



An appeal

- by -

Richard Welsh a Director and Officer of Cantech Manufacturing Ltd.
(“Mr. Welsh”)

- 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: Carol L. Roberts

FILE No.: 2015A/60

DATE OF DECISION: July 7, 2015

DECISION

SUBMISSIONS

Richard Welsh	on his own behalf as a Director and Officer of Cantech Manufacturing Ltd.
Greg Smithman	on his own behalf
Amanda Clark Welder	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision arises out of an appeal by Richard Welsh a Director and Officer of Cantech Manufacturing Ltd. (“Mr. Welsh”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued June 12, 2014. On December 12, 2014, I issued a decision dismissing Mr. Welsh’s appeal of his liability for wages. However, I concluded that the delegate had erred in calculating that liability since Mr. Welsh was not a Director for the entire period during which the wages were earned and referred the matter back for re-calculation. (see *Welsh*, BC EST # D128/14)
2. On December 30, 2014, the delegate issued a letter reporting back on the outcome of her supplementary investigation. The delegate re-calculated Mr. Welsh’s liability for the period May 10, 2013, to June 3, 2013, to be \$50,208.07, representing wages and interest.
3. Mr. Welsh contended that the delegate erred in calculating his liability with respect to both the number of days that he was determined to be a Director as well as the dates for which the wages were unpaid. He also contended that one of the employees was not an employee of Stony Creek (see *Welsh, supra*, for background on associated companies) during the period of time it was determined he was a Director. Several of the employees also expressed confusion about the calculations. The Director did not respond to the submissions, and on February 27, 2015, I referred the matter back to the Director a second time. (see *Welsh*, BC EST # D022/15)
4. On May 5, 2015, the delegate issued a Refer Back Report finding Mr. Welsh a director of Cantech as of May 10, 2013, and noted that he continued to be a director as of May 4, 2015. The delegate noted that the business had ceased operating as on June 3, 2013, at which time all but one of the complainants were terminated. One of the former employees quit on May 15, 2013.
5. The delegate found that while section 96 limited Mr. Welsh’s personal liability for unpaid wages per employee, the length of time he was a director did not affect the calculation of his personal maximum liability for each employee. The delegate noted that the amount of his liability was only limited to excluding wages that were earned or became payable prior to May 10, 2013. As Mr. Welsh was a director at the time the employees were terminated, he is liable for accrued vacation pay and compensation for length of service owed to the former employees. The delegate found that to limit a director’s liability to the length of time the director held that position would be inconsistent with the *Act*.
6. The delegate calculated the wages owed to each of the former employees between May 27, 2013, and June 3, 2013, when the business closed. The delegate noted that vacation pay becomes payable upon termination of employment within the time frame prescribed by section 18, which was, with the exception of one employee,

June 5, 2013. As that employee quit on May 15, 2013, his vacation pay was payable May 21, 2013. The delegate found Mr. Welsh personally liable for the outstanding vacation pay.

7. Similarly, the delegate found that compensation for length of service became payable upon the termination of their employment, which resulted from the closure of the business on June 3, 2013.
8. The delegate found overtime wages, including wages for work performed during various pay periods as well as banked overtime wages, were owed to 8 employees. The delegate determined that Mr. Welsh was not personally liable for any overtime wages earned and payable prior to him becoming a director on May 10, 2013, but concluded that he was liable for any overtime wages that remained in the employees' time banks, or remaining unpaid, at the time their employment was terminated, pursuant to section 18 of the *Act*.
9. The delegate determined that three employees were owed wages as a result of paying the Employer's costs of doing business. One of those employee's business costs were incurred on June 3, 2013. The Employer issued cheques to cover business expenses owed to the other two on May 13, 2013. Both of those cheques were unable to be negotiated due to insufficient funds. The delegate found Mr. Welsh to be liable for these amounts owing.
10. The delegate noted that the calculation of the 2 months' wages per employee had not been appealed and, accordingly, remained unchanged. She further noted that Mr. Welsh's personal liability represents less than 2 months' wages for each of the former employees except two, and was limited to the equivalent of 2 months' wages for each of those two.
11. The delegate set out the amounts determined owing to each individual employee, including wages, overtime wages, vacation pay, compensation for length of service, and for paying the employer's costs of doing business. The delegate identified which of the employees were owed overtime wages and calculated those amounts, and which of the former employees were owed wages as a result of paying the Employer's costs of doing business. The total amount determined owing was \$79,165.14.
12. Although Mr. Welsh concedes his liability as a Director of Cantech Manufacturing Ltd., he argues that he should not be held liable for vacation pay and compensation for length of service that accrued during the period he was not a director. He contends that the responsibility for payment of those amounts rests with the Directors and owners of Stony Creek Cabinet Company, Dave Kiselback and Jeff Venos, who he says were the employees' actual employers.
13. Mr. Welsh agrees that he is liable for outstanding wages for 6 days earned during the period he was deemed to be a director plus vacation pay accrued for that same period plus interest. He disagrees that he is liable for vacation pay and compensation for length of service that accrued in the period before he became a director. Mr. Welsh expressed confusion over the calculations arrived at by the Director on December 30, 2014, which limited his liability to 6 days plus the corresponding vacation pay on the recalculated amounts arrived at by the current delegate.
14. Mr. Welsh argues:

Using the formula that the delegate used to calculate vacation pay and [compensation for length of service], the amounts shown would be the same whether I was a director for 10 years or 1 day. This defies logic. I know the delegate stated that section 96 of the Act has no provision to limit liability based on how long a person has been a director, but I disagree with that interpretation. Common sense and fairness should prevail. It just doesn't make sense that I should be singled out to be responsible for this

entire financial burden - monies earned in the period that occurred before I had any involvement whatsoever with Stoney Creek - simply because I am accessible and , frankly, an easy target.

15. Mr. Smithman contends that it was Mr. Welsh's responsibility to know what his responsibilities were when he purchased and became a director of the business. He contends that it is time the employees were paid what they are owed.

ANALYSIS

16. As noted previously, the appellant bears the burden of demonstrating any basis for the Tribunal to interfere with the Determination. While it is clear Mr. Welsh disagrees with the Director's method of calculating his total liability, he is simply restating arguments he has made previously without demonstrating any error on the part of the Director. I find the delegate has clearly laid out all of the amounts owing by Mr. Welsh as well as identifying the basis for his liability for those amounts. I conclude he has demonstrated no basis for me to interfere with her conclusions.

17. Section 96(1) of the *Act* provides that:

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.

18. Wages are defined to include:

- (a) salaries, commissions or money, paid or payable by an employer to an employee for work,
- (b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,
- (c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act

... (Section 1(1) of the *Act*)

19. In *Hutchison* (BC EST# D094/08), Mr. Hutchison, a corporate director, advanced arguments similar to those made by Mr. Welsh; that is, vacation pay and compensation for length of service were not properly characterized as wages for the purposes of section 96. This argument was rejected by the Tribunal. Mr. Hutchison also argued that section 96 meant that, before an individual could be determined to be personally liable, the individual must have been a director or officer at the time the unpaid wages were earned. In essence, Mr. Hutchison argued he was not responsible for wages earned before he became a director. This argument was also rejected by the Tribunal:

In my opinion, Mr. Hutchison's submission misconstrues section 96(1). By its plain language, it renders a person liable for up to two months' unpaid wages if the person was a director or officer of a corporation at the time wages of an employee of the corporation were a) earned, or b) should have been paid. Thus, it is not the end of the matter that Mr. Hutchison may not have been a director or officer of a corporation that employed the complainants when the unpaid wages were earned. If, instead, Mr. Hutchison was a director or officer of a corporation, in this case VTI, at a time when the unpaid wages should have been paid, he is also personally liable for up to two months of those unpaid wages (see *Mitton* BC EST #D025/06).

20. I find no error in the delegate's calculation of Mr. Welsh's liability for compensation for length of service and regular wages.
21. Similarly, I find no error in her calculation of vacation pay owing. In *Sean Orr* (BC EST # D095/12) (Reconsidered in *Pioneer Distributors Ltd.* BC EST # RD012/13), a decision dealing with accumulated vacation pay, the Tribunal determined that section 80(1) limits an employer's back pay liability for vacation pay to 6 months, and that vacation pay must be paid out in accordance with the *Act* in the absence of an express agreement to do otherwise. (see also *O'Reilly*, reconsideration decision BC EST # RD165/02)
22. Finally, section 21 of the *Act* provides as follows:
- (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.
 - (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.
 - (3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.
23. As business expenses paid by an employee contrary to the *Act* constitute wages, Mr. Welsh is also properly liable for those amounts as well.
24. I dismiss Mr. Welsh's appeal.

ORDER

25. Pursuant to section 115 of the *Act*, I confirm the amount of liability for outstanding wages as determined by the delegate in the Refer Back Report dated May 5, 2015, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal