findings of fact in a subsequent appeal proceeding relating to a section 96 determination.
14. The issues that are properly before the Tribunal in a section 96 proceeding include the status of the individual (was the person a director or officer when the wages were earned or should have been paid?); or the possible application of any statutory defences [e.g., section 96(2)]; or whether the director/officer’s liability has been correctly determined in terms of the 2-month “liability ceiling”.
15. Accordingly, in my view, Mr. Mitton’s arguments regarding Ms. Reese’s date of hire—for purposes of calculating compensation for length of service—and regarding whether the new shareholders contractually agreed to pay Ms. Reese’s compensation are not properly before me.

16. Although, as indicated above, in my view Mr. Mitton has not submitted any “new evidence” for consideration, this appeal does raise a question of law or, at least, mixed fact and law, and thus could be characterized as an appeal based on an alleged error of law. Mr. Mitton’s material is not as clear as it could be. Having said that, however, he appears to suggest that he cannot be held liable since he was no longer involved in Allegro’s operations after the share sale concluded. In other words, and putting the matter somewhat more formally, Mr. Mitton is essentially suggesting that he was not an officer or director when Ms. Reese’s wages were earned or became payable.
17. In his January 11th submission, the delegate says that Ms. Reese was terminated on December 15th, 2003 “as a result of the sale of the café”. The delegate’s reasons accompanying the Corporate Determination contains the following summary of Ms. Reese’s testimony (at page 9):
- Reese continued on medical leave until November 2003 at which time she heard from former co-workers that the restaurant was to be sold.
- Reese called Mitten [sic] to discuss the matter and was advised that yes the restaurant was to be sold and that the new owners would be hiring the employees so Reese’s job was safe.
- Nothing more was heard by Reese until the sale of the café in December 2003. In January 2004 Reese called the restaurant to introduce herself to the new owners. The new owners indicated they did not know Reese, that they had their own chef and that Reese’s service was not required.
- Reese attempted to contact both Mitten [sic] and Walsh leaving messages for them to call. No response was received from either person.
- Reese then mailed a completed self-help kit, exhibit #6 to the café by registered mail on January 13, 2004.
18. It is important to bear in mind that the sale of business in this case was a share sale rather than an asset sale. Accordingly, section 97 of the *Act* is not relevant. At all relevant times, Ms. Reese was only employed by Allegro; the share sale did not affect the identity of her employer.
19. Allegro apparently granted Ms. Reese an indefinite “sick leave” following her motor vehicle accident of July 5th, 2003. By reason of the definition of “employee” contained in section 1 of the *Act*, Ms. Reese, being “a person on leave from an employer”, continued to be an employee until her employment was terminated. Ms. Reese, *on her own evidence*, was not terminated until some time in early January 2004 when she was told that Allegro’s new principals did not intend to honour her on-going leave and allow her to return to work when she was fit to do so.
20. Ms. Reese’s award is solely for compensation for length of service (section 63)—the further vacation pay component simply represents an additional 6% on her section 63 award. Compensation for length of service is included within the section 1 definition of “wages”. Pursuant to section 96(1), a corporate director or officer is personally liable for wages (up to 2 months per employee) that “were earned or should have been paid” when the person was a director or officer.
21. Ms. Reese’s compensation for length of service was *payable* when she was terminated—sometime in early January 2004. However, her compensation for length of service was *earned* on an on-going basis as soon as she completed 3 months’ consecutive service. The material before me does not unequivocally indicate that Mr. Mitton was a corporate director or officer when Ms. Reese’s wages (compensation for length of service) were payable, but the material before me does indicate that Mr. Mitton was an Allegro

officer and/or director when Ms. Reese's entitlement to compensation for length of service (7 weeks' wages) was "earned". That being the case, and since none of the available statutory defences applies, the Section 96 Determination was, in my view, properly issued against Mr. Mitton and, accordingly, I am dismissing this appeal.

22. Mr. Mitton may—and I do not wish to put the point any stronger than that—have one or more claims for indemnification against one or both of Messrs. Walsh (actually, his estate since Mr. Walsh is now deceased), Alex Fraser (a third person who apparently became involved in Allegro's business affairs following the share sale), Abdulah or Daya. However, these latter claims arise, if they arise at all, in contract and do not impact Mr. Mitton's statutory liability under section 96(1) of the *Act*.

ORDER

23. Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$10,971.10** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal