

An appeal

- by -

Edward Terrance Lowe a Director or Officer of
578047 B.C. Ltd. operating as Pro Gas & Heating
("Lowe")

- 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.: 2005A/66

DATE OF DECISION: June 24, 2005

DECISION

SUBMISSIONS

Edward Terrance Lowe

on his own behalf

Ken White

for the Director of Employment Standards

INTRODUCTION

1. This is an appeal filed by Edward Terrance Lowe (“Lowe”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”). Mr. Lowe appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on March 15th, 2005 (the “Determination”). The Determination is supported by “Reasons for the Determination” (“Reasons”) also issued on March 15th, 2005.
2. The Director’s delegate determined that Mr. Lowe was a director and officer of 578047 B.C. Ltd. (operating as “Pro Gas and Heating”)—I shall refer to this latter firm as “Pro Gas”—when wages were earned or should have been to Mr. Cameron Munford (“Munford”). Accordingly, the delegate ordered, pursuant to section 96(1) of the *Act*, that Lowe pay Mr. Munford the sum of \$3,992.72 on account of unpaid overtime wages (\$3,501.50) and accrued section 88 interest (\$491.22).
3. Section 103 of the *Act* incorporates several provisions of the *Administrative Tribunals Act* (“*ATA*”) including section 36 which states: “...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). By way of a letter dated June 7th, 2005, the Tribunal’s Vice-Chair advised the parties that this appeal would be adjudicated based solely on their written submissions. I note that none of the parties asked that the Tribunal hold an oral appeal hearing.
4. I have before me the section 112(5) record as well as written submissions from the delegate and from Mr. Lowe. Mr. Munford did not file a submission with the Board despite a written invitation to do so.

FACTUAL BACKGROUND

5. On November 7th, 2003 the Director issued a determination against Pro Gas ordering that firm to pay \$3,963.45 on account of unpaid wages owed to Mr. Munford, section 88 interest and a \$150 administrative penalty (the “Corporate Determination”).
6. Pro Gas appealed the Corporate Determination to the Tribunal and Mr. Lowe represented Pro Gas in that appeal. Member Roberts dismissed the appeal and confirmed the Corporate Determination (see B.C.E.S.T. Decision No. D037/04).
7. Pro Gas applied for reconsideration of Member Roberts’ decision; that application was refused (see B.C.E.S.T. Decision No. RD128/04).

8. As recounted in the delegate's Reasons, Pro Gas failed to pay Munford the wages it was ordered to pay to him. The delegate conducted a corporate records search that disclosed Mr. Lowe was a director and officer of Pro Gas when Mr. Munford's unpaid wage claim crystallized. A copy of the latter search record (of the Corporate Registry's records) is contained in the section 112(5) record; the record indicates that Mr. Lowe is the sole officer (holding the dual offices of president and secretary) and director of Pro Gas. Accordingly, the Determination now under appeal was issued against Mr. Lowe in his personal capacity pursuant to section 96(1) of the *Act*:

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.

ISSUES ON APPEAL

9. Lowe submits that the Determination should be cancelled on the ground that the delegate erred in law [section 112(1)(a) of the *Act*]. More particularly, Lowe submits that "the calculations made by [the delegate] are in error" and "[the delegate] has taken artistic license with the interpretation of Section 96 of [the *Act*]".

FINDINGS AND ANALYSIS

Alleged Calculation Errors

10. Mr. Lowe does not indicate to what extent the delegate's calculations are incorrect and, in any event, the correctness of the delegate's calculations is not an issue that can be properly raised in this appeal. That latter question should have been addressed in the appeal of the Corporate Determination (indeed, to some degree it was). The matter of Mr. Munford's actual unpaid wage entitlement is now *res judicata*; that issue cannot be raised anew in these proceedings (see e.g., *Steinemann*, B.C.E.S.T. Decision No. D280/96).

Section 96

11. Mr. Lowe suggests that Mr. Munford's wages were paid in full during the last two months of his employment and notes that the unpaid wage liability accrued over many months due to unpaid overtime. Mr. Lowe submits:

These individual totals exceed the two month time frame and extend to the beginning of Mr. Munford's employment. Nowhere in section 96 of the Act, does the Act by example or by direct statement, make it acceptable for the director to; pool moneys owed, (past the equivalent time frame) and re-introduce these amounts as monies not paid, within the last 2 months of employment or an equivalent to two months unpaid wages. It is my position that as the director I am responsible for the equivalent of two months; that being: monies unpaid for the last two months equaling but not exceed the average two month wage of the employee. Since Mr. Munford was indeed paid during the time frame in question, it is my position that I am only responsible for that portion of wage that is the difference between what Mr. Munford was paid, and what Employment Standards are claiming that he is owed for that time frame. (*sic*)

12. Mr. Lowe's submission is very similar to that made by the appellants in *Tracey Docherty* (B.C.E.S.T. Decision No. D248/98), *Gabriele* (B.C.E.S.T. Decision No. D260/98), and *Robert Docherty* (B.C.E.S.T. Decision No. D262/98). In those latter three decisions, I rejected the submission that the section 96(1) liability is limited to the total amount of unpaid wages that crystallized in any 2-month (or the last 2-month) period of employment. In *Tracey Docherty* I observed (at p. 4):

In my view, section 96 creates an unpaid wage liability "ceiling" based on an employee's monthly wage. Accordingly, if an employee's "regular wage" (see section 1) was \$2,000 per month, the unpaid wage liability of a director or officer for that employee would be the lesser of \$4,000 (i.e., 2 x \$2,000 per month) or the actual amount of the employee's unpaid wages...

...a corporate officer or director may be held personally liable for employees' unpaid wages, but such liability cannot exceed the equivalent of two months' wages per employee.

13. Adjudicator Petersen expressed a similar view in *Lee and Rowlett* (B.C.E.S.T. Decision No. D158/00): "...Section 96 simply creates a "ceiling" based on the employee's monthly wages. 'Unpaid wages' in Section 96 do not refer to the balance owing on the wages for the last two months of employment."
14. A person may be held liable for any and all unpaid wages that were earned by, or should have been paid to, employees during the period when that person was a director or officer of the corporate employer. This latter unpaid wage liability is, however, limited to a maximum equivalent to two months' wages for each and every employee. The 2-month period referred to in section 96(1) does not define a specific time frame within which an employee's unpaid wage claim is restricted; rather, the 2-month time frame defines the maximum per employee obligation that may be imposed on directors and officers.
15. It follows that I reject the interpretation of section 96 advanced by Mr. Lowe and, accordingly, the appeal is dismissed.

ORDER

16. Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$3,992.72** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal