

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Adrenalin III Sports Ltd. and Adrenalin IV Sports Ltd.

(“III” and “IV”)

and

George Leloup

(“Leloup”)

- of a Determination issued by -

The Director Of Employment Standards

(the “Director”)

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 96/571

DATE OF HEARING: February 18, 1997

DATE OF DECISION: March 7, 1997

DECISION

OVERVIEW

The appeal is by George Leloup and the Adrenalin Sports companies, III and IV, pursuant to Section 112 of the *Employment Standards Act* (the “Act”). It is against the Determinations CDET 003915 and DDET 000420 of the Director of Employment Standards, decisions dated September 9, 1996 and September 10, 1996 respectively. Sarah Gleason, Terry Goode, Peter Jones and Gordon Todd were found to be owed wages and compensation for length of service and Wendy Riding and Gillian Wilburn, wages alone, by Adrenalin Sports Ltd. (“ASL”). The limited companies ASL, Adrenalin Sports II Ltd. (“II”), III and IV were found to have George Leloup as owner, director and officer, and related purposes and objectives, and were associated as employer pursuant to section 95 of the *Act*. Leloup was found liable for wages as director and officer of the employer in Determination DDET 420.

APPEARANCES

Michael J. Weiler	Counsel for Leloup, III & IV
Alan Caplan	Witness for Leloup, III & IV
George Leloup	
Sarah Gleason	For the complainants and witness
Gordon Todd	For the complainants and witness
Peter Jones	
Terry Goode	
Wendy Riding	
Richard Gleason	
Michelle Alman	Counsel for the Director
Adele Adamic	Witness and as Director’s delegate

ISSUES TO BE DECIDED

At issue is whether the companies, III and IV, and the company ASL should be associated as employer, pursuant to s. 95 of the *Act*. The appellant argues that the Director should have proceeded against ASL, II and a Mr. Ken Morey for satisfaction of claims, and should not have associated ASL, II, III and IV as employer, because ASL and II were sold to Morey and there was

not common control and direction. The Director maintains that the companies are properly associated as employer.

Also at issue is whether George Leloup is liable for wages as a director or officer of the employer under s. 96 of the *Act*. The appeal argues that Leloup ceased to be a director or officer of the employer on selling ASL and II to Morey. The complainants and the Director say that Leloup is a director/officer of the employer.

FACTS

ASL operated as a retail dive shop in Vancouver. Sarah Gleason, Gordon Todd, Terry Goode, Peter Jones, Wendy Riding and Gillian Wilburn were working for ASL when it ceased operations. All goods and assets were suddenly removed from the shop on April 4, 1996 and with that the business closed.

George Leloup owned all four of the companies that go by some version of the name, Adrenalin Sports. II leased property for ASL. III owns, leases and operates aircraft. IV was established for the purchase and development of real estate and has acquired a leasehold interest in hangars in Langley for III's planes. When Leloup owned the companies, he operated them in an integrated fashion. There were inter-company loans. ASL made mortgage payments and paid for the goods and services of III and IV, such things as fireworks and aircraft repairs. Todd, Jones, and another employee, Frank Smith, cleaned out airplane hangars and yet were paid by ASL.

George Leloup was contacted by the Director's delegate as part of investigating the complaints of the employees. He was at the time listed as sole officer/director of ASL in the records of the Registrar of Companies, and also sole director/officer of Adrenalin companies II, III and IV. Leloup said that he was not an officer, director or shareholder of ASL after February 20, 1996, nor II for that matter, that Morey controlled those two companies. Attempts at contacting Morey proved unsuccessful. Leloup submitted nothing to support his assertions. The Determinations were issued and all four of the Adrenalin companies were declared to be under common control and direction.

As matters have been presented to me, they are not as presented to the Director's delegate. I am presented with photocopies of documents, dated February 20, 1996, which have George Leloup on that day, selling both ASL and II to Morey, principal of the Corporate Search and Rescue Group, for one dollar and unspecified considerations; Leloup resigning as President and officer of ASL; and Leloup nominating Morey as President and sole director of ASL. I have also the benefit of hearing from Alan Caplan, counsel for Leloup and ASL at the time, and witness to the sale. He confirms the sale of the companies and the resignation of Leloup as an officer and director of ASL. And submitted to me is evidence of an action begun in mid-April of 1996 by ASL in Supreme Court of British Columbia [B.C.S.C. Action #C962239]. It has Morey on behalf of ASL, suing Leloup, an April Zalasky and a Joel Burman over the seizure of goods, and in doing so, describing

Leloup as former director, officer, shareholder and general sales manager of ASL, and himself as owner of ASL. I conclude that Leloup sold ASL to Morey on February 20, 1996 and thought that he had resigned as President and director of ASL on that day.

Days after being sold, ASL was in financial difficulty. Employees were paid at the end of February only when a customer paid down its large account. As the end of March neared, ASL was behind in its rent and once again it did not have money to pay its employees. This time the employees were not paid although Leloup lent some of them money on April 2, 1996, writing cheques against a personal account. Two days later, without warning, all goods and assets, and some of Gordon Todd's personal diving gear, were removed from the shop.

Morey, in the five week period between the sale of ASL and its closing, did not work in the dive shop but did visit on occasion. He spoke vaguely of plans he had for ASL. He brought in a new accountant, Ron Orr, and instructed employees to direct major creditors to Orr. He introduced employees to other people said to be part of the management team. On visiting the dive shop he would use ASL's point of sale bank terminal for processing transactions. There is no evidence that he added to ASL's working capital. The day-to-day running of ASL was left to Leloup.

In selling ASL, Leloup agreed to operate the dive shop for Morey. In exchange for what is termed "consulting services", a note has ASL agreeing to pay Leloup between \$50,000 and \$100,000 plus interest, the exact amount depending on how much he was paid in the first twelve months of the deal. On the basis of the direct evidence of Todd and Sara Gleason, ASL's bookkeeper, evidence which is not contradicted by Leloup, I conclude that, after the 20th of February, Leloup;

- was in the dive shop virtually as often as he was before the sale of ASL,
- directed employees and dive shop operations;
- promoted the business of ASL;
- dealt with customers and small creditors;
- took customers out for dives and instruction;
- gave instructions to order diving equipment; and
- in terms of matters financial, signed cheques on behalf of ASL, remained responsible for the Point of Sale bank terminal, withdrew moneys from ASL as charter expenses through an account called the RSCU account, and took excess cash from the till at the end of work days, just as he did before selling the company.

The Director accepts that the loans by Leloup are a form of payment to employees and consents to their deduction from what has been found owed for the period March 15 to March 31, 1996.

ANALYSIS

In the relevant period, Morey owned ASL and the company II. Leloup owned III and IV and operated as consultant to ASL, operating ASL for Morey. Has the Director erred in associating the companies ASL, III and IV as employer under s. 95 of the *Act*?

Section 95 is as follows:

95. *If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,*

(a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one person for the purposes of this Act, and

(b) if so, they are jointly and separately liable for payment of the amount stated in a determination or in an order of the tribunal, and this Act applies to the recovery of the amount from any or all of them.

For businesses, trades or undertakings to be associated under section 95 there must be,

- more than one corporation, individual, firm, syndicate or association;
- the carrying on of business, a trade or an undertaking;
- common control or direction; and
- a statutory purpose for treating the entities as one employer.

In the matter before me, businesses and undertakings have been carried on by or through more than one corporation and also Leloup operating as consultant to ASL, and there is a statutory purpose to the treating of the entities as employer, namely, the provision and enforcement of the basic employment standards of the *Act*. But were ASL, III and IV under common control and direction in the relevant period, ASL and II having been sold to Morey?

Section 95 of the *Act* allows the Director to look beyond ownership in the strict legal sense, to pierce the corporate veil, so that all parts of a business whole can be held accountable in the event of an insolvency. Ownership and financial control are an important part of assessing common control and direction but common ownership is not necessary for a finding of common control or direction. It is enough to show that businesses, trades and/or undertakings are **in practice** run by a person or group and in that regard, control need not be perfectly overlapping [*Invicta Security Systems Corp.* BCEST No. 349/96]. Even in the absence of a single guiding force in day-to-day operations or actual control of shareholdings, there may be common control or direction through the functional interdependence of businesses [*Wills Enterprises Ltd.*, BCLRB No. 153/84 (1984), 6 CLRBR (NS) 231] [See also *Sangard Electrical Ltd.*, BCLRB No. B101/94].

In the matter before me, in the period for which wages are owed, Morey as owner, President and a director of ASL had control of ASL but not complete control. It is Leloup that was in charge of day-to-day operations. He acted as general manager of ASL, that is clear from the duties, tasks and functions that he performed in the relevant period. It is Leloup that had operational control, and beyond that, he exercised surprising financial control, cheque signing authority and an ability

to withdraw money from ASL as if he were owner of the company. And in withdrawing moneys as he did, he continued to act, or reverted to acting, as owner of ASL. The company was run by both Leloup and Morey in the relevant period, that is my conclusion. Each had an important hand in its slide towards insolvency.

Despite selling ASL, Leloup continued to direct and control ASL in important respects. In the relevant period, he had complete control of the companies III and IV and operated as George Leloup consultant to ASL. It is the practice of Leloup to operate his businesses and undertakings in an integrated fashion. A common thread of control runs through the businesses ASL, III and IV and that is Leloup. The Director has associated the companies as employer, pursuant to s. 95. I see no reason to change that declaration, there is a sufficient basis for it.

I now turn to the matter of Determination DDET 420 which is against George Leloup as a director/officer of the employer. Section 96 (1) of the *Act* is as follows:

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.

The *Employment Standards Act* does not define “officer” or “director” as it is used in s. 96. One must look to the *B.C. Company Act* for guidance [*Erwin Penner and Beverly Hauff*, BC EST No. D371/96]. In that act, “director” is defined in section 1 (1) as,

“director” includes every person, by whatever name he is designated, who performs the functions of a director.

The *B.C. Company Act* does not define the term “officer” but rather the position of “senior officer”. That term is defined as follows:

“senior officer” means the chairman or any vice chairman of the board of directors, the president, any vice president, the secretary, the treasurer or the general manager of the corporation or any other individual who performs functions of the corporation similar to those normally performed by an individual occupying any of those offices, and the 5 highest paid employees of a corporation, including any individual referred to in this definition.

It is then not the title that is given a person by a corporation which is of primary importance in determining who are its officers and directors, nor is it the fact that a person is or is not listed as officer or director in the records of the Registrar of Companies. It is whether a person **performs** the functions of an officer or director [*G. Elmitt Construction Ltd. v. Kaplan* 1 C.L.R. (2d) 219]. As found above, Leloup functioned as general manager of ASL and directed it in important ways. He is a director/officer of the principal employer. Leloup is as well sole director/officer of the companies III and IV, companies associated as employer pursuant to section 95 of the *Act*. As such he is liable for wages pursuant to s. 96 of the *Act* as director/officer of the employer. Determination DDET 420 is confirmed in that respect.

The Director consents to the deduction of loans from the amount of wages which is owed the complainants. The amount owed employees who received loans is varied accordingly and as follows:

<u>REVISION of AMOUNTS OWED EMPLOYEES in DETERMINATION 3915</u>				
	Amt. Of Determination	Loan	Remainder	Total incl. Interest
Sara Gleason	\$2,378.80	\$784.93	\$1,593.87	\$1,636.90
Terry Goode	1,675.51	645.25	1,030.26	1,058.08
Peter Jones	3,631.99	776.60	2,855.39	2,932.49
Gordon Todd	2,864.00	784.93	2,079.07	2,135.21

<u>REVISION of AMOUNTS OWED EMPLOYEES in DETERMINATION 420</u>				
	Amt. Of Determination	Loan	Remainder	Total incl. Interest
Sara Gleason	\$1,418.79	\$784.93	\$633.86	\$650.97
Terry Goode	1,253.11	645.25	607.86	591.88
Peter Jones	1,711.99	776.60	935.39	960.65
Gordon Todd	1,423.99	784.93	639.06	656.31

ORDER

I order, pursuant to Section 115 of the *Act*, that the Determinations CDET 3915 and DDET 420 be varied in respect to the amount of moneys which is found to be owed employees, so that they reflect deductions for loans as is set out in the above two tables.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

LDC:lc