

An appeal

- by -

Barry Lang a Director or Officer of Pacific Western Coastal Constructors Ltd.

- 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.: 2008A/59

DATE OF DECISION: August 6, 2008

DECISION

SUBMISSIONS

William Thomson on behalf of Barry Lang
Terry Hughes on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Barry Lang, a Director or Officer of Pacific Western Coastal Constructors Ltd. (“PWC”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination of the Director of Employment Standards (“the Director”) issued May 2, 2008.
2. A number of individuals filed complaints alleging that PWC, a construction business, had failed to pay them wages. The complainants were employees on a project for which PWC was a subcontractor during 2007. In late 2007, the developer, Aviawest Group of Companies (“Aviawest”), alleged that PWC had put “ghost” employees on their payroll and accused it of cost overruns and deficiencies on the project. Aviawest did not pay PWC sufficient funds to meet its mid December, 2007 payroll, instead making direct payments to its employees. The complainants worked the following pay period, December 12, 2007 to December 21, 2007 but Aviawest did not provide PWC with funds to meet this payroll. PWC ceased work on the site on December 21, 2007 and filed a builder’s lien against the property. PWC did not dispute the complainants’ allegations that they were not paid for work performed from December 12 – 21, 2007.
3. A delegate of the Director found that there was no dispute that the employees performed work for PWC or that they had not been paid any wages for the final pay period. The delegate determined that wages were owed in the total amount of \$51,056.60, including interest and that PWC had contravened section 17 of the *Act* in failing to pay wages no later than eight days after the end of a pay period. The delegate also imposed an administrative penalty in the amount of \$500.00 for the employer’s contravention. The Determination indicated that “Directors and officers of companies can also be required to pay wages owed to employees.” The appeal period for that Determination expired February 27, 2008.
4. On April 1, 2008, the delegate sent a letter to Mr. Lang indicating that since the appeal period of the PWC Determination had expired, the Branch had registered the Determination with the Supreme Court. The letter noted that Mr. Lang had been a Director/Officer of PWC at the time the wages were earned and should have been paid and reproduced sections 96 and 98 of the Act for Mr. Lang’s benefit. The letter noted:

A Director/Officer cannot argue the merits of the Determination against the company after its appeal period has expired. After that time, there are only three grounds for appeal:

 - 1) whether you were a Director of the company at the time wages were earned or should have been paid, and
 - 2) whether the calculation of your personal liability is correct, and
 - 3) whether you authorized, permitted or acquiesced in the contravention, in relation to the matter of personal liability for administrative penalties.

5. The delegate asked Mr. Lang to pay the judgement to avoid further action against him as a Director/Officer and sought any submissions to be made by April 18, 2008. The letter was copied to counsel for PWC in its dispute with the developer. Neither Mr. Lang nor counsel for PWC responded to the delegate by April 18, 2008, or at any time.
6. In a Determination issued May 2, 2008, the Director's delegate found that PWC had not filed an appeal of the February, 2008 Determination, and that the Determination had not been satisfied. The delegate found that Mr. Lang was a Director and Officer of the company at the time the complainants' wages were earned and payable. The delegate determined that Mr. Lang was personally liable to pay \$51,056.60, which represented not more than two months' unpaid wages for each of the employees.
7. Mr. Lang alleges that the delegate failed to observe the principles of natural justice in making the Determination.
8. Section 36 of the *Administrative Tribunals Act* ("ATA"), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal's Rules of Practice and Procedure provide that the Tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). Mr. Lang did not seek an oral hearing and I conclude that this appeal can be adjudicated on the section 112(5) "record", the submissions of the parties, and the Reasons for the Determination.

ISSUE

9. Did the delegate fail to observe the principles of natural justice in concluding that that Mr. Lang was personally liable for the employees' wages?

ARGUMENT

10. Mr. Lang argues that he is not liable for payment of the employees' wages because he understood that the developer would be paying the employees. He relies on *Shimco Metal Erectors Ltd. v North Vancouver (District of)*, (2002 BCSC 238, upheld 2003 BCCA 193) in support of his position that the Branch should attach the funds in court to recover the outstanding wages rather than pursuing him.
11. Mr. Lang also contends that, at the time the Determination was issued, he was in court seeking to have the lien against the developer upheld, which it did successfully.
12. The delegate says that PWC neither appealed nor satisfied the Determination. He submitted a copy of the corporate registry search showing William Thomson and Barry Lang as Directors of PWC at the time the wages were earned. He says that he notified PWC's counsel before issuing the Director Determinations, at counsel's request and received no response. He noted that the Determination against PWC was not appealed until after the Director Determinations were issued. The delegate says that the Branch has attempted to collect the wages, but has been unsuccessful to date.

ANALYSIS

13. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - (a) the director erred in law;
 - (b) the director failed to observe the principles of natural justice in making the determination; or
 - (c) evidence has become available that was not available at the time the determination was being made
14. The burden of establishing that the Determination is incorrect rests with an Appellant. Having reviewed the submissions of the parties, I am unable to find that the Appellant has discharged that burden.
15. Mr. Lang's appeal raises issues that relate solely to the February 2008 Determination against PWC, which was appealed at the same time as the appeal of the Director's Determination, along with an application for an extension of time to file the appeal. I dismissed PWC's application for an extension of time in which to file an appeal on August 6, 2008. (see BC EST #D075/08)
16. Once corporate liability has been established, directors cannot, through an appeal of a determination of director liability, reargue the issue of a company's liability for wages unless they can establish fraud or fresh evidence that is decisive to the merits of the issue. (*Steinemann*, BC EST #D180/96). Given that PWC neither disputed the initial claims of the employees nor appealed the corporate determination, Mr. Lang cannot now re-argue the issue of PWC's liability for wages.
17. The May 2, 2008 Determination relates to the personal liability of Mr. Lang as a Director and Officer of PWC.
18. Section 96(1) of the *Act* provides as follows:

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.
19. Mr. Lang does not deny that he is, or continues to be a Director or Officer of PWC. He also does not deny that the wages found to be owed are for a two month period in which he was a Director or Officer.
20. Mr. Lang provides no evidence that the delegate failed to notify him of the consequences of PWC's failure to appeal or satisfy the corporate Determination or afforded him the opportunity to respond to it. Mr. Lang did not respond to the delegate's April 1, 2008 letter seeking a response to his intended action. I am unable to conclude that the delegate failed to observe the principles of natural justice in making the Determination.
21. The appeal is dismissed.

ORDER

22. I Order, pursuant to Section 115 of the Act, that the Determination dated May 2, 2008 be confirmed in the amount of \$51,056.60, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal