

An appeal

- by -

Beverly Kovic
("Kovic")

- 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: Shafik Bhalloo

FILE No.: 2009A/027

DATE OF DECISION: May 13, 2009

DECISION

SUBMISSIONS

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|---------------|---|
| Beverly Kovic | on behalf of Victoria Floor Essence Incorporated |
| John Heaney | on behalf of Victoria Floor Essence Incorporated |
| Terry Hughes | on behalf of the Director of Employment Standards |

OVERVIEW

1. This is an appeal filed by Beverly Kovic (“Kovic”) pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”). Kovic appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on January 28, 2009 pursuant to which she was ordered to pay \$2,765.39 on account of unpaid wages, annual vacation pay and Section 88 interest (the “S. 96 Determination”).
2. The S. 96 Determination was issued following an investigation of a complaint (the “Complaint”) filed by Mr. Steve Boulay (“Boulay”), a former employee of a corporation known as Victoria Floor Essence Incorporated (“Victoria Floor”). The investigation of the Complaint resulted in a determination being issued against Victoria Floor on January 28, 2009, in the amount of \$3,765.39 inclusive of two administrative penalties (the “Corporate Determination”). Kovic, on behalf of Victoria Floor, appealed the Corporate Determination, which I considered in a separate decision reported in *Re: Victoria Floor Essence BC EST # D047/09* wherein I confirmed the Corporate Determination.
3. As no monies were paid under the Corporate Determination, because Victoria Floor does not have any assets, the Director proceeded against Kovic under Section 96 of the *Act*, which provides:

Corporate officer 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.

4. It should be noted that in the corporate search of Victoria Floor conducted on November 25, 2008 by the delegate, Kovic is shown as the sole director/officer of Victoria Floor. This information combined with the delegate’s finding that Boulay’s unpaid wages were earned between October 16, 2008 and October 27, 2008 inclusive during the currency of Kovic’s directorship of Victoria Floors led the delegate to make the S.96 Determination against Kovic.
5. Kovic’s appeal of the S.96 Determination is based on the same grounds of appeal and submissions she and counsel made in the appeal of the Corporate Determination.
6. The Director has also relied on the same submissions adduced in the appeal of the Corporate Determination.
7. There are no submissions made by the Respondent Boulay in this appeal.
8. Pursuant to Section 36 of the *Administrative Tribunals Act* (the “*ATA*”), which is incorporated in the *Act* (S.103) and Rule 17 of the *Tribunals Rules of Practice and Procedure*, the Tribunal may hold any combination of

written, electronic and oral hearings. In my view, this Appeal can be adjudicated on the basis of the Section 112(5) “record”, the written submissions of the parties and the Reasons for the Section 96 Determination.

ISSUE

9. As indicated, Kovic’s appeal relies on and duplicates the same three grounds of appeal raised in the appeal of the Corporate Determination, which I dismissed in a separate decision reported in *Re: Victoria Floor Essence* BC EST # D047/09. I, therefore, do not propose to revisit those grounds of appeal here except to state that my decision and the reasons for dismissing those grounds of appeal in the Corporate Decision remain the same and apply here.
10. Having said this, I believe the ultimate issue in this appeal is a question of law, namely, whether the Director had proper jurisdiction to make the Section 96 Determination against Kovic in light of the latter’s voluntary filing of an assignment into bankruptcy in advance of both the Corporate Determination as well as the Section 96 Determination.

SUBMISSIONS OF KOVIC AND HER COUNSEL

11. I have reviewed and carefully considered all of the submissions of both Kovic and her counsel in this Appeal. As indicated earlier, both Kovic and her counsel in this Appeal raise the same grounds of appeal and advance the same submissions as those they advanced in the appeal of the Corporate Determination I earlier dismissed. Therefore, I will neither reconsider nor reiterate those submissions here.
12. I would like to, however, make one observation in the submissions of Kovic and her counsel which is pertinent to the issue of the jurisdiction of the delegate to make a S.96 Determination and that is that Kovic does not dispute that she was a director/officer of Victoria Floor when Boulay’s unpaid wage claim crystallized.

SUBMISSIONS OF THE DIRECTOR

13. The Director, like Kovic and her counsel, repeated his submissions earlier made and considered in context of the appeal of the Corporate Determination. I do not propose to set out those submissions here nor do I consider them particularly useful on the penultimate issue in this appeal of the jurisdiction, if any, of the Director to make the S.96 Determination.
14. The most relevant information in the submissions of the Director pertaining to the issue in this appeal is that the Director’s delegate was in contact with the Bankruptcy Trustee of Kovic as early as November 2008. The Director has also submitted as part of the record a copy of the Notice of the First Meeting of the Creditors and of the Impending Automatic Discharge of First-Time Bankrupt (the “Notice”). The Notice is executed by the Trustee on November 10, 2008 and indicates that Kovic filed an assignment in bankruptcy on November 7, 2008 and her impending discharge pursuant to Section 168.1 of the *Bankruptcy and Insolvency Act* (R.S., 1985, c. B-3) (the “BLA”) is scheduled to take place on August 8, 2009.
15. Attached to Notice is the Statement of Affairs of Kovic, which does not list Boulay as a creditor.
16. It is the intention of the Director to file a Proof of Claim respecting the wages ordered in the Section 96 Determination with the Trustee in Bankruptcy of Kovic.

ANALYSIS

17. Having reviewed the submissions of the parties including the Section 112(5) record, I am satisfied that Kovic was a corporate director of Victoria Floor when Boulay's wage claims crystallized. Moreover, Kovic does not dispute that she was a corporate director of Victoria Floor during the material time in question.
18. I am also satisfied that none of the statutory defences delineated in Subsection 96(2) of the *Act* below apply in Kovic's case to relieve her of the S. 96(1) liability:

96 (2) Despite subsection (1), a person who was a director or an officer of a corporation is not personally liable for

(a) any liability to an employee under section 63, termination pay or money payable in respect of individual or group terminations, if the corporation is in receivership,

(b) any liability to an employee for wages, if the corporation is subject to action under section 427 of the *Bank Act (Canada)* or to a proceeding under an insolvency Act,

(c) vacation pay that becomes payable after the director or officer ceases to hold office, or

(d) money that remains in an employee's time bank after the director or officer ceases to hold office.

19. In the circumstances, I would be inclined to summarily dismiss Kovic's appeal, however, in light of the bankruptcy documents showing that Kovic voluntarily filed an assignment in bankruptcy on November 7, 2008 (over two months before both the Corporate Determination and the Section 96 Determination) and the finding that the delegate was aware of the assignment in bankruptcy of Kovic as early as November 2008, the matter of the Director's jurisdiction to make the Section 96 Determination is a live issue. I say this mainly because of Sections 69.3 and 121(1) of the *BLA* which provide:

Stay of proceedings-bankruptcies

69.3 (1) Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

Claims provable

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

20. The claim for wages of Boulay against Victoria Floors for the period October 16 to October 27, 2008 in my view is a provable claim pursuant to Section 121(1) of the *BLA* in the bankruptcy of Kovic as it arose prior to Kovic's filing an assignment in bankruptcy on November 7, 2008, although the Complaint was filed with the Employment Standards Branch on November 24, 2008. It is also arguable that Kovic, as a corporate director of Victoria Floor, should have been aware of her "indirect" and "contingent" liability under Section 96 in the event Victoria Floor defaulted on the wages due to Boulay for the period specified above. Therefore, when Kovic filed an assignment in bankruptcy on November 7, 2008 (when Boulay was already owed wages for the period October 16 to October 27, 2008) she could have listed Boulay as a claimant or given Boulay notice of

her assignment in bankruptcy in a timely fashion. However, Kovic does not list Boulay in the list of creditors in her bankruptcy filing. Had Boulay been included as a creditor in the bankruptcy of Kovic and provided notice, but failed to take reasonable steps to protect his interest then I may be in a position to cancel the Section 96 Determination. However, I do not find any evidence to show that Boulay had notice from Kovic of her assignment in bankruptcy or that he failed to take reasonable steps to prove his claim to the trustee.

21. Further, and equally important, I note that with respect to Boulay's "provable claim" for outstanding wages, S.69.3 of the *BLA* imposes a stay of proceedings "for the recovery of a claim provable in bankruptcy". Therefore it is questionable whether or not the Director had jurisdiction to issue the Section 96 Determination against the bankrupt Kovic in January 2009 after Kovic had filed an assignment in bankruptcy and before her discharge.
22. In accordance with the decision of the Tribunal in *Re: Blanchard* [2005] B.C.E.S.T.D No. 173, I refer this matter back to the Director with instructions to obtain appropriate legal advice and reconsider the Section 96 Determination in light of the *BLA* provisions I have referred to.

ORDER

23. Pursuant to Section 115(1)(b) of the *Act*, I order that the Determination be referred back to the Director.

Shafik Bhalloo
Member
Employment Standards Tribunal