

An appeal

- by -

Paul Nell, a Director or Officer of California Shutters & Shades Inc.
(“Nell”)

- 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

ADJUDICATOR: Norma Edelman

FILE No.: 2002/044

DATE OF DECISION: April 8, 2002

DECISION

OVERVIEW

This is an appeal by Paul Nell ("Nell") under Section 112 of the *Employment Standards Act* (the "*Act*") of a Determination, which was issued against him as a director or officer of the California Shutters & Shades Inc. ("California Shutters") by a delegate of the Director of Employment Standards on January 10, 2002. The Determination requires Nell to pay \$6067.73 as a result of a finding that he is personally liable for wages owing to four former employees of California Shutters. That liability arises from Section 96 of the *Act*.

ISSUE TO BE DECIDED

Did the delegate err in determining that Nell is liable under Section 96 to pay wages in the amount of \$6067.73 to four former employees of California Shutter?

FACTS AND ARGUMENTS

On October 22, 2001, the delegate issued a Determination against California Shutters, which found that it owed four former employees a total of \$6067.73. I shall refer to this Determination as the corporate Determination.

There has been no appeal of the corporate Determination.

On January 10, 2002, the delegate issued the Determination, which is the subject of this appeal. In it, Nell is found liable as a director or officer of California Shutters for the same amount of wages as set out in the corporate Determination.

Nell filed an appeal on February 4, 2001. He does not dispute that he is an officer/director of California Shutters, nor does he dispute that the delegate has erred with respect to the calculation of his personal liability. Nell says he was denied the opportunity to respond to the investigation. He further says:

- Employees did not give time or notice.
- All monies were paid.
- Mabel Shau is not a Director of this company.

The delegate and one employee replied to Nell's appeal.

The employee said he agreed with the Determination and he enclosed a Record of Employment to support his position that he is owed the amount of wages set out in the Determination.

The delegate said the corporate Determination was served on the company with copies sent to the directors and officers. The company filed no appeal and a director/officer cannot now argue the merits of the corporate Determination. Nell is limited to arguing the issue of his personal liability under Section 96 of the *Act*. According to the delegate, Nell's appeal should be dismissed as he admits he was a

director/officer of California Shutters at the time wages were earned and the amount of wages owed by Nell is less than 2 months wages for each employee and therefore is within the statutory limit.

Nell was given an opportunity to reply to the submissions of the delegate and the employee. The Tribunal received no reply.

ANALYSIS

Section 96(1) of the *Act* creates a personal liability for corporate officers and directors, as follows:

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 two months unpaid wages for each employee.

The Tribunal has consistently held that an appeal by an officer or director must be limited to the issues that arise under Section 96 of the *Act* -- whether she/he is or was a director or officer of a certain corporation and/or whether the calculation of her/his personal liability is correct. A director or officer is estopped from arguing the merits of the corporate Determination, except when there has been fraud in the issuance of the corporate Determination or where she/he has cogent new evidence not previously available: (*Steinemann*, BCEST # D180/96, *Perfecto Mondo Bistro* BCEST # D205/96, and *Seacorp Properties Inc.* BCEST # D440/97).

Nell does not admit he is an officer/director of California Shutter as submitted by the delegate. However, he does not dispute his status as a director or officer of California Shutters at the time wages were earned or should have been paid to the four employees and he does not claim that the calculation of his personal liability is in error. Rather, he argues the merits of the liability of the corporation and he also says Mabel Shau is not a director and he was not given the opportunity to respond to the investigation. However, whether Mabel Shau is or is not a director of California Shutters is not pertinent to this appeal. Furthermore, Nell provides no particulars regarding his allegation that he was denied an opportunity to respond to the investigation and as result I find no basis to cancel the Determination on that basis. Finally, Nell does not deny he received a copy of the corporate Determination. As noted above, no appeal was filed with respect to the corporate Determination. If Nell had wished to challenge the employees' wage claims he could have (but chose not to) caused the company to file the appropriate appeal. Having failed to do so, the principle of issue estoppel applies and he is not entitled to utilize the present appeal process to reopen the Determination issued against California Shutters. There are some limited exceptions to the issue estoppel principle, none of which applies here. Nell has not shown evidence of fraud in the issuance of the corporate Determination as it relates to the four employees nor has he provided any new and relevant evidence that was not in existence at the time the corporate Determination was issued. For the foregoing reasons Nell's appeal must fail.

ORDER

I order, under Section 115 of the *Act*, that the Determination dated January 10, 2002 be confirmed.

Norma Edelman
Adjudicator
Employment Standards Tribunal