

An appeal

- by -

Robin Bruce Hutchison, a Director and Officer of Vox Logic Technologies Inc.
(“Hutchison”)

- 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: Robert Groves

FILE No.: 2008A/69

DATE OF DECISION: September 22, 2008

DECISION

OVERVIEW

1. Robin Bruce Hutchison ("Hutchison") appeals a determination dated May 26, 2008 (the "Determination") issued by a delegate of the Director of Employment Standards (the "Delegate") in which the Delegate determined that Mr. Hutchison was a director and officer of Vox Logic Technologies Inc. ("VTI") and liable in that capacity under section 96 of the *Employment Standards Act* (the "Act") for wages, including regular pay, vacation pay, compensation for length of service and accrued interest found to be owed by VTI to two former employees of the company, Lianrong Chen and Wei Lin, in a determination dated September 7, 2007 (the "Corporate Determination").
2. I have before me Mr. Hutchison's Appeal Form and attached submission, the Determination and the Reasons for the Determination, a submission from the Delegate and the record the Delegate says was before her at the time the Determination was being made, a submission from the complainant Chen, as well as a final submission from Mr. Hutchison.
3. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 17 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. I have concluded that this appeal shall be decided on the Determination, the Reasons for the Determination, the section 112(5) record, and the submissions received, without an oral hearing."

FACTS

4. The Corporate Determination was issued following an investigation that was launched by the Director after Mr. Chen and Mr. Lin filed complaints against VTI under section 74 of the *Act*. The delegate issuing the Corporate Determination ordered VTI to pay wages, interest and administrative penalties totaling \$29,814.81. In the reasons prepared in support of the Corporate Determination the delegate found that the complainants had worked continuously as software developers for a series of companies, and in the end VTI. The delegate further concluded that VTI was a successor to those other companies for the purposes of section 97 of the *Act*.
5. VTI appealed the Corporate Determination, unsuccessfully. The Tribunal decision confirming the Corporate Determination was issued on December 11, 2007 (the "Corporate Appeal Decision").
6. No payment having been received from VTI in respect of the Corporate Determination, the Delegate conducted a BC Online Registrar of Companies Corporation Search which revealed that VTI was incorporated on August 25, 2004, and that Mr. Hutchison was listed as a director on August 29, 2005, on February 17, 2006, and on December 27, 2007. As the Delegate found that the complainants' wages were earned or should have been paid while Mr. Hutchison was a director of VTI, she determined that Mr. Hutchison was liable under section 96 of the *Act*, the relevant portion of which reads:
 - 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.

7. In the result, the Delegate ordered Mr. Hutchison to pay regular wages, vacation pay, compensation for length of service and accrued interest in the amount of \$28,826.44.

ISSUES

8. Is there a basis for my deciding that the Determination must be varied or cancelled, or that the matter must be referred back to the Director for consideration afresh?

ANALYSIS

9. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:

112(1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

- (a) the director erred in law;
- (b) the director failed to observe the principles of natural justice in making the determination;
- (c) evidence has become available that was not available at the time the determination was being made.

10. Section 115(1) of the *Act* should also be noted. It says this:

115(1) After considering whether the grounds for appeal have been met, the tribunal may, by order,

- (a) confirm, vary or cancel the determination under appeal, or
- (b) refer the matter back to the director.

11. In his Appeal Form, Mr. Hutchison attacks the Determination in two ways. He asserts that the Delegate erred in law, and that she failed to observe the principles of natural justice in making the Determination.

Error of law

12. I discern that Mr. Hutchison alleges the Delegate made two errors of law. First, he submits that those parts of the amount he has been ordered to pay which represent unpaid vacation pay or compensation for length of service are not properly to be characterized as "wages" for the purposes of section 96(1). In support of this submission he refers to the fact that section 88(3), which requires employers to pay interest, deems such interest awards to be "wages" for the purposes of the *Act*. By contrast, he notes, section 58, pursuant to which employers must pay vacation pay, and section 63, which requires employers to pay compensation for length of service, contain no provisions deeming any such sums to be "wages."

13. Mr. Hutchison's observations concerning the wording in the *Act* are correct. However, the conclusion he would have me draw from them is untenable. Regarding vacation pay, there is much authority which holds that vacation pay is, indeed, to be included within the definition of "wages" appearing in section 1 of the *Act*, principally because it constitutes "money, paid or payable by an employer to an employee for work" and "money...required to be paid by an employer to an employee under this *Act*" (see, for example,

John Andrew BC EST #D068/99; *Bell v. British Columbia* [1996] BCJ No.1372; and *Pay Less Gas Co. (1972) v. British Columbia* [1991] BCJ No.2721). As for compensation for length of service, the section 1 definition of "wages" states clearly that it incorporates "any liability under section 63." It is immaterial, therefore, that vacation pay and compensation for length of service are not deemed to constitute "wages" in sections 58 and 63, respectively. Indeed, if specific statements to that effect were contained in those sections, they would be redundant.

14. The second error of law alleged by Mr. Hutchison is that the Delegate misapplied section 96(1). He says that the section, properly construed, means that before an individual is determined to be personally liable under it, the individual must have been a director or officer at the time the unpaid wages were earned by an employee of the corporation. I also infer from his submission that Mr. Hutchison wishes me to conclude that part of the complainants' unpaid wages the Determination orders him to pay were earned before he became a director or officer of VTI, and so he should not be responsible for paying anything under section 96(1) in respect of those sums.
15. In my opinion, Mr. Hutchison's submission misconstrues section 96(1). By its plain language, it renders a person liable for up to two months' unpaid wages if the person was a director or officer of a corporation at the time wages of an employee of the corporation were a) earned, or b) should have been paid. Thus, it is not the end of the matter that Mr. Hutchison may not have been a director or officer of a corporation that employed the complainants when the unpaid wages were earned. If, instead, Mr. Hutchison was a director or officer of a corporation, in this case VTI, at a time when the unpaid wages should have been paid, he is also personally liable for up to two months of those unpaid wages (see *Mitton* BC EST #D025/06).
16. It is clear from the Corporate Determination that the components of the unpaid wages found to be owed to the complainants should have been paid at various times from late in 2005 to the time on May 15, 2006 when the complainants' employment ended, and in any event on May 17, 2006. The latter date is critical because section 18(1) of the *Act* requires that an employer pay all wages owing to an employee within 48 hours after the employer terminates the employment. In the Determination, the Delegate refers to corporate searches she conducted which showed that Mr. Hutchison was a director of VTI on dates before, during, and after the period for which the delegate in the Corporate Determination found that wages should have been paid to the complainants. Thus, there was evidence on the basis of which the Delegate could conclude, rationally, that Mr. Hutchison was a director of VTI throughout the relevant period commencing in late 2005, and in any event on May 17, 2006. Mr. Hutchison has tendered no evidence to the contrary. He says, simply, that he did not become a director of VTI until December 31, 2004. I have no reason to doubt that statement, and for the purposes of this appeal I am prepared to accept that it is true. In light of what I have said about the ways in which a person may be found liable under section 96(1), however, it does not assist Mr. Hutchison to avoid personal liability pursuant to that statutory provision.

Failure to observe the principles of natural justice

17. A plea that a delegate failed to observe the principles of natural justice raises a procedural concern that the proceedings which preceded the making of a determination were in some manner conducted unfairly. Typically, a challenge on this ground asserts that a party did not have an opportunity to know the case against it, or an opportunity to be heard in its own defence. This aspect of the obligation is imported directly into proceedings conducted at the behest of a delegate under the *Act* by virtue of section 77,

which requires that if an investigation is conducted, the delegate must make reasonable efforts to give a person under investigation an opportunity to respond.

18. Mr. Hutchison argues that since he was not a party, in his personal capacity, in the proceedings that led to the Corporate Determination, and the Corporate Appeal Decision, he should have been entitled, on natural justice grounds, to re-argue before the Delegate issues that were decided in those proceedings against VTI, at least insofar as they may be said to have an impact on his liability as a director of VTI under section 96. To be specific, Mr. Hutchison says that the delegate who decided the Corporate Determination was wrong in concluding that VTI was a successor corporation for the purposes of section 97 of the *Act*, and that the Tribunal erred when it dismissed VTI's appeal on that issue in the Corporate Appeal Decision. It follows, he asserts, that any vacation pay or compensation for length of service that accrued to the credit of the complainants for periods of service prior to their being employed by VTI, and any interest thereon, should not have been attributed to VTI for the purposes of determining Mr. Hutchison's liability under section 96. In further support of this submission, Mr. Hutchison has delivered copies of corporate documents, agreements, and other communications which, he argues, conclusively show that VTI had no dealings with the corporate bodies of which VTI was determined to be the successor and, indeed, that in separate proceedings the Employment Standards Branch concluded that VTI was not a successor corporation.
19. Previous decisions of the Tribunal have made it clear that in appeals of this type, the doctrine of *res judicata* precludes individuals like Mr. Hutchison from arguing whether VTI was properly found liable in the Corporate Determination (see *Steinemann* BC EST #180/96 and the authorities noted therein). A policy reason underlying this approach is that the enforcement mechanisms of the *Act* are meant to operate quickly and inexpensively, and permitting corporate directors to re-litigate a finding of corporate liability would undermine the fulfillment of that goal. A further rationale is that Mr. Hutchison and VTI can be said to be privies for the purposes of the Corporate Determination, particularly as VTI cannot act except through its directors and officers, and so even if there is not strict mutuality in the identity of the parties in the proceedings leading to the Corporate Determination and the appeal proceedings before me now, it would be an abuse of process to permit re-litigation of matters that have already been determined in those prior proceedings.
20. An exception to this approach occurs in situations where there is fraud or collusion, or fresh evidence is tendered which is decisive and was not available previously through the exercise of reasonable diligence. I am not persuaded that Mr. Hutchison has shown that any of these factors are present here. There is no suggestion made regarding fraud or collusion. I infer that Mr. Hutchison is of the view that the documentary evidence he has presented is of a type which permits me to re-open the Corporate Determination, and the Corporate Appeal Decision which followed it. I do not agree. Even if it could be said that the evidence is decisive, and I do not concede that it is, it consists entirely of material that appears to have been in Mr. Hutchison's possession, or under his control, and therefore available to him, long before the Corporate Determination was made. Indeed, some of it appears to be documentation that was tendered, and considered, in the previous proceedings.
21. As for Mr. Hutchison's statement that another representative of the Director had concluded that VTI was not a successor corporation in separate proceedings involving another employee of VTI, the matter was alluded to in the reasons given for the Corporate Determination where the delegate noted that the complaint in question had been withdrawn and no such determination had been made. On this point, too, Mr. Hutchison offers no proof to the contrary. He merely states that the employee in the other proceedings was advised by a Branch mediator that VTI was not a successor. Assuming that such a

statement was in fact made at a mediation, it could not have aided VTI in the proceedings leading to the Corporate Determination, or in the proceedings before me. Statements made at a mediation are normally made without prejudice. They decide nothing, and are binding on no one, except in circumstances where it may be necessary to determine whether the mediation session has resulted in a settlement. Moreover, it is trite to say that any statement made at a mediation in other proceedings involving another employee could in no way bind Mssrs. Chen and Lin for the purposes of the adjudication of their complaints.

22. It follows that I cannot accede to Mr. Hutchison's argument that the Delegate failed to observe the principles of natural justice in making the Determination.

ORDER

23. I order that the Determination dated May 26, 2008 be confirmed.

Robert Groves
Member
Employment Standards Tribunal