



An appeal

- by -

Stan Polsom, a Director or Officer of Mountainview Mobile Homes Ltd.  
(“Stan Polsom”)

- 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:** W. Grant Sheard

**FILE No.:** 2000/876

**DATE OF DECISION:** March 14, 2001

## DECISION

### SUBMISSIONS:

Stan Polsom	on his own behalf
Berhane Semere	on behalf of the Director
No One	on behalf of the Employee, James M. Lamberton

### OVERVIEW

This is an appeal based on written submissions by Stan Polsom, the Director or Officer of a corporate employer, Mountain View Mobile Homes Ltd., pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination of the Director of Employment Standards (the “Director”) issued on November 29, 2000. The Director had earlier found in a Determination dated June 14, 1999 that the corporate employer had contravened sections 40 and 63 of the *Act* regarding wages for overtime and compensation for length of service ordering the company to pay the employee, James M. Lamberton, \$15,244.74. In the Determination of November 29, 2000 the Director found that the corporate employer had not paid the wages determined to be owed, that Stan Polsom was a Director/Officer of the employer at the relevant times and therefore applied section 96 of the *Act* and ordered Stan Polsom to pay unpaid overtime wages equivalent to two months’ wages of \$4,992.00.

### ISSUE

In an appeal of a Determination against a Director/Officer of a corporate employer, can the Director/Officer appeal the issue of the corporation’s liability for wages, or is the Director/Officer limited to arguing the issues of whether he is a Director/Officer of the company (or whether he was at the material times) and whether the amount of the Determination falls within the 2 month ceiling for a Director/Officer’s personal liability for unpaid wages under section 96 of the *Act*?

### ARGUMENT

#### *The Position of The Director/Officer of the Employer*

In written submissions dated December 21, 2000, Stan Polsom asserts that the employee was paid more than the industry standard and that he and the corporate employer are, for all intents and purposes, bankrupt. He offers to assign accounts receivable as payment in full.

### *The Employee's Position*

The Employee did not file submissions on this appeal.

### *The Director's Position*

The Director's Delegate says in written submissions dated January 19, 2001 that the appellant's arguments are not relevant as they appear to address the liability of the corporate employer and the Determination issued against it on June 14, 1999. The Director's Delegate further submits that the only two grounds for an appeal of the Determination against Stan Polsom as director of the company are whether he was a Director at the time wages were earned and should have been paid and whether the calculation of his personal liability is correct. The Delegate says that the appeal fails to address either of these issues and should therefore be dismissed.

## **THE FACTS**

In a Determination dated June 14, 1999, the Director's Delegate found that the corporate employer, Mountain View Mobile Homes Ltd., had contravened sections 40 and 63 of the *Act* regarding overtime wages and compensation for length of service and ordered the corporate employer to pay the employee, James M. Lamberton, \$15,244.74. The corporate employer submitted an appeal of that Determination to the Employment Standards Tribunal, but that application for appeal was dismissed as incomplete.

In evidence presented during the investigation of the Determination of June 14, 1999, Russ Polsom, a manager of the employer, indicated Stan Polsom was a Director/Officer of the corporate employer at the time the wages were earned or should have been paid. The Delegate further found in the Determination of November 29, 2000 that a BC Online Registration of Companies Corporate Search indicates that Stan Polsom was listed as a Director/Officer of the employer company as at May 21, 1999 and the company was incorporated on November 5, 1991. James Lamberton's unpaid wages were earned between December 13, 1994 to December 12, 1996. Stan Polsom was a Director/Officer of Mountain View Mobile Homes Ltd. and was so appointed at the time the wages were earned and became payable. The Director's Delegate determined that James Lamberton is entitled to unpaid overtime wages equivalent to his two months' wages of \$4,992.00 from Stan Polsom pursuant to section 96 of the *Act*.

## ANALYSIS

Section 96 of the *Act* provides as follows:

s.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.

The issue of whether a Director/Officer of an employer corporation found liable for unpaid wages under section 96 of the *Act* can appeal the issues of the company's liability or whether that Director/Officer is limited to arguing the issues of whether the Director/Officer was a Director/Officer at the relevant times or whether the amount falls within the 2 month ceiling for such personal liability was squarely dealt with by this Tribunal in the case of *Steinemann, Kerry Director/Officer of Pacific Western Vinyl Windows & Doors Ltd.*, BC EST #D180/96 (Adjudicator N. Edelman) ("*Steinemann*")

In *Steinemann*, Adj. Edelman said, in part, as follows:

It is my opinion that the doctrine of res judicata, and particularly issue estoppel, operates to prevent Steinemann from arguing the issue of the company's liability for wages.

Res judicata provides that a thing or matter which has been previously decided should, as a matter of policy, be binding on the parties or their privies, which are persons who partake or have an interest in some act. Issue estoppel is a species of res judicata. It covers individual issues addressed in earlier proceedings which necessarily and fundamentally form the basis of the judgment delivered. The doctrine of issue estoppel applies to decisions of administrative tribunals as well as courts [*Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (C.A.)].

Issue estoppel operates to prevent a party from raising an argument at a later proceeding if the following conditions are present:

1. The same question has already been decided;
2. The previous decision was final; and
3. The parties to the decision, or their privies, were the same persons as the parties, or their privies, to the proceedings in which the estoppel is raised.

In *Stelmaschuk v. Dean* [(1995) 13 C.C.E.L. (2d) 220; [195] 9 W.W.R. 131] the Northwest Territories Supreme Court accepted that the doctrine of issue estoppel, in the context of an employment standards proceeding, applied to preclude a director from relitigating the issue of a company's liability.

Further on she continued saying:

*Evans v. British Columbia (Employment Standard Board)* (1983), 149 D.L.R. (3d) 1 (B.C.C.A.), the Court held that it was consistent with the aims of the legislation to impose liability on directors and to preclude them from relitigating the company's liability. The enforcement mechanisms of the legislation was meant to be quick and inexpensive and it would be counterproductive to those aims to have constant relitigation of the same issues.

In my opinion, it is wholly consistent with the purpose of the legislation, and the summary administrative enforcement scheme contained within it, to say that a director, on whom liability is imposed because of section 62 of the *Act*, should not be able to relitigate the underlying liability of the company.

The only exception would be in the case of fraud or collusion being shown, or the tendering of fresh evidence which would be decisive and was not available previously throughout the exercise of reasonable diligence. None of those factors are present here.

As in *Steinemann*, there is no evidence in this case of fraud or collusion or of fresh evidence which would be decisive and was not available previously. I agree with the Director's Delegate and, following *Steinemann*, find that, in the absence of fraud, collusion, or decisive fresh evidence not previously available, a Director/Officer of an employer company appealing a Determination of personal liability under section 96 of the *Act* is limited to arguing issues of whether he was a Director/Officer at the time the wages were earned and should have been paid or whether the amount of the Determination falls within the 2 month ceiling on such personal liability.

The comment of Ms. Edelman in *Steinemann* is apt:

The intent of Section 96 of the *Act* is to provide the Director of Employment Standards with a way of collecting wages that are owed by a company to its employees. It ensures that employees are protected against insolvent employers - which appears to be the case with Pacific Western - through making directors and officers liable, within limits, for the payment of wages. This section of the *Act* was not meant to provide a company with a further opportunity to dispute the company's liability for wages.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination of this matter, dated November 29, 2000 and filed under number 82-995, be confirmed.

***W. GRANT SHEARD***

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**W. Grant Sheard  
Adjudicator  
Employment Standards Tribunal**