

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 -

Myer Allen Goldberg
("M. Goldberg")
a Director or Officer of Syncros Applied Technology Inc.

- and -

Lori Goldberg
("L. Goldberg")
a Director or Officer of Syncros Applied Technology Inc.

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE No: 1999/683 & 1999/673

DATE OF DECISION: February 23, 2000

DECISION

OVERVIEW

These are appeals by Myer Allen Goldberg (“M. Goldberg”) and Lori Goldberg (“L. Goldberg”) as Directors or Officers of Syncros Applied Technology Inc. under Section 112 of the *Employment Standards Act* (the “Act”), against a Directors Determination (“DDET”) dated October 20, 1999 issued by a delegate of the Director of Employment Standards (the “Director”) in the amount of \$5,458.23.

M. Goldberg alleges that the delegate of the Director erred in concluding that M. Goldberg was liable as a Director/Officer of Syncros Applied Technology Inc. (“Syncros”). M. Goldberg further alleges that the delegate of the Director erred by issuing the DDET as M. Goldberg had no responsibility as an officer of Syncros.

L. Goldberg alleges that the delegate of the Director erred in including vacation pay in the amount determined to be owing as L. Goldberg had resigned as a director or officers prior to the vacation pay becoming payable.

These appeals were dealt with by way of written submissions.

ISSUES

The issues to be decided in this appeal are:

1. Was M. Goldberg a Director or Officer of Syncros at the time wages were earned and became payable?
2. If M. Goldberg is found to have been a Director or Officer of Syncros at the relevant times, is he liable for the wages as set forth in the Determination?
3. Was L. Goldberg a Director or Officer of Syncros at the time vacation pay became payable?
4. If L. Goldberg is found to have been a Director or Officer of Syncros at the relevant times, is she liable for the wages as set forth in the Determination?

FACTS

As a result of a number of complaints filed with the *Employment Standards Branch* (the “Branch”) and after an investigation, a Corporate Determination (“CDET”) was issued to Syncros for the amount of \$36,312.41.

The CDET is dated October 20, 1999 and clearly sets out that any appeal must be delivered to the Tribunal by November 12, 1999.

There was no evidence that the CDET was appealed.

The delegate of the Director, having been made aware that Syncros had filed an assignment in bankruptcy on September 30, 1999, issued a Directors Determination (“DDET”) in the amount of \$5,458.23 to all those individuals listed by the Registrar of Companies as being a Director or Officer.

The Registrar of Companies search indicated that 3 individuals were listed as Directors or Officers of Syncros as of August 27, 1999. Those 3 individuals were Lori Goldberg listed as a Director, Myer Allen Goldberg listed as an Officer and Peter Hamilton (“Hamilton”) listed as both a Director and Officer.

Hamilton agreed to a payment plan for the full amount of the Determination against him \$5,458.23. The first payment has been made and, if the following 11 payments are made as arranged, the Determination would be paid in full by October 15, 2000.

Counsel for M. Goldberg states that the Determination wrongly holds that Myer Allen Goldberg, as a Director/Officer of Sycros Applied Technology Inc. was liable as a director and officer at the time the complaining employees wages were earned and became payable. The evidence was that M. Goldberg resigned as a director of Syncros by letter dated September 26, 1996.

Counsel for M. Goldberg further states that M. Goldberg had no responsibility as an officer of Syncros. Counsel further states that the only director or officer who had knowledge of Syncros Applied Technology Inc. was Peter Hamilton.

Counsel for M. Goldberg finally states that the delegate of the Director has agreed to the settlement proposal therefore this appeal ought not to be processed or heard unless there is a default in the settlement proposal.

Counsel for L. Goldberg states that L. Goldberg’s resignation letter of August 10, 1999 is prior to the termination of the employees on August 13, 1999, therefore, pursuant to Section 96 (2) of the *Act* L. Goldberg is not liable for any vacation pay determined to be owing.

A delegate of the Director, by way of a submission dated November 24, 1999, in regard to the appeals of M. Goldberg and L. Goldberg states

“The Director feels that it is in everybody’s best interest not to set a hearing date on the above tribunal appeals until it is shown that the payment plan made by Peter Hamilton is being met.

The Director asks that the above-mentioned appeals be held in abeyance at the Employment Standards Tribunal pending further notification from us.”

A subsequent submission from the delegate of the Director dated December 17, 1999 in regard to the appeal of M. Goldberg states:

“...I believe the Determination stands on its own merit...”

A submission from the delegate of the Director dated December 17, 1999 in regard to the appeal of L. Goldberg states:

“I believe the Determination stands on its own merit. Correspondence was addressed to the appellant (L. Goldberg) prior to the issuance of the Determination. Prior to issuing the Determination, the appellant failed to provide evidence that a resignation was submitted in writing to the company and delivered to the company’s registered office.”

The delegate of the Director further states that pursuant to Section 130 (2) of the Company Act, the effective date of L. Goldberg’s resignation would be the later date of September 8, 1999 and not August 10, 1999.

ANALYSIS

With respect to the request from a delegate of the Director in the November 24, 1999 submission to hold these matters in abeyance pending further notification, I have considered the subsequent submission of the delegate of the Director as such further notification. In any event, in my view, it is not appropriate for the Tribunal to act as a holding agency for Determinations issued by the Director. The Director has, in my opinion, the authority pursuant to Section 91 to not file an order of the Tribunal pending resolution of certain issues or the Director has the authority to cancel the Determination prior to the hearing before the Tribunal.

The onus of establishing that the delegate of the Director erred in the Determinations rests with the appellants, M. Goldberg and L. Goldberg.

The *Act* sets forth the liability of a Director or Officer in Section 96 which states:

Section 96, Corporate officer's 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.

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

(a) any liability to an employee under section 63, termination pay or money payable under a collective agreement in respect of individual or group terminations, if the corporation is in receivership or is subject to action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act,

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

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

(3) This Act applies to the recovery of the unpaid wages from a person liable for them under subsection (1).

(emphasis added)

Upon the reading of Section 96 *supra* it is clear that the primary challenge to the application of this section is whether an individual *is or 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*. Once it has been established that an individual was indeed a director or officer of the corporate entity, the exclusions contained in Section 96 (2) *may* be considered as applicable to any calculation of liability.

M. GOLDBERG

The evidence with respect to M. Goldberg was that he resigned as a *director* by letter dated September 26, 1996. The evidence further shows that M. Goldberg was listed by the Registrar of Companies as an *officer - Secretary* on a company search conducted on August 27, 1999.

The term “officer” is not defined in the *Act*. A company must have at least two “officers”, namely, a president and a secretary “*and other officers as are provided for by the memorandum, the articles or by resolution of the directors*”. M. Goldberg was the secretary of Syncros at all times relevant to the complaints filed with the Director.

As the Tribunal has previously noted, corporate searches only raise a *rebuttal presumption* regarding an individual’s status (see *Wilinofsky*, BC EST No. 106/99). Further, an individual may be considered to be an officer or a director even if not so named in corporate records (see BC EST No. 371/96 *Penner and Hauff*) and logic would suggest that the opposite result may also hold.

The evidence before this panel is inconclusive on the point of what, if any, *functions* of an officer were performed by M. Goldberg. The delegate of the Director bases her decision solely on the fact that the “BC OnLine” corporate search lists M. Goldberg as an officer of Syncros. Counsel for M. Goldberg, in the appeal, merely states that “Myer Goldberg had no responsibility as an officer of Syncros” but does not submit any evidence to support that proposition.

With respect to M. Goldberg I conclude that the evidence provided is insufficient to support the conclusion that M. Goldberg was an officer of Syncros at the time wages were earned and should have been paid. This matter requires further investigation with respect to whether M. Goldberg performed any of the *functions* of an officer of Syncros.

It is therefore appropriate that this matter be referred back to the Director for further investigation.

L. GOLDBERG

The evidence from the delegate of the Director was that L. Goldberg provided no information with respect to her resignation as a director of Syncros during the investigation.

L. Goldberg does not dispute the failure to provide evidence of her resignation during the investigation, nor does she offer any reasonable explanation why that information was not provided prior to the issuing of the Determination.

The Tribunal has consistently taken the position that, absent any extenuating circumstances, information not provided during the investigation will not be considered during the appeal. The Tribunal has addressed similar situations in *Tri-West Tractor Ltd. BC EST No. D268/96*, *Kaiser Stables Ltd. BC EST No. D058/97* and many others since that point in time where the Employer did not submit certain information to the delegate of the Director during the delegate's investigation. On appeal, the Employer then sought to rely upon that information.

In my view, the appeal by L. Goldberg is distinguishable from the above-noted cases in that there was no evidence provided that the issue of directorship was raised with L. Goldberg prior to the issuance of the Director's Determination. In my opinion, it would be inappropriate for this panel to refuse to accept evidence with respect to an issue which, prior to the issuance of the Determination, was not known to be an issue in dispute. The first opportunity L. Goldberg would have to challenge the finding that she was a director or officer would be at this appeal. I am therefore prepared to accept the evidence of the letter of resignation for consideration in my deliberations.

The activities relative to company officers or directors are covered by the *Company Act [RSBC 1996] Chapter 62*. Specifically, Section 130 of the *Company Act* deals with a director or officer ceasing to hold office and provides:

Section 130, Ceasing to hold office

130 (1) A director ceases to hold office when his or her term expires in accordance with the articles or when he or she

- (a) dies or resigns,
- (b) is removed in accordance with subsection (3),
- (c) is not qualified under section 114, or
- (d) is removed in accordance with the memorandum or articles.

(2) Every resignation of a director becomes effective at the time a written resignation is delivered to the registered office of the company or at the time specified in the resignation, **whichever is later**.

(3) A company may, despite any provision in the memorandum or articles, remove a director before the expiration of the director's term of office by special

resolution, and, by ordinary resolution, may appoint another person in his or her stead.

(emphasis added)

The evidence with respect to L. Goldberg was that the letter of resignation dated August 10, 1999 was received by the registered office of the company on September 8, 1999.

Pursuant to the provisions of the *Company Act* Section 130 (2) *supra*, the letter of resignation does not become effective until September 8, 1999, the later date. L. Goldberg was therefore a director or officer of Syncros until September 8, 1999.

The evidence further disclosed that August 13, 1999 was the latest date that the employment of some of the affected employees was considered terminated, although some employees were in fact terminated prior to that date.

As L. Goldberg's resignation did not become effective until September 8, 1999, the exclusions contained in Section 96 (2) (b) of the *Act* are not applicable to the liabilities as set forth in the Determination.

For all of the above reasons, I conclude that L. Goldberg was a director or officer of Syncros at the time wages, including vacation pay, were earned or should have been paid. L. Goldberg is therefore, pursuant to Section 96 of the *Act*, liable for the amount of wages as set forth in the Determination. I am further satisfied that the calculation of wages as set forth in the Determination are correct in all respects.

The appeal of L. Goldberg is therefore dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated October 20, 1999 issued to L. Goldberg be confirmed in the amount of **\$5,458.23** together with whatever interest has accrued pursuant to the provisions of Section 88 of the *Act*.

I further order that the Determination dated October 20, 1999 issued to M. Goldberg be referred back to the Director for further investigation.

Hans Suhr
Adjudicator
Employment Standards Tribunal