

An appeal

- by -

Cathy McLellan

- 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

ADJUDICATOR: M. Gwendolynne Taylor

FILE No.: 200/743

DATE OF DECISION: February 14, 2001

DECISION

APPEARANCES:

Written submissions by:

Cathy McLellan	on her own behalf
R. A. Stea	on behalf of the Director of Employment Standards (“Director”)

OVERVIEW

This is an appeal by Cathy McLellan (“McLellan”) pursuant to section 112 of the *Employment Standards Act* (“*the Act*”) from a determination dated October 11, 2000 (#ER 29-751) by the Director of Employment Standards (“the Director”).

In the determination the Director found that Brenda Cairns (“Cairns”) was owed compensation for length of service because her employment with McMillan College was terminated without just cause or advance written notice of termination. The Director found that Cairns was entitled to seven weeks wages, plus vacation pay, for a total of \$8,635.17.

The Director determined that McLellan was a director or officer of McMillan College who, pursuant to section 96 of the *Act*, is personally liable for up to 2 months’ unpaid wages for each employee.

McLellan appeals on the basis that directors are not responsible for severance.

ISSUE

Whether this is a debt for which a director or officer of a corporation is legally liable pursuant to section 96 of the *Act*.

The applicable subsections are:

S. 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 terminations, 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.*

Section 1

“wages” includes

- (c) *money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,*

ARGUMENT

McLellan referred the tribunal to *Mills-Hughes et al v. Raynor et al. (1988)*, 47 D.L.R. (4th) 381, Ontario Court of Appeal. The issue in that case was the extent of liability of the corporate directors under s. 114 of the *Canada Business Corporations Act*, S.C. 1974-75-76, c. 33, to employees. The corporation had been petitioned into bankruptcy.

Section 114 provided:

- (a) Directors of a corporation are jointly and severally liable to employees of the corporation for all debts not exceeding six months wages payable to each such employee for services performed for the corporation while they are such directors respectively.

The issue before the Court of Appeal was whether the claims for bonuses, vacation pay and severance or termination pay were "debts ... for services performed for the corporation.." The Court determined that bonuses and vacation pay were "debts."

The contracts of employment specifically stated that "severance payments ... are not compensation for past services." Based on the contract language, the Court found that severance pay was not compensable. The Court also considered the Ontario *Employment Standards Act*

provision for severance pay and concluded that it was a statutory benefit, not a “debt ... for services performed.” Accordingly, the Court found the directors were not liable for that portion of the claim.

The Director submitted that the *Mills-Hughes* case does not apply because compensation for length of service has been included in the definition of “wages” in the British Columbia *Employment Standards Act*. In support the Director referred the tribunal to *James et al In Bankruptcy*, 2000 BCSC 1127, Vancouver Registry, July 24, 2000, B.C. Supreme Court.

The *James* case involved a claim by the Director of Employment Standards in the bankruptcy proceedings arising out of determinations against directors or officers. The issue was whether the claims should be accepted as unsecured or preferred. The corporate employer had made an assignment in bankruptcy, the Director issued “corporate determinations” for unpaid wages and the Director submitted a Proof of Claim in the corporate bankruptcy, which was accepted as a preferred claim.

The Director then issued Determinations against James as the sole director and officer. James made an assignment in bankruptcy.

The issue involved interpretation of the federal *Bankruptcy and Insolvency Act* and the B.C. *Employment Standards Act*. Mainly relying on the interpretation section of the provincial Act, the Court determined that the wages owing by the corporation could be accepted as a preferred claim in the personal bankruptcy as “wages, salaries, commissions or compensation” under the federal Act.

THE FACTS AND ANALYSIS

I accept the undisputed findings of the Director that

- Cairns is owed compensation for length of service in the amount of \$8,635.17 from her employment with McMillan College, and
- McLellan was a director or officer of McMillan College at the time the compensation was earned or should have been paid.

The definition of “wages” in the Act includes compensation for length of service. Under section 96(1), McLellan is clearly liable, unless section 96(2) applies.

Section 96(2) relieves a director or officer from liability for corporate wages owing under section 63, if the corporation is in receivership or is subject to action under the federal *Bank Act* or an insolvency Act.

There is no evidence before me to support finding that section 96(2) applies to relieve liability in this case.

The *Mills-Hughes* case does not apply to these circumstances. That case was governed by federal legislation and an employment contract. The finding was specific to those provisions and the facts of that case. The finding of the Court of Appeal does not assist this case.

I find that the *James* case does not assist either. It does not stand for the proposition that compensation for length of service is “wages” for the purposes of section 96. The Court in the *James* case does not refer to section 96(2) and, therefore, I assume that the Director’s Determinations did not include amounts under Section 63, compensation for length of service.

This case rests solely on section 96(1). The directors and officers are liable for up to two months’ unpaid wages, as defined in section 1, owed to employees by the corporate employer.

ORDER

Pursuant to section 115, I confirm the Determination of the Director.

M. Gwendolynne Taylor

M. Gwendolynne Taylor

Adjudicator

Employment Standards Tribunal