Employment Standards TRIBUNAL

An appeal

- by -

Roger Ogden, Director/Officer of CJS Victoria Inc.
operating Copper John's Cafe
("Ogden")

- 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

TRIBUNAL MEMBER: Alison H. Narod

FILE No.: 2004A/20

DATE OF DECISION: May 21, 2004

DECISION

OVERVIEW

This decision concerns an appeal pursuant to Section 112 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 (the "*Act*") by Roger Ogden ("Ogden"), Director/Officer of CJS Victoria Inc., operating Copper John's Café, of a Determination issued on February 13, 2004 by a delegate of the Director of Employment Standards (the "Delegate").

The Delegate found Ogden personally liable to pay $38,814.85 in respect of unpaid wages owed by CJS Victoria Inc., pursuant to s.96 of the *Act*.

Ogden appeals the Determination on the grounds that the Director failed to observe the principles of natural justice in making the Determination. He argues that he ought to fall within the exception to Directors and Officers liability under s.96(2)(b) of the *Act* because the Corporation was in a *de facto* state of bankruptcy and insolvency at the relevant time and there were legitimate reasons for not obtaining formal declarations to that effect.

ISSUE

The issue in this case is whether or not the Delegate failed to observe the principles of natural justice by not finding that Ogden fell within the exceptions to Directors and Officers liability.

FACTS

CJS Victoria Inc. closed Copper John's Café for financial reasons. On October 15, 2003, Arbitrator Jean Greatbatch issued an arbitration award against CJS Victoria Inc., finding that it owed unpaid wages in the amount of $38,814.85 to 81 former employees. The Arbitrator referred her award to the Director to collect the wages. The Arbitrator found that provisions of the Collective Agreement as well as s. 17(1) of the *Act* had been breached.

The Delegate observed that s. 3(8) provides that the Director may collect wages pursuant to an arbitration award in certain circumstances. Section 17 of the *Act* falls within the scope of the collection powers set out in s. 3(8). Section 3(8) provides that the Director may collect these wages as if the decision of the Arbitrator were an order of the Tribunal. Section 96 is included in this authority and this, therefore, includes director liability found in s. 96. Accordingly, the Director held that, as a director or officer, Ogden was personally liable for up to two (2) months' unpaid wages for each employee.

There is no dispute that the monies, as found by the Arbitrator, are owing by the Corporation.

ARGUMENT

Ogden submits that he is entitled to the protection of the exceptions to Directors and Officers liability under s.96(2)(b) of the *Act*. He says the Corporation was in a state of *de facto* bankruptcy and insolvency at the relevant time. This was disclosed to the Delegate during the investigation of the matters under

consideration. Formal bankruptcy or insolvency has not been declared for a number of reasons. It was possible that the employee complaints would be satisfied outside the Corporation. The cost of filing for bankruptcy or insolvency prevented the Corporation from doing so. It takes at least six months to obtain a formal declaration. The books of the Corporation were not complete at the time and were nearing completion. They are necessary to obtain a formal declaration. Confirmation of the bankrupt/insolvent position of the Corporation in the form of its final financial statements, which have now been filed with the Canada Customs and Revenue Agency, would be submitted to the Tribunal for consideration. The Corporation is involved in ongoing disputes with the Union representing its employees (CAW-Canada Local 114) over issues relating to closure of the business.

Ogden now seeks to submit what he described as the Corporation's "final financial statements" and he supplies a copy of the Director's letter of January 29, 2004 stating that an earlier determination of a delegate of the Director of Employment Standards made in connection with the parties was cancelled. Additionally, Ogden seeks an oral hearing in the event that the final financial statements of CJS Victoria Inc. are not accepted as evidence of the *de facto* insolvent or bankrupt position of the Corporation.

The Union argues that the appeal discloses no *prima facie* case and therefore should be dismissed without a hearing. The Delegate's Determination arises out of an arbitration award which was never appealed by the Corporation, despite the opportunity to do so under the *Labour Relations Code*. There is no evidence to support the assertion that the Delegate failed to observe the principles of natural justice in making the order. The Corporation participated in the arbitration process and did not argue that the award was in breach of natural justice. The Determination simply enforces the Arbitrator's award.

The Union also argues that the Employer's financial statements are insufficient to trigger the application of s. 96(2)(b) of the *Act*. The Union relies on the Delegate's explanation that exclusion from personal liability does not apply simply due to a shortage of funds, cash-flow problems, lack of assets, closure of business, etc. There is no suggestion that Ogden's situation falls under a s. 96(2)(b) exemption. The Union asks that the appeal be dismissed without hearing and that collection proceed.

The Delegate submits that there is no evidence that any statutory insolvency or receivership actions or proceedings have occurred to date. Section 96(2)(b) is very specific with respect to the exceptions to director and officer liability. As there is no evidence that the Corporation is subject to a proceeding under s. 427 of the *Bank Act* (Canada), this exception does not apply.

The Delegate also points out that the *Act* contains a definition of "insolvency Act" and that s. 96(2)(b) is very specific in stipulating that an exclusion for personal liability will apply only when there is a formal proceeding under one of the insolvency Acts specifically referenced. As there is no evidence that there are any actions or proceedings under an insolvency Act, the exception of "insolvency" does not apply.

The Delegate notes that Ogden makes reference to the cancellation of an earlier Determination. The Delegate points out that Determination is not the subject of this appeal. The earlier Determination was cancelled after a brief internal review of the file. Upon further review and consideration, it was determined that the current Determination was in fact correct and was issued.

In reply to the Union's submission, Ogden affirms that the Arbitrator's award was not appealed. However, he distinguishes between the Corporation's liability and the finding of director and officer liability against him. He asserts that there has been an error of natural justice because the evidence demonstrates the Corporation was in a *de facto* position of insolvency or bankruptcy and there were

legitimate reasons for not obtaining a formal declaration of insolvency or bankruptcy. Ogden submits that if this evidence is insufficient to support his case, the Corporation will be forced to obtain a formal determination of its position effective as of the time when the liabilities were incurred.

ANALYSIS AND DECISION

This appeal is brought under s. 112(1) of the *Act*. There is no need to hold an oral hearing as the matter can be determined on the basis of the written submissions. The "final financial statements" of the Corporation do not alter the conclusion herein. There is no basis for delaying the hearing of this matter to await a potential application for a determination that the Corporation is insolvent or bankrupt.

As noted, Ogden alleges that the Delegate breached the principles of natural justice.

After reviewing the parties' submissions, I find that there has been no breach of the principles of natural justice. Ogden does not submit that he did not know the case he had to meet and was not permitted to have an opportunity to respond. He does not dispute that he was a director or officer at the material time. He does not dispute the findings of the Arbitrator in terms of the Corporation's liability.

Rather, he argues that the Determination was in error because the Corporation was in a *de facto* position of insolvency or bankruptcy at the relevant time.

Subsections 96(1) and (2) of the *Act* state:

> 96. **Corporate officer's liability for unpaid wages**
>
> (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 an officer of a corporation is not personally liable for
>
> (a) any liability to an employee under section 63, termination pay or money payable in respect of individual or group terminations, if the corporation is in receivership,
>
> (b) any liability to an employee for wages, if the corporation is subject to action under section 427 of the *Bank Act* (Canada) or to a proceeding under an insolvency Act,
>
> (c) vacation pay that becomes payable after the director or officer ceases to hold office, or
>
> (d) money that remains in an employee's time bank after the director or officer ceases to hold office.

Section 1(1) of the *Act* defines "insolvency Act" as follows:

> "**insolvency Act**" means the Bankruptcy and Insolvency Act (Canada), the Companies' Creditors Arrangement Act (Canada) or the Winding-Up Act (Canada)

According to s. 96(2)(b), a person who was a director or an officer of a corporation may be exempted from liability for unpaid wages if the corporation is "subject to action under section 427 of the *Bank Act* (Canada) or to a proceeding under an insolvency Act".

There is no dispute that the Corporation was not subject to action under section 427 of the *Bank Act* (Canada) or to a proceeding under an insolvency Act. As noted above, the *Act* defines "insolvency Act" as meaning the *Bankruptcy and Insolvency Act* (Canada), the *Companies' Creditors Arrangement Act* (Canada) or the *Winding-up Act* (Canada). The *Act* is very specific in this regard. Those exemptions are simply not triggered unless and until its express terms are met. The fact that there may exist a *de facto* insolvency or bankruptcy is not sufficient to trigger the exemption. As a result, Ogden is not protected by the exemptions set out in subsection 96(2)(b).

ORDER

The appeal is dismissed and the Determination dated February 13, 2004 is confirmed.

Alison H. Narod
Member
Employment Standards Tribunal