

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 -

Gerard M. Toms, a Director or Officer of 4230 Investments Ltd.
(" Toms ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 1999/654

DATE OF DECISION: February 24, 2000

DECISION

OVERVIEW

Gerard M. Toms (“Toms”), a Director or Officer of 4230 Investments Ltd. (“Investments”, also, the employer”) has appealed a Determination which has been issued by a delegate of the Director of Employment Standards (the “Director”). The Determination is dated October 13, 1999. It orders Toms to pay, as a director/officer of Investments, wages which Investments has been found to owe Michael Torontow and Sandy Forbes, two of that company’s former employees. Appealed is the order to pay Torontow. The appeal is pursuant to section 112 of the *Employment Standards Act* (the “Act”).

Investments is in and by a Determination dated June 16, 1999 ordered by the Director to pay Torontow vacation pay, compensation for length of service and interest, a total of \$8,526.06. That determination (the “Corporate Determination”) was appealed by Investments but not until November, nearly four months after the statutory period for the appeal had expired. I was assigned the task of deciding whether the Tribunal should or should not exercise its discretion to waive the time limit for the appeal and I decided against doing so. Investments had not shown a genuine and on-going interest in an appeal and there was not a strong *prima facie* case in favour of the appellant [4230 Investments Ltd. (BCEST No. D036/00)].

Toms on appealing the order that he personally pay Torontow (the “Toms/Torontow determination”) asks that both it and the Corporate Determination be cancelled. According to Toms, they have been “fully compromised” through settlement of a claim for the amount of the Corporate Determination which Torontow brought against Family Underwriting Management Limited (“FUMML”) pursuant to proceedings under the *Companies Creditors Arrangement Act* of Canada (the “CCAA”). In a subsequent submission, Toms goes on to suggest that there is no longer any factual basis for the original Complaint and the Corporate Determination. In that regard, Torontow is said to have asserted that it is not Investments that was his employer but another company.

ISSUE TO BE DECIDED

Has the appellant presented the Tribunal with any reason to cancel the order which calls for Toms to pay wages to Torontow.

FACTS

Toms was a director or officer of Investments at the time of the Corporate Determination.

Torontow’s claim for wages is against Investments. His employment was terminated on May 3, 1999. He was at that time provided with an Record of Employment (“ROE”) by his employer. Investments is given as the employer on the ROE. According to the Corporate Determination,

Investments was contracted during the course of the investigation and it agreed that the employee was owed \$400.82 in vacation pay plus termination pay of \$8,016.32.

On August 31, 1999, Torontow sought to recover the amount of the Corporate Determination through a Proof of Claim against FUML which he filed pursuant to the *Companies Creditors Arrangement Act* of Canada (the "CCAA") and the *Winding-up and Restructuring Act* of Canada.

A plan for consolidation and final settlement of the credit obligations of six companies (the "Family companies") was negotiated and put to the creditors of those companies. It was approved by a majority. Mr. Justice Harvey of the Supreme Court of British Columbia has, by Order dated September, 1999, given his approval to the plan and ordered that it be implemented. The six Family companies listed on that court order are;

Family Group Holdings Ltd.,
Family Insurance Corporation,
Family Insurance Group Limited,
Harbord Insurance Services Limited,
Automated Debit Systems (ADS) Corporation, and
FUML.

In appealing the Corporate Determination, Investments made two claims; one, that Torontow has now asserted that his employer is not Investments but another company; and two, that the Torontow's claim for wages has been fully compromised through the claim which he filed against FUML and the settlement of that claim.

ANALYSIS

The liability of corporate directors and officers to pay wages is established through section 96 (1) of the *Act*. That section of the *Act* is as follows:

- 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.

A person served with a determination which is against them personally as a director/officer of a company may argue that they are not a director or officer and/or the amount of their personal liability under the *Act*. But the Tribunal has said through its decisions, notably *Kerry Steinemann, Director/Officer of Pacific Western Vinyl Windows* (BCEST No. D180/96), *Perfekto Mondo Bistro Corp.* (BCEST No. D198/96) and *Seacorp Properties Inc. et al* (BCEST No. D440/97), that the directors and officers of an incorporated company are not entitled to use the appeal process to, in effect, reopen the determination which is against the corporate body. The principle of issue estoppel applies. The Tribunal has said, two exceptions aside, that a director/officer may not challenge a determination which is against them personally if the corporate determination is final, the identical issue has already been decided and the decision

involved the same parties, or their privies. The exceptions are fraud in issuing the Corporate Determination and new, cogent evidence not previously available.

In this case, Toms neither claims that he is not a director/officer of Investments, nor disputes the amount of the Determination. In part, the claim on appeal is that there is no factual basis for the Corporate Determination and, therefore, no basis for the Toms/Torontow determination in that Torontow has apparently said that Investments is not his employer. It is to ask the Tribunal to revisit the matter of who is the employer. I will not. The matter of who is the employer is decided by the Corporate Determination. That determination is final now that the appeal by Investments has been rejected. Toms as a director/officer of Investments is a privy of the corporate body (See *Steinemann*). And the exceptions do not apply. Toms has not suggested fraud in issuing the Corporate Determination, nor does he offer new, convincing evidence which was not previously available.

I realise that Toms is very likely of the view there is new, convincing evidence, a declaration by Torontow that Investments is not the employer. But what I find is; one, no evidence which confirms that Torontow has made such a declaration, and two, that even if it is true that he has made such a declaration, nothing will turn on it. That is because Investments has by itself acted to show that it is the employer. It has done that through the ROE that it issued. I am satisfied that Investments, when contacted by the delegate during the course of the investigation, made no issue of his assumption that Investments was Torontow's employer, but agreed that the employee is owed \$400.82 in vacation pay plus termination pay of \$8,016.32. And Investments, which should of course know whether it is or is not the employer, never made an issue of the Corporate Determination that named it as the employer until a determination was issued against Toms personally.

The second issue which is raised by the appeal is the matter of whether the Corporate Determination and the Toms/Torontow determination should or should not be cancelled on the basis that Torontow has sought to enforce the Corporate Determination against FUMML as a creditor and settlement of the claim. Investments, on appealing the Corporate Determination, has already asked that that determination be cancelled for reason of that claim and that settlement. And in deciding that the Tribunal should not waive time limits and allow Investments' appeal, I have already found that there was not even a strong *prima facie* case in favour of the appellant. As noted in the decision on time limits, Investments is not one of Family companies to which the court ordered settlement pertains. I find that Toms is attempting to raise, by appealing the determination against him personally, an issue which has already been raised by his company and which has already been finally decided.

In this case, Toms goes on to add that not only the Corporate Determination but the Toms/Torontow determination is affected by the settlement of Torontow's claim against FUMML. I suppose that it can be argued that I have not yet considered the matter of whether the Toms/Torontow determination is affected by settlement of the claim against FUMML, only the Corporate Determination. But that is in my view to miscast the issues. The Tribunal is still being asked to decide whether the Director may or may not act to enforce the order which calls for the payment of wages to Torontow now that the credit obligations of the Family companies

have been settled, Torontow's claim against FUML included. That is, I find, the real issue. And that issue has already been decided, Investments' appeal having been rejected for the reason that the settlement agreement binds the Family companies but not Investments. It is not a matter which Toms may reopen through an appeal of the determination which is against him, for the same reasons as he may not reopen the matter of who is the employer. I will add, however, that it is clear to me that the Toms/Torontow determination has been issued by the Director on her own authority under section 76(3) of the *Act* and, like all determinations, is by virtue of section 87 of the *Act* in "*favour of the Director*" with the amount of wages being "*payable and enforceable in priority over all liens, judgements, charges and security interests or any other claims or rights*". Torontow has done nothing to alter that.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination which is dated October 13, 1999, and against Gerard M. Toms, be confirmed.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal