

An appeal

- by -

Modern Logic Inc. -and- Auto - Carpark Controls Ltd. -and- Traf-O-Data
Investment Corp -and- Modern Access Systems Inc. Associated Corporations
under section 95 of the Employment Standards Act (Appeal by Modern Access
Systems Inc.)

(“Modern Access Systems Inc.”)

- 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: Kenneth Wm. Thornicroft

FILE No.: 2001/878

DATE OF DECISION: April 25, 2002

DECISION

INTRODUCTION

This is an appeal filed by Modern Access systems Inc. (“Modern Access”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”). Modern Access appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on December 11, 2001 (the “Determination”).

The Director’s Delegate determined, in accordance with section 95 of the Act, that Modern Access, Modern Logic Inc., Auto-Capark Controls Ltd. and Traf-O-Data Investment Corp. were “associated corporations” and, accordingly, jointly and severally liable for \$38,384.21 on account of unpaid wages and interest owed to seven former employees of Modern Logic Inc. Section 95 of the Act provides as follows:

Associated corporations

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 the determination or in an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.

By way of a letter dated March 14th, 2001, the parties were advised by the Tribunal’s Vice-Chair that this appeal would be adjudicated based on the parties’ written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). I might add that Modern Access in its appeal documents indicated that “we do not feel we require an oral hearing”.

ISSUES ON APPEAL

Modern Access’ reasons for appeal are set out in a two-page letter dated December 24th, 2001 appended to its notice of appeal. This letter is signed by Mr. George Asp in his capacity as “Secretary” of Modern Access and, in general terms, asserts that Modern Access should not have been made a party to a section 96 declaration with the other named firms and that the Director proceeded to do so without proper notice. In particular, Mr. Asp says that:

- “...the Director of Employment Standards in the above-noted Determination has, without any notice whatsoever, associated our company, [Modern Access], with Modern Logic Inc, Auto-Carpark Ltd. and Traf-O-Data Investment Corp. for the purposes of his determination under the Labour Standards Act.” (sic);

- “[Modern Access} was given no notice prior to the final Determination of the Director of Employment Standards that he was considering associating our company – we had no chance to present evidence nor were we presented with the evidence of the Complainants so that we could answer same.”;
- “Both Modern Logic and Auto-Carpark are wholly owned subsidiaries of Traf-O-Data Investment Corp. (hereinafter collectively called the ‘TOD Group’.”;
- “Prior to the relevant dates pertaining to the claims of the Complainants...George Asp was a shareholder of Traf-O-Data Investment Corp. and a director of each of those members of the TOD Group.”;
- “G. Asp had loaned the TOD Group, jointly and severally, substantial sums of money (which, with interest, eventually exceeded \$1.5 million).”; and
- “In April of 2001 G. Asp, through his legal counsel, make a formal settlement proposal...to settle his secured claim against the Group...[and later a]...modified proposal was acknowledged and accepted by the parties effective the 19th day of November, 2001...It was on the basis of this ‘foreclosure’ procedure to realize debt on security that Modern Access Systems Inc., as the nominee of the secured creditor, George Asp, took possession of the assets of the TOD Group.”

FINDINGS

Section 77 of the Act

I shall first address the question of whether Modern Access was given prior notice of the employees’ unpaid wage claims, and its possible liability for those claims by reason of section 95, prior to the issuance of the Determination. Although not mentioned directly, Modern Access raises an argument with respect to section 77 of the Act which states:

Opportunity to respond

77. If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

In his submission to the Tribunal dated January 28th, 2002, the Delegate states that Mr. Asp was informed in writing “that an association of all companies listed would be investigated”. I have before me the one-page letter to which the Delegate refers, dated July 18th, 2001 and addressed to Mr. Asp. In my view, even the most generous reading of this letter does not satisfy the dictates of section 77 with respect to Modern Access.

First, the letter is addressed to Mr. Asp in his personal capacity and primarily concerns his potential liability under section 96 of the Act as an officer or director with Modern Logic Inc. The Delegate requests that Mr. Asp contact him forthwith “regarding the potential liability incurred by you” (i.e., Mr. Asp personally).

Second, Modern Access is not mentioned anywhere in the letter. The reference at the outset of the letter refers to only three of the four companies – Modern Access is not listed. In the body of the letter, Moder

Logic is identified as an entity that “shut down it[s] operation” without paying certain wages. The *only* reference to section 95 states:

“Also I have enough information that associates *all the companies listed above* under section 95 of the Act. This will enable me to treat *all the entities* as one employer for the purpose of collecting wages under the Act.” (my *italics*)

The final paragraph of the Delegate’s July 18th letter is reproduced below:

“It is important that you contact me as soon as possible regarding the potential liability *incurred by you*. If no response is received by 1:00 pm July 27, 2001 I will proceed to file the determinations and pursue each and all entities, including directors/officers [*sic*], for the balance of wages determined. For the purpose of this investigation the aforementioned dated can be used as an extension to the demand for records attached” [directed to Modern Logic]. (my *italics*)

As previously mentioned, in my view, even the most generous reading of the Delegate’s July 18th letter would not lead the reader to conclude that Modern Access was being investigated for purposes of association under section 95 of the *Act*. Indeed, even with respect to the firms that are named, the Delegate simply asserts that he *intends* to issue a section 95 declaration based on information that he has in hand. The Delegate does not disclose the nature of such information, nor does the Delegate ask for any submissions with respect to a possible section 95 declaration. In my view, the Delegate presents the section 95 issue as a *fait accompli*. Further, the primary thrust of the letter from Mr. Asp’s point of view is his potential personal liability under section 96 by reason of his status as an officer or director of Modern Logic.

The Tribunal has previously held that if a Determination is issued without prior compliance with section 77, that Determination is void (see e.g., *Tina Argenti*, BC EST # D332/00; *Terry Pasiuk*, *Graeme Go*, *Directors/Officers of Pacific Office & Business Systems Inc. operating as Pacific Office 'N Things*, and *Pacific Office & Business Systems Inc. operating as Pacific Office 'N Things*; BC EST # D007/98; *Cineplex Odeon Corporation*, BC EST # D577/97).

However, it is an accepted principle of administrative law that where an administrative decision-maker has failed to satisfy a disclosure obligation, that failure can be cured if the requisite disclosure is made in the course of a later administrative hearing. All of the relevant information with respect to the possible application of section 95 vis-à-vis Modern Access is before me. I do not consider it to be a fair and efficient procedure [see subsections 2(b) and (d) of the *Act*] to simply refer the matter back to the Director [which could result in another Determination that, in turn, might be appealed to the Tribunal yet again] if the matter can be properly addressed by the Tribunal.

As noted above, one could characterize the Determination as being void, at least with respect to Modern Access, by reason of the Delegate’s failure to comply with section 77. However, in my view, the section 95 declaration as against Modern Access is also problematic in substantive terms.

The only basis set out in the Determination for associating Modern Access with the three other named firms is the allegation that “Modern Systems In. [*sic*, Modern Access Systems Inc.] of the Asp Group of companies purchased the assets of [the] Traf-O-Data Group of Companies”. The material before me shows that by way of an agreement entered into on November 19th, 2001, Modern Access agreed to acquire certain assets owned by Auto-Carpark Controls Ltd., Modern Logic Inc. and Traf-O-Data Investment (U.S.A.) Corp. The completion date for the asset sale was fixed as January 9th, 2002.

The catalyst for the filing of the seven employees' unpaid wages was the closure of Modern Logic Inc.'s operations on or about February 28th, 2001. The unpaid wage claims for five of the seven employees span periods all ending on February 28th, 2001. The two other employees' claims span periods ending as of January 15th and April 8th, 2001 respectively. Thus, in each and every case, the employees' wage claims crystallized well before Modern Access acquired the assets of the other three firms named in the section 95 declaration. It seems apparent that at the time the unpaid wage claims of the seven employees crystallized, Modern Access was not involved in any sort of common business enterprise with any of the other three firms.

Having purchased the assets of, inter alia, Modern Logic, Modern Access might have been held liable under section 97, however, in every case the seven complainants' employment with Modern Logic ceased prior to the asset sale and thus section 97 would not appear to be applicable in this case. Alternatively, it may be that the assets acquired by Modern Access are subject to a lien (section 87) in favour of the Director [see *Helping Hands Agency Ltd. v. Director of Employment Standards* (1995), 131 D.L.R. (4th) 336 (B.C.C.A.)], however, that is not a matter that is before me.

ORDER

Pursuant to section 115 of the *Act*, I order that the section 95 declaration set out in the Determination be varied by deleting Modern Access Systems Inc. as one of the associated corporations. It follows that the Determination must also be varied to indicate that Modern Access Systems Inc. has no monetary liability whatsoever under the Determination.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal