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 -

Albert Kenneth Archibald
(" Archibald ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2000/011

DATE OF DECISION: April 12, 2000

DECISION

OVERVIEW

This is an appeal brought by Albert Kenneth Archibald ("Archibald") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on December 16th, 1999 under file number ER 095-475 (the "Determination").

The Director's delegate determined that Archibald was an officer and director of Centrux Management Ltd. ("Centrux") and, in accordance with the provisions of section 96(1) of the *Act*, was therefore liable for $2,486.56 in unpaid wages owed to a former Centrux employee, Terrance J. Hutchinson ("Hutchinson"). The unpaid wages in question represent 2 weeks' wages as compensation for length of service [see section 63(2)(a) of the *Act*] together with concomitant vacation pay and interest.

FACTS

According to the information set out in the Determination, the complainant employee, Hutchinson, was formerly employed as the manager of Centrux's vehicle maintenance centre from April 1st, 1998 until his termination on May 18th, 1999. Hutchinson filed a complaint with the Employment Standards Branch on May 19th, 1999.

Following an investigation, a Director's delegate issued a determination against Centrux on October 28th, 1999 for $2,466.43 on account of the same unpaid termination pay claim in favour of Mr. Hutchinson that is now before me--the slightly higher figure in the present Determination is accounted for by additional accrued interest (see section 88). I shall refer to this latter determination as the "Corporate Determination".

Centrux entered into bankruptcy on September 8th, 1999 and the firm Evancic Perrault Robertson Ltd. has been appointed as its bankruptcy trustee. The trustee has never appealed the Corporate Determination. Archibald, purporting to act as Centrux's agent, filed an appeal of the Corporate Determination, however, that appeal was not filed within the statutory time limit [section 112(2)] and, in any event, Archibald did not have the legal authority to file an appeal of the Corporate Determination on Centrux's behalf. Accordingly, in a decision issued on February 21st, 2000 (B.C.E.S.T. Decision No. D091/00), I refused to grant an extension of the appeal period relating to the Corporate Determination and dismissed Centrux's appeal pursuant to, *inter alia,* section 114(1)(a) of the *Act.*

ISSUE TO BE DECIDED

As previously noted, the Determination now under appeal was issued against Archibald in his capacity as an officer and director (indeed, I understand that Archibald is, and remains, Centrux's *only* officer and director) in accordance with the provisions of section 96(1) of the *Act* which states that a corporate director or officer is personally liable for up to 2 months' unpaid wages for

each employee of the corporation. However, there are various statutory and regulatory exceptions to such personal liability including section 96(2)(a) which provides as follows:

> 96. (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...

The threshold issue raised by this appeal is whether or not the above-quoted defence applies in this case. I requested that the parties provide further written submissions on this issue by 4:00 P.M. on March 7th, 2000 and I have now received submissions from both Mr. Archibald (dated March 3rd) and the Director (dated March 7th).

Archibald also says that he should not be held liable for any compensation for length of service since Centrux had "just cause" to terminate Hutchinson's employment [see section 63(3)(c) of the *Act*]. The delegate submits that Archibald cannot raise the issue of "just cause" in this appeal; rather, only Centrux's bankruptcy trustee could raise that issue by way of an appeal of the Corporate Determination and, as noted above, the trustee never appealed the Corporate Determination. The delegate says that the only issues that may be raised by Archibald on this appeal are: i) whether or not Archibald was a Centrux officer or director when Hutchinson's claim for compensation for length of service crystallized; and ii) whether the Determination exceeds the "2-month wage liability ceiling".

I shall first address the scope of the section 96(2)(a) defence. As will be seen, given my decision regarding the effect of section 96(2)(a), I do not find it necessary to address the issue of Archibald's right to appeal the present Determination based on a "just cause" defence.

ANALYSIS

Directors' and Officers' Liability For Employees' Unpaid Wages

As noted above, section 96(1) of the *Act* provides that corporate officers and directors may be held personally liable for up to 2 months' unpaid wages per employee. This statutory form of "vicarious liability" extends not only to regular wages but also, by reason of the section 1 definition of "wages", to compensation for length of service payable pursuant to section 63 of the *Act.* It should be noted that this statutory liability is imposed irrespective of any "fault" on the part of the directors or officers nor does it connote that, in fact, the directors/officers were simply using a corporate vehicle for their own personal purposes (as an "alter ego") in which case they could be held jointly and separately liable as an "employer" along with the corporate entity pursuant to section 95 of the *Act* (see *e.g., Watt,* B.C.E.S.T. Decision No. 510/97; *Pacific Water Ventures Ltd.,* B.C.E.S.T. Decision No. 518/97).

The statutory liability imposed on directors and officers is not a new obligation that was imposed when the present *Act* came into force in 1995. Under the former *Employment Standards Act* (S.B.C. 1980, c. 10) directors and officers were also liable for up to 2 months' unpaid wages per employee (see section 19 of the former Act). The Commission appointed to review provincial employment standards legislation rejected the various representations made to it that the personal director/officer liability ought to be abolished [see Mark Thompson (Commissioner), *Rights and Responsibilities in a Changing Workplace: A Review of Employment Standards in British Columbia*, February 3rd, 1994 at pp. 153-157]. However, both the former and the current *Act* set out an exemption for directors and officers with respect to their liability for severance pay if the corporation is in receivership or bankruptcy.

Under the new *Act*, the directors'/officers' liability extends to unpaid wages that are both "earned" and "payable" whereas the former *Employment Standards Act* only imposed a liability for wages that were "payable". Undoubtedly, this changed statutory language was triggered by our Court of Appeal's decision in *Re Westar Mining Ltd.* (1996), 136 D.L.R. (4th) 564. In any event, the legislative purpose underlying the imposition of personal liability for unpaid wages on corporate officers and directors is to protect employees' wage claims in the event that the employer does not, or cannot, meet its payroll obligations. I think it important to note that section 96 appears in that part of the *Act* entitled "Enforcement", which also includes, *inter alia*, unpaid wage lien rights, the Director's authority to seize and sell employer assets and to garnish third parties, and successors' obligations for unpaid wages in the event of a sale of assets. Of course, an employer may fail to meet its payroll obligations for a variety of reasons; often, wages remain unpaid due to financial exigencies including insolvency which, in turn, usually leads to a formal receivership order or a declaration of bankruptcy.

In *Barrette v. Crabtree Estate* [1993] 1 S.C.R. 1027 the Supreme Court of Canada observed that it is appropriate to hold corporate officers and directors personally liable for unpaid wages because such individuals are in the best position to know whether the corporation can meet its ongoing payroll obligations and, when the corporation fails to do so, the resulting losses should not be borne entirely by the comparatively more vulnerable employees.

While, to some, it may seem harsh that corporate officers and directors are personally liable for employees' unpaid wages, it should be noted that there are various limitations on their liability; it is not "open-ended". First, the liability is "capped" at 2 months' wages per employee; second, officers and directors have the ability to limit their liability by ensuring that employees' wages are kept current; third, in the event of a impending payroll shortfall, directors can further limit their continuing liability through resignation; and fourth, officers and directors are not liable for compensation for length of service if the corporation is in receivership, bankruptcy or is the subject of some other similar insolvency proceeding.

It should be noted, however, that even in the event of, say, bankruptcy, the directors remain liable for most unpaid wage claims--it is only those claims for compensation for length of service and termination pay that are within the ambit of the section 96(2)(a) defence. Under both the present and former employment standards legislation, directors and officers are not liable for termination pay if the employer is the subject of a formal insolvency proceeding. Section 19(2) of the former

Employment Standards Act [which is not markedly dissimilar from section 96(2)(a) of the current *Act*] provided as follows:

> 19. (2) Notwithstanding subsection (1), where a corporation is in receivership, bankruptcy or is subject to action under section 178 of the *Bank Act* (Canada), a person who was a director or officer of the corporation is not personally liable for severance pay.

Both our Court of Appeal and the Supreme Court of Canada have repeatedly stressed that employment standards legislation, being "benefits-conferring" legislation, should be interpreted in a "broad and generous manner" [*cf. e.g., Helping Hands Agency Ltd. v. B.C.* (1995), 131 D.L.R. (4th) 336 (BCCA); *Machtinger v. HOJ Industries Ltd.* [1992] 1 S.C.R. 986; *Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27]. On the other hand, our Court of Appeal and the Supreme Court of Canada have both recognized that the imposition of a personal unpaid wage liability on corporate officers and directors is an extraordinary exception to the general principle that directors and officers are not personally liable for corporate debts. Accordingly, while the *Act* as a whole is to be interpreted in a broad and generous fashion, the provisions imposing a personal liability on corporate directors and officers should be narrowly construed [see *e.g., Barrette v. Crabtree Estate, supra.*; *Re Westar Mining, supra.*; *Jonah v. Quinte Transport (1986) Ltd.* (1994), 50 A.C.W.S. (3d) 435 (Ont. S.C.)].

The scope of the section 96(2)(a) defence

As previously noted, Centrux entered into bankruptcy on September 8th, 1999 whereas the director/officer Determination was not issued until some three months later. Thus, *when the Determination was issued, Centrux was already in bankruptcy;* accordingly, in such circumstances, does the section 96(2)(a) defence apply?

The delegate held that Centrux's bankruptcy did *not* absolve Archibald from his personal liability to Hutchinson pursuant to section 96(1) of the *Act:*

> "Section 96(2) is intended to relieve corporate directors and officers from having to pay compensation for length of service to employees who are terminated as a result of the corporation being placed into bankruptcy. Often a corporation enters into bankruptcy due to the actions of a third party (i.e. a creditor). Directors and officers are relieved of this liability because neither they nor the corporation decided to terminate the employment relationship. It was forced onto the corporation by its being placed into bankruptcy.
>
> Hutchinson was terminated in May 1999. His termination was not in any way related to the bankruptcy of Centrux. His termination was as a result of a decision made by Archibald. The event that ended his employment was Archibald's decision, not the placing of Centrux into bankruptcy. The fact that Centrux entered into bankruptcy in September 1999 does not deny Hutchinson the compensation for length of service to which he is entitled." (Determination, p. 3)

Thus, the delegate's view is that the section 96(2)(a) defence applies only when it is an act bankruptcy or insolvency that causes the employee's termination.

I have several comments regarding the delegate's reasoning wit respect to the scope of the section 96(2)(a) defence. While it is true that bankruptcy *may* result in the employees' termination thereby triggering an entitlement to compensation for length of service (see *Rizzo, supra.*), bankruptcy coupled with a *continued* employment by a successor employer (who may, for example, be the trustee) does not necessarily trigger *any* section 63 obligation to pay compensation for length of service (see *Re Alpine Press Ltd.,* B.C.S.C. Vancouver Registry No. 177432/97, February 10th, 2000). It is important to note that in *Rizzo,* the employees' employment ended *solely by reason of the bankruptcy.* It should also be noted that bankruptcy is not always instigated by the corporation's creditors; the corporation may voluntarily assign itself into bankruptcy or it may have automatically become bankrupt following its creditors' rejection of a proposal regarding the repayment of the firm's debts. The exemption extended to directors and officers regarding their personal liability for compensation for length of service stands irrespective of the mechanism utilized to formally recognize a corporation's insolvency.

Thus, as was the situation in *Rizzo,* if the employees' employment ended as a direct result of their employer's bankruptcy, the employer's officers and directors would not be personally liable to pay compensation for length of service.

Archibald, for his part, maintains that Centrux was effectively insolvent when Hutchinson was terminated and, therefore, the section 96(2)(a) defence applies. Assuming, for the sake of argument only, that Centrux was, practically if not in a formal legal sense, insolvent when Hutchinson was terminated, I am nonetheless of the view that the defence only applies when that state of affairs (*i.e.*, insolvency) has been recognized through some sort of formal insolvency proceeding. In my view, that result flows from the use of the phases "*is in* receivership" and "*is subject to action* under section 427 of the *Bank Act*" or subject to "a *proceeding* under an insolvency Act". In this case, the "proceeding" under the federal *Bankruptcy and Insolvency Act* was not filed until some three months after Hutchinson's employment had already been terminated.

I might also note that Archibald appeals the Determination on the basis that Hutchinson was terminated for "just cause" (based on certain alleged misconduct by Hutchinson) and therefore is not entitled to any compensation for length of service. Accordingly, regardless of whether or not Centrux was in fact insolvent when Hutchinson was terminated (and there is no evidence before me that such was the case), Centrux's insolvency was not the underlying reason for Hutchinson's termination. Accordingly, had the Determination been issued prior to the date of Centrux's bankruptcy, I am of the view that the section 96(2)(a) defence could not have been successfully raised by Archibald at that point in time.

However, and this is the central point raised by the present appeal, once a corporate employer's insolvency *has* been formalized by way of a receivership or bankruptcy proceeding, do such proceedings, in effect, terminate the ongoing unpaid wage liability relating to compensation for length of service that would otherwise extend to directors and officers pursuant to section 96(1)? It should be recalled that Centrux was already in bankruptcy (for over 3 months) when the

Archibald director/officer Determination was issued. This is not a case where the director/officer determination was issued--and the monies owed pursuant to that determination collected--prior to the corporate employer's bankruptcy. In the latter circumstances, I have no doubt that the section 96(2)(a) defence has no application whatever.

I am of the view, however, that the section 96(2)(a) defence applies regardless of the *reason* why an employee was terminated. An officer or director "is not personally liable" for compensation for length of service if the corporation is in receivership or bankruptcy. Absent bankruptcy, directors and officers can, of course, seek indemnity from the corporation for those monies that have been claimed against them pursuant to section 96(1). However, once the corporation enters bankruptcy, or is the subject of some other insolvency proceeding, directors and officers would only be entitled to claim indemnity in concert with all other general creditors--in most instances, such creditors can expect little, if any, recovery of the amounts due to them. For that reason, upon a receivership, bankruptcy, or some other related insolvency proceeding, directors and officers are released from any continuing liability for compensation for length of service.

It should be noted that directors and officers are not released from *all* unpaid wage claims, only those consisting of compensation for length of service and other termination pay claims. Thus, employees will still be able to claim against corporate officers and directors (subject to the 2-month wage ceiling and other applicable defences) for unpaid regular wages, vacation pay etc. (*i.e.*, monies that were earned and payable during their tenure with, and in exchange for their services to, the corporate employer). However, once their former employer has been formally declared insolvent, those same employees will only be able to look to the corporation's available assets as security for their compensation for length of service and termination pay claims.

The Director's delegate submits that the section 96(2)(a) defence only applies if the corporation was bankrupt or otherwise formally insolvent when the compensation for length of service was earned. The delegate's submission states (at page 3):

> "Section 96(2)(a) states that the compensation for length of service element of a wage liability is removed from those persons who were directors or officers at the time it was earned if that time is when the corporation was subject to a proceeding under an insolvency Act. Section 96(2)(a) should be read as follows: 'A person who was a director or officer of a corporation is not personally liable to an employee for compensation for length of service if the corporation, at the time those wages were earned, is subject to a proceeding under an insolvency Act'."

I cannot, for several reasons, accept the Director's delegate's submission.

First, under section 96(2)(a) the threshold question is not when the compensation for length of service was "earned" but, rather, when the compensation becomes "payable". Compensation for length of service is "earned" and accrues over the course of employment but only becomes "payable" (if payable at all--for example, proper written notice may have been given; the employer may have had "just cause") "on termination of the employment" [see section 63(4)]. If an "earnings" test, rather than a "payable" test, was utilized, directors and officers would almost always be liable for some compensation for length of service since most employees would have "earned" at least a partial entitlement prior to any formal insolvency proceeding.

Second, I do not accept that corporate directors and officers are only exempt from liability for compensation for length of service if, "on termination of the employment", the corporation is formally insolvent. Such an interpretation would involve "reading in" language that does not presently exist in the subsection. In light of the fact that the director/officer liability provision ought to be restrictively interpreted, I do not think it appropriate to interpret the statutory language so as to expand the scope of that personal liability by restricting the reach of a statutory defence.

Had the legislature so wished, it could have clearly expressed--as has the Director's delegate in his submission--an intention to narrow the scope of the 96(2)(a) defence. As matters now stand, I do not see any particular ambiguity in the language of section 96(2)(a). If a corporation is in receivership, bankruptcy or is otherwise formally insolvent, any person who *was* an officer or director "is not personally liable for" compensation for length of service or termination pay. Accordingly, employees who were terminated prior to formal insolvency do not stand in any preferred position, in terms of their ability to claim compensation for length of service against corporate officers and directors, vis-à-vis those employees whose employment was terminated by reason of a formal insolvency proceeding. *Once the corporation has been formally declared insolvent*, neither group of employees is entitled to claim compensation for length of service or termination pay as against the corporation's officers or directors. Of course, the directors and officers (subject to the 2-month wage ceiling and any other applicable defences) remain personally liable to the former employees for any unpaid wages other than compensation for length of service or termination pay.

Summary

In light of the foregoing, it follows that this appeal must be allowed and the Determination cancelled. Further, it also follows that I need not address the question of whether or not Archibald can assert, in the present appeal, that Centrux had "just cause" to terminate Hutchinson's employment and is, therefore, not entitled, in any event, to any compensation for length of service.

ORDER

Pursuant to section 115 of the *Act*, I hereby cancel the Determination issued against Albert Kenneth Archibald on December 16th, 1999 under file number ER 095-475.

KENNETH WM. THORNICROFT

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal