

**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 -

John Andrew, Director or Officer of  
Xinex Networks Inc., in Receivership  
("Andrew")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** David Stevenson

**FILE No.:** 1998/767

**DATE OF DECISION:** February 22, 1999

**DECISION**

**OVERVIEW**

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by John Andrew (“Andrew”), a Director or Officer of Xinex Networks Inc., in Receivership (“Xinex”) of a Determination which was issued on November 13, 1998 by a delegate of the Director of Employment Standards (the “Director”). In that Determination the Director found that Andrew was a director or officer of Xinex, ordered Andrew to comply with the requirements of the *Act* and, pursuant to Section 96 of the *Act* ordered Andrew to pay \$319,819.93. This appeal is one of eight appeals filed by director or officers of Xinex. All of the appeals are identical. Accordingly, the reasons given in this Decision will apply to all of the appeals and subsequent Decisions for the other directors or officers will adopt this Decision.

Andrew says the Determination is wrong because the amount ordered to be paid includes calculations for interest, vacation pay, bonuses and other amounts which are not the responsibility of a director or officer under the *Act* and is excessive. Andrew seeks to have the amount reduced to an amount that “accurately reflect the amounts owed to former employees” of Xinex.

The Tribunal has decided that an oral hearing is not required.

**ISSUE TO BE DECIDED**

The issue raised by this appeal is whether Andrew has met the burden of persuading the Tribunal that the Determination ought to be varied or cancelled because the Director erred in fact or in law.

**FACTS**

Xinex was engaged in high tech research and development. Its office and principal place of business was in Delta, British Columbia. It was placed in receivership on June 5, 1998. On September 21, 1998, the Director issued a Determination against Xinex in an amount of \$421,817.10. The calculation of the amount owing was based on information provided to the Director by Andrew, who was the Controller and chief financial officer of Xinex. There was no appeal by Xinex of that Determination. Andrew was a director or officer of Xinex and held office until Xinex was placed in receivership.

A spreadsheet attached to the Determination listed 69 employees and provided some information relating to amounts owed to each employee. The spreadsheet identified, among other things:

- an amount equivalent to 2 months wages, which is the limit of a director or officer's liability under subsection 96(1);
- an amount of vacation pay owing;
- an amount that included unpaid overtime, commissions and bonuses;
- an amount for interest; and
- an amount specifically identifying the "Director or Officer's liability", stated individually for each employee and as a total amount.

In all cases but one, the amount claimed as the director or officer's liability for each employee was less than or equal to the amount identified as 2 months wages.

### ANALYSIS

Section 96 of the *Act* reads:

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 termination, 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 unpaid wages from a person liable for them under subsection (1).*

The appeal was filed by Counsel acting on behalf of the appellant and on behalf of seven other directors or officers of Xinex, each of whom have filed appeals with the Tribunal. The Director filed a submission in reply to the appeals and Counsel for the appellant responded to that reply. The appeal challenges four aspects of the calculations done by the Director, each of which Counsel argues are not included as an aspect of the personal liability of the Directors or Officers under Section 96 the *Act*.

1. bonuses payable to two former employees;
2. vacation pay;

3. interest payable under Section 88 of the *Act* and
4. commissions, overtime pay and bonuses other than those addressed in the number

### **Bonuses**

Counsel for the appellant argues that bonuses credited to two employees, Roy Leahy (“Leahy”) and Rike Wedding (“Wedding”), are not wages or, alternatively, are not owed and consequently are not the responsibility of the directors or officers. In respect of Leahy, Counsel says the bonus was an amount paid at the discretion of the employer under a contract of employment between Leahy and Xinex and was not related to hours of work, production or efficiency. Neither the contract of employment nor any other document supporting this assertion is filed with the appeal or with the submission of Counsel on the appeal. Counsel also says that Leahy deferred payment of the bonus and therefore it was not wages owed at the time of receivership.

Counsel says that the bonus credited to Rike Wedding (“Wedding”) was not wages under the *Act* (although her submission does not set out why I should reach this conclusion) or, even if it was wages, was invested in Xinex for stock options and may or may not have been lost at the time of the receivership.

The definition of “wages” under the *Act* includes salaries and commissions and can include bonuses that are paid as an incentive and are related to productivity or efficiency. The Tribunal has had an opportunity to address the circumstances relating to Wedding in *Rike Wedding* BC EST #D578/98. There are two points that arise from that case that are determinative of this part of the appeal. First, the Tribunal noted that the bonus paid by Xinex to Wedding was “wages” under the definition in the *Act*:

... it is agreed that the incentive bonus, when declared, was wages under the *Act*. Under the *Act*

“wages” includes . . .

(b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency, . . .

That conclusion was supported by the employment contract between Wedding and Xinex and by other documents that showed the bonus was identified by the parties as an incentive payment and the amount paid was based on the achievement of established objectives and targets in the engineering and development department managed by Wedding. In other words, it was an incentive that related to both production and efficiency. It follows that I do not accept the assertion by Counsel for the appellant that the bonus would not be included in the definition of “wages” under the *Act*.

Second, the Tribunal rejected the notion that a deferral of the bonus or an agreement to apply part of the bonus to the acquisition of stock options changed the character of the money from wages owed to something else. In the Decision, the Tribunal stated:

Under Section 17 of the *Act*, wages are payable within 8 days of the end of the pay period in which they are earned. The material on file does not indicate the exact date the incentive bonus became payable by Xinex, but I conclude from the material on file that it was payable, *in its entirety*, prior to the February 19 discussion between Wedding and Leahy in which Wedding says it was agreed to allow her to trade a portion of her wages, \$18,000.00 of her incentive bonus, in return for stock options. The decision by Wedding to allow Xinex to defer payment of the incentive bonus does not alter the statutory requirement of Section 17 or the effect of the *Act*. Counsel for the Receiver says that

following the February 19, 1998 agreement the \$18,000.00 was no longer “payable”, as Wedding had spent it to acquire stock options in Xinex. I do not agree. Under the *Act* wages are payable by an employer 8 days following the pay period in which they are earned and are required to be paid in their entirety to the employee unless the employer is permitted or required by the *Act* to retain all or part of them.  
(pages 5-6)

It should be noted that Section 4 of the *Act* does not give effect to any agreement to waive the requirements of the *Act*. Wedding could not “defer” the statutory requirements that made the wages payable in February, 1998 and they were “owed” under the *Act* from that time.

It follows that I also do not accept the argument of Counsel for the appellant that the bonus payable to Wedding was not owed either because it had been converted to an investment and may have been lost or because Wedding had agreed to defer demanding payment of it to some later date.

Returning to Leahy, without some evidence to the contrary, there is no factual basis upon which to address the argument that the Director was wrong in concluding his “performance bonus” was wages under the *Act*. The burden is on the appellant to demonstrate the Director was wrong to consider the bonus to be wages and that burden has not been met. In response to the argument that his agreement to defer payment of the bonus changes its character from wages owed under the *Act* to something else, I refer to the comments from *Rike Wedding*, above.

#### **Vacation Pay**

The definition of “wages” under the *Act* is inclusive. Vacation pay falls within the definition, as it is “money, paid or payable by an employer to an employee for work”. I agree with the submission of the Director that all the employees of Xinex were terminated by operation of law on June 5, 1998, the date Xinex was placed in receivership. Any vacation pay owed at the time of termination became payable to the employees within 6 days of termination by application of Section 58(3) of the *Act*, which says:

58. (3) *Any vacation pay an employee is entitled to when the employment terminates must be paid to the employee at the time set by section 18 for paying wages.*

Unpaid vacation pay falls quite comfortably within the concept of what would be “unpaid wages” under subsection 96(1) of the *Act*. Section 80 of the *Act* allows recovery of wages that became payable in the period beginning 24 months before the termination of employment.

Counsel for the appellant argues that the liability of the directors and officers of Xinex for vacation pay is limited by the obligation on the employer in Section 57 of the *Act* to ensure an employee takes an annual vacation within 12 months after completing a year of employment. There is no interdependency between Section 57 and Section 58 of the *Act*. They share a commonality only to the extent that they both deal with different statutory obligations relating to annual vacations. Section 57 deals with the statutory obligation to ensure an employee takes time off for vacation, not with the requirement to pay vacation pay. Section 58 of the *Act* deals with that statutory obligation. Failure by an employer to allow an employee to take annual vacation time as required by Section 57 is a contravention of the *Act* and may be subject to a penalty, even if vacation pay is paid out. Similarly, failure to pay vacation pay as required by Section 58 is a contravention of the *Act*, even if annual vacation time off is given. Unpaid vacation pay is unpaid wages and the time limited for collection of unpaid wages is established by Section 80, not Section 57.

#### **Interest**

Counsel for the appellant says that directors and officers are not liable for interest that has accrued on unpaid wages. Counsel submits that the provisions in the *Act* imposing personal liability on directors and officers must state clearly what that liability entails and the *Act* does not clearly state that directors and officers are liable for interest. Counsel cites *Barrette v. Crabtree* (1993) 191 D.L.R. (4th) 66, as support for the submission. I do not find the *Act* to be unclear in that respect. Interest is payable on wages that are owed at the time of termination and such interest is “wages” under the *Act*. The obligation to pay interest on wages the employer has failed to pay at the date of termination is clearly established by subsection 88(1) of the *Act*:

88. (1) *If an employer fails to pay wages or another amount to an employee, the employer must pay interest at the prescribed rate on the wages or other amount from the earlier of*
- (a) *the date the employment terminates, and*
- (b) *the date a complaint about the wages or another amount is delivered to the director*
- to the date of payment.*

In the circumstances of this case, interest became payable on June 5, 1998, the date the employment of the employees was terminated. Under subsection 88(3) of the *Act*, interest payable under subsection 88(1) is deemed to be wages:

- (3) *Interest payable under subsection (1) is deemed to be wages and this Act applies to the recovery of those wages.*

The *Act* is also clear that the personal liability of a director or officer is for “up to 2 months’ unpaid wages for each employee”. I have no hesitation confirming that interest can form part of the amount for which a director or officer is liable under subsection 96(1) of the *Act* and the Director was not wrong to include interest as unpaid wages when calculating the liability of the appellant.

#### **Overtime Pay and Commissions and Bonuses Other Than Those Referred to Above**

On this point, Counsel for the appellant submits:

Unless it can be determined that the amounts claimed in the other column fall within the definition of wages as set out by the *Act*, the same should not be recoverable from the directors and officers.

I have two comments about that submission. First, it is not apparent that recovery of those amounts are being sought from the directors or officers. The amounts identified as “other”, with the exception of the bonuses to Leahy and Wedding which have been addressed elsewhere in this decision, represent only a small part of the wages of any employee. The amounts calculated as the liability of the directors and officers are more than established by the amounts derived from the rest of the schedule. Second, the reason that the “other” amounts are set out in the schedule at all is that the Director found them to be “unpaid wages”. If the appellant contends some of those amounts are not “unpaid wages”, then the appellant has the burden of identifying which amounts are disputed and of demonstrating that the Director was wrong, in fact or in law, to consider them as “unpaid wages”. That has not been done.

I can find no basis for concluding that the Determination is in error or that the amount calculated to be owing by the appellant is excessive.

The appeal is dismissed.

**ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated November 13, 1998 be confirmed in the amount of \$319,819.93.

**David Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**