



An appeal

- by -

Nigel Patrick Turner, a Director and Officer of 0708964 B.C. Ltd.
(“Turner”)

- 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.: 2011A/48

DATE OF DECISION: July 5, 2011

DECISION

SUBMISSIONS

Jonathan D. Tweedale

counsel for Nigel Patrick Turner

Karry Kainth

on behalf of the Director of Employment Standards

INTRODUCTION

1. This appeal, filed pursuant to section 112(1)(a) of the *Employment Standards Act* (the “*Act*”), addresses the interplay between sections 95 (the “associated employers” or “common employer” provision) and 96 (the “director/officer liability” provision) of the *Act* and section 45 of the *Employment Standards Regulation* (which immunizes directors and officers of charities from personal liability provided they only receive reimbursable expenses from the charity).
2. The appeal concerns a March 17, 2011, determination issued against the appellant, Nigel Patrick Turner (“Turner”), in the total amount of \$89,408.07 under subsections 96(1) and (4) of the *Act* (the “Section 96 Determination”). The amount payable under the Section 96 Determination includes unpaid wages (principally section 63 compensation for length of service) and section 88 interest of \$88,408.07 as well as two \$500 monetary penalties (see section 98(2) of the *Act*).
3. I am adjudicating this appeal based on the parties’ written submissions and, in that regard, I have submissions from Mr. Turner’s legal counsel and from the delegate of the Director of Employment Standards who issued the Section 96 Determination (the “delegate”). Although each of the 25 former employees whose unpaid wage complaints underlie the Determination was invited to file a written submission, none did so. In adjudicating this matter, I have also reviewed the delegate’s “Reasons for the Determination” appended to the Section 96 Determination (the “delegate’s reasons”) and the section 112(5) record that was before the delegate.

THE STATUTORY FRAMEWORK

4. As noted above, this appeal concerns the interplay between sections 95 and 96 of the *Act* and section 45 of the *Employment Standards Regulation* (the “*Regulation*”). I have reproduced the relevant portions of these provisions, below:

Associated employers

95. If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,
 - (a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one employer for the purposes of this Act, and
 - (b) if so, they are jointly and separately liable for payment of the amount stated in a determination, a settlement agreement or an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.

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...
- (3) This Act applies to the recovery of the unpaid wages from a person liable for them under subsection (1) or (2.1).
- (4) In this section, "director or officer of a corporation" includes a director or officer of a corporation, firm, syndicate or association that the director treats as one employer under section 95.

Exclusion from liability provisions

45. Section 96 of the Act does not apply to a director or officer of a charity who receives reasonable out-of-pocket expenses but no other remuneration for services performed for the charity.

[Note: "charity" is defined in section 1 of the *ESR* as follows: "charity" means a) a charity as defined in the *Income Tax Act* (Canada), or (b) a society incorporated under the *Society Act*]

5. Accordingly, two or more entities may be "associated" for purposes of enforcing the wage recovery provisions of the *Act* and once a section 95 declaration has been made, the "associated" entities are considered to be a *single entity* ("one employer") for purposes of the statute and are jointly and severally liable for any and all unpaid wage claims that would otherwise only bind the nominal employer. Section 96 makes directors and officers of the employer firm "vicariously liable" for employees' unpaid wages subject to a 2-month wage ceiling per employee and to certain other defences set out in subsections 96(2) and (2.1). Section 96(4) – very clearly a legislative response to the Tribunal's decision in *ICON Laser Eye Centres Inc.*, BC EST # D649/01, confirmed on reconsideration BC EST # RD201/02 – states that the directors and officers of each of the associated entities are personally liable for employees' unpaid wages. Section 45 of the *Regulation* reflects a legislative policy to protect volunteer directors and officers in the not-for-profit sector (see, e.g., *Henry*, BC EST # D214/00).
6. The issue that arises in this appeal is whether the regulatory immunity extended to a volunteer director or officer of a charitable organization operates as a form of "blanket immunity" when that individual is also a director or officer of a business corporation that has been associated with the charitable organization.

PRIOR PROCEEDINGS

7. On October 1, 2010, the delegate issued a Determination (the "Corporate Determination") regarding the unpaid wage complaints filed by 25 former employees (the "complainants") of an educational institution known as "VIS-Greybrook Academy". This independent school, formerly located in Pitt Meadows, ceased operations on or about November 30, 2009 and the complainants were employed as teachers, administrators, and other support staff. The total amount of the Corporate Determination was \$88,726.57 representing unpaid wages (largely comprising section 63 compensation for length of service), \$1,500 representing three separate \$500 administrative penalties (see section 98) and section 88 interest.
8. The Corporate Determination was issued against an incorporated society, "Vancouver International Primary and Secondary School", carrying on business as "VIS-Greybrook Academy" ("Greybrook"), and against 0708964 B.C. Ltd. (the "Numbered Company"). The delegate determined that Greybrook and the Numbered Company were "associated employers" under section 95 of the *Act*. The delegate determined that Greybrook operated the school and the Numbered Company was its landlord. It was common ground that the Numbered Company owned the lands and premises where the school was located. Mr. Turner is a

director of both Greybrook and the Numbered Company. The delegate found that although Greybrook was a tenant, the Numbered Company allowed Greybrook to fall into significant rent arrears and that Mr. Turner provided significant operating funds, both personally and through the Numbered Company, to Greybrook.

9. Greybrook did not appeal the Corporate Determination. The Numbered Company appealed the Determination and I dismissed that appeal and confirmed the Corporate Determination by way of written reasons issued on February 4, 2011 (*0708964 B.C. Ltd.*, BC EST # D015/11). As of the date of these reasons for decision, no application has been filed to have my February 4, 2011, decision reconsidered under section 116 of the *Act* and the deadline for filing such an application has now passed (see Rule 22 of the Tribunal's *Rules of Practice and Procedure*).
10. In the appeal relating to the section 95 declaration, counsel for the Numbered Company (who is also counsel for Mr. Turner in this appeal) raised the matter of the relationship between sections 95 and 96 of the *Act* and section 45 of the *Regulation*. I addressed counsel's submission at paras. 14 and 15 of my earlier reasons for decision:

In a separate submission, also dated November 8, 2010, counsel made the following point regarding section 45 of the *Employment Standards Regulation* (see above) in support of his position that the section 95 declaration should not have been made in this case:

In addition, because Nigel Turner is the sole shareholder and director of the Company, to treat the [Appellant] as a "common employer" with the Society would undermine the public policy underlying section 45 of the *Employment Standards Regulation*. That section of the *Regulation* exempts from liability for unpaid wages directors or officers of charities. In our submission, to impose liability upon the [Appellant] and, in turn, liability upon Mr. Turner in such circumstances is contrary to the public policy purposes recognized in the *Regulation*.

I wish to reiterate, however, that section 45 of the *Employment Standards Regulation* does not provide a blanket immunity from section 96 liability; as noted above, the immunity is only extended to directors and officers who do not draw any remuneration from the charity beyond reasonable out-of-pocket expenses. Mr. Turner may or may not be immunized from liability under section 96 given his status as a director and officer of Greybrook. Further, the question of Mr. Turner's potential liability under section 96 is not before me since, so far as I am aware, no section 96 determination has been issued against him although I do recognize that if the section 95 declaration is upheld, Mr. Turner could be held personally liable as a director and officer of the Appellant under section 96(4) of the *Act*.

11. Thus, Mr. Turner's potential concern about his section 96 liability, discussed above, has now crystallized in the form of the Section 96 Determination now before me.

THE SECTION 96 DETERMINATION

12. As noted above, Mr. Turner is a director of both Greybrook and the Numbered Company; according to B.C. Corporate Registry records, he is listed as the sole director and officer (president/secretary) of the Numbered Company. On February 10, 2011, the delegate wrote to both Mr. Turner and his counsel advising them that he had reached a preliminary conclusion that Mr. Turner was liable, under section 96(1) of the *Act*, for the former school employees' unpaid wages. The delegate asked for a written response by February 17, 2011, (later extended to February 24, 2011) and a response was provided. In brief, Mr. Turner's counsel took the position that since Mr. Turner was a volunteer director of Greybrook (an incorporated society), section 45 of the *Regulation* "forecloses the 'tracing' of 96(1) liability from the directors of one entity to those of an associated employer, under 96(4), where one of such entities is a charity". He further asserted "that there is

no statutory basis for holding Mr. Turner personally liable for unpaid wages under section 96(1) of the Act as a director of an entity constituting ‘one employer’ with the Society” (delegate’s reasons, page R3).

13. The delegate did not find Mr. Turner’s counsel’s argument to be “compelling”. He found Mr. Turner liable for the former employees’ wages under section 96(1) and (4) of the *Act* (delegate’s reasons, page R4):

...In this case, a decision was made to associate two entities, a society and a corporation, as one employer under Section 95 of the Act. It follows that the director and officer of the associated entity, 0708964, is personally liable for unpaid wages under Section 96 of the Act...Mr. Tweedale...noted that in 2003 the Legislature appeared to amend Section 96 of the Act to extend wage liability to directors or officers of entities held associated as one employer, where appropriate. Following this interpretation, Mr. Turner should certainly be liable for outstanding wages via 0708964; any protection that may be afforded to him via Section 45 of the Regulation would only apply to his directorship of the society. For this protection to apply to him as a director of a corporation would run contrary to the intention of Section 96(4) of the Act. I find Mr. Turner is liable for unpaid wages via his position as a director and officer of 0708964.

As a director/officer of 0708964, Mr. Turner is personally liable for up to two (2) months’ unpaid wages for each employee.

14. The Corporate Determination included three monetary penalties based on contraventions of sections 17 (regular payment of wages), 18 (payment of wages upon termination of employment) and 63 (payment of compensation for length of service). Subsection 98(2) of the *Act* states: “If a corporation contravenes a requirement of this Act or the regulations, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the contravention is also liable to the penalty.” The delegate determined that there was “insufficient evidence to find Mr. Turner personally liable for the Section 17 contravention” (delegate’s reasons, page R4) but that he was personally liable for the section 18 and section 63 contraventions (delegate’s reasons, page R4):

Mr. Turner acknowledged not giving appropriate notice to the complainants (with respect to the termination of their employment) and then he essentially gave the complainants an ultimatum in which they could work two weeks without pay or lose their jobs. I find Mr. Turner is personally liable for the Section 18 and 63 administrative penalties.

THE APPEAL

15. Mr. Turner says that the Section 96 Determination should be cancelled because the delegate erred in law. More particularly, Mr. Turner’s legal counsel submits that since Mr. Turner is a director of a charity [*i.e.*, Greybrook], section 45 of the *Regulation* exempts him from liability. Counsel, at para. 7 of his appeal submission, put the issue in this appeal as follows: “...whether section 96 of the [*Act*] applies to a director of a charity (to whom section 96 of the [*Act*] does not apply) if another entity is ‘associated’ with the charity under section 95 of the [*Act*].”
16. Mr. Turner’s counsel says that the purpose underlying section 45 of the *Regulation* is “to provide a measure of protection to directors and officers of charities” (para. 20) and that one must interpret subsection 96(4) of the *Act* narrowly and that “any ambiguity...must be resolved in favour of exempting [Mr. Turner] from liability” (para. 26).
17. The delegate says that he disagrees with Mr. Turner’s counsel position regarding both the combined effect of sections 95 and 96 of the *Act* and section 45 of the *Regulation* and, further, says that he does not believe the sections should be narrowly construed since “an interpretation...that extends protection to employees is to be preferred over an interpretation that does not” (delegate’s May 9, 2011 submission, page 2).

FINDINGS AND ANALYSIS

18. The unique feature of this appeal is that the section 95 declaration associated a business corporation (the Numbered Company) with a charitable society (Greybrook). If two *business corporations* were associated, clearly section 45 of the *Regulation* would not apply and the directors/officers of both associated firms would presumptively be personally liable for the employees' unpaid wages under subsections 96(1) and (4) of the *Act* (subject to any statutory defences and the 2-month per employee wage liability ceiling). Conversely, if two *charitable organizations* were associated, clearly all of the volunteer directors/officers would be immunized from liability by reason of section 45 of the *Regulation*. What, then, is the situation when a business corporation is associated with a charitable organization? In the latter instance, there are three scenarios regarding the volunteer directors'/officers' status.
19. First, the individual may only be a director or officer of the charity. In this instance, it could be argued that despite 96(4) of the *Act*, that person's immunity under section 45 of the *Regulation* continues to insulate them from personal liability. The legislative policy of protecting volunteer directors and officers should not be frustrated by a section 95 declaration since the individual never agreed to assume a wider potential liability (as is the case for someone who agrees to become a director of a for-profit organization). On the other hand, given that section 95 declarations require proof of a common enterprise under common direction or control, it could perhaps be argued that the individual is not solely a director of a charitable organization but is also involved in the management of an integrated organization (by reason of the section 95 declaration) that is not wholly charitable in nature. I need not decide which of those competing positions is correct since that is not the situation here.
20. Second, the person might only be a director or officer of the business corporation. In this scenario, and absent a section 95 declaration, their personal liability under section 96(1) would be clear. Why would a section 95 declaration associating the business corporation with a charity immunize the person from the section 96(1) liability that they previously agreed to assume (when they became a director or officer of the business corporation)? I am inclined to the view that section 45 of the *Regulation* would not apply in this scenario but, again, that is not the situation here.
21. Third – and this is the present scenario – the individual might be a director or officer of *both* the business corporation and the charity. The Section 96 Determination was *not* issued against Mr. Turner in his capacity as a Greybrook director/officer (*i.e.*, the charitable organization); rather, it was issued against him in his capacity as a director/officer of the Numbered Company (*i.e.*, a business corporation). Clearly, Mr. Turner continues to enjoy the protection of section 45 of the *Regulation* in his position as a Greybrook director/officer, however, I fail to see how his status with Greybrook limits his personal liability flowing from his *separate* status as a director/officer of the Numbered Corporation.
22. Mr. Turner's counsel says (at para. 16): "Absent subsection 96(4) there would be no basis for imposing liability upon [Mr. Turner] personally even if the Society were not a charity". However, the fact remains that subsection 96(4) *does* create the very liability that has been imposed on Mr. Turner in this case. Further, it should also be remembered that when *ICON Laser Eye Centres Inc.* was decided, section 95 provided that the associated entities were "one person" not, as the section now reads, "one employer". Thus, as section 95 is presently worded, to some extent subsection 96(4) may be superfluous.
23. If the section 95 declaration had associated the Numbered Company with any entity – other than a charity – Mr. Turner's section 96(1) and (4) liability would stand unchallenged. I do not believe that because the other entity was a charity, he is now immunized from liability given Mr. Turner's status as a director/officer of a for-profit firm. Mr. Turner's counsel suggests that the underlying purpose of section 45 of the *Regulation* is

“to provide a measure of protection to directors and officers of charities” (para. 20) and I agree. However, it must equally be recognized that the corollary of that position is that directors and officers of business corporations have not been granted any such protection. Mr. Turner may be immunized from section 96(1) liability *qua* Greybrook but he is not immunized *qua* the Numbered Company and, as noted above, the Section 96 Determination was issued against Mr. Turner solely by reason of his status with the Numbered Company.

24. If I were to accept Mr. Turner’s counsel’s submission, I would, in effect, be redrafting section 45 of the *Regulation* to read as follows:

45. Section 96 of the Act does not apply to a director or officer of a charity who receives reasonable out-of-pocket expenses but no other remuneration for services performed for the charity or to a person who is, in addition to being a director or officer of the charity, also a director or officer of any entity that is associated with the charity under section 95 of the Act.

25. In my view, such a significant change to section 45 can only be effected by an express regulatory amendment and not by an unwarranted interpretation of the provision by this Tribunal.

26. The position advanced by Mr. Turner’s counsel is essentially identical to that advanced by the appellants in the “Delphi International Academy” group of decisions (see especially, the following director/officer liability decisions: *Biln*, BC EST #s D302/02 and D485/02; *Kor*, BC EST #s. D301/02 and D486/02). The “Delphi International Academy” situation was remarkably similar to the present case in that an independent school was operated through three separate entities – a society formally operated the school, one business corporation operated the school’s athletic academies and another business corporation owned or leased the school’s physical assets and was the school’s landlord. The school ceased operations and the members of the teaching staff filed unpaid wage claims. In due course, determinations were issued under both section 95 (associating all three entities) and 96 of the *Act*.

27. Although the “Delphi International Academy” appeals were decided when section 95 of the *Act* stated that associated firms were “one person” rather than “one employer”, a similar argument was advanced regarding the impact of section 45 of the *Regulation* as is raised in this appeal. Both Mr. Biln and Ms. Kor were directors of the business corporation that was the school’s landlord and were ultimately found liable under section 96(1) on the basis that, on the facts of that case, *both* the society and the landlord corporation constituted the “employer” of the employees in question. In the present appeal, both entities are legally the “employer” of the complainant employees, not on the basis of any finding of fact, but by reason of the “deeming” effect of section 95 of the *Act*. Mr. Biln’s and Ms. Kor’s argument that they were somehow immunized from liability under section 96 because one of the associated entities was arguably a “charity”, was rejected.

28. In my view, even if one takes a narrow interpretive view of section 96(1), the fact remains that Mr. Turner’s liability arises from his position with the Numbered Company and not with Greybrook. I am not satisfied that simply because he is also a Greybrook director and officer, the immunity that he might otherwise enjoy with respect to wage claims filed by Greybrook employees extends to protect him from claims filed by the Numbered Company’s employees. It must be recalled that the effect of the section 95 declaration is to make the Numbered Company an *employer* of the complainants. Mr. Turner was, and continues to be, a director and officer of the Numbered Company and, accordingly, he is liable for the complainants’ unpaid wage claims by reason of subsections 96(1) and (4) of the *Act*.

29. Counsel for Mr. Turner did not question the calculation of Mr. Turner’s unpaid wage obligation nor did he question the delegate’s assessment of two administrative penalties against Mr. Turner under subsection 98(2) of the *Act*. That being the case, the appeal will be dismissed and the Section 96 Determination confirmed.

ORDER

- ³⁰. Pursuant to section 115(1)(a) of the *Act*, the appeal is dismissed and the Section 96 Determination is confirmed in the amount of \$89,408.07 together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date the Section 96 Determination was issued.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal