

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

Raymond Man Wah Lee, Director/Officer of C-O-E Posscan Systems Inc.

-and-

Blaine Howard Rowlett, Director/Officer of C-O-E Posscan Systems Inc.

- of Determinations issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib Skov Petersen

FILE No.: 1999/702, 1999/703, 1999/704 and
1999/705

DATE OF DECISION: April 17, 2000

DECISION

SUBMISSIONS

Mr. Raymond Man Wah Lee	on behalf of himself
Mr. Blaine Howard Rowlett	on behalf of himself
Mr. Douglas Stevens	on behalf of himself
Mr. W.H. Dennis	on behalf of himself

OVERVIEW

This is an appeal by Mr. Lee (“Lee”) and Mr. Rowlett (“Rowlett”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against four Determinations of the Director of Employment Standards (the “Director”) issued on October 25, 1999 which determined that Lee was liable as a corporate director and officer for two months wages to two former employees of C-O-E Posscan Systems Inc. (“Posscan” or the “Employer”): Mr. Douglas Stevens (“Stevens”), for a total of \$2,358.12, and to Mr. Dennis Law (“Law”), for a total of \$17,156.12. A corporate determination was issued on June 24, 1999 and appealed. The appeal was dismissed.

The Director’s delegate found that Lee and Rowlett were directors or officers of Posscan. Lee and Rowlett take issue with the findings that Rowlett is a director/officer and dispute the calculation of the amounts awarded.

FACTS AND ANALYSIS

Section 96 of the *Act* provides for personal liability for corporate directors and officers. They may be liable for up to two month’s unpaid wages for each employee, if they were directors and officers at the time the wages were earned or should have been paid.

The appellants argue that the Determinations with respect to Stevens contain the following errors:

- 1) The Determinations name Blaine Howard Rowlett, The correct name is Blaine Harold Rowlett. The appellants request that the error be corrected.
- 2) The appellants point out that the corporate determination awarded interest for the period August 25, 1998 to June 24, 1999 and that the Determinations against them as directors or officers also included an amount of interest for the period August 25, 1998 to October 25, 1999, i.e., that there was an error in the calculation of the amount owed.

The delegate and Stevens agree that the Determinations should be amended to reflect the errors, i.e., that the correct name is Blaine Harold Rowlett, and the correct amount is \$2,188.36. The

appellants do not take issue with that. There is no issue that Rowlett did not receive the correspondence from the delegate (or the Determinations) or that he has otherwise been prejudiced by the error. I order the Stevens Determinations amended to reflect the changes.

The appellants argue that the Determinations with respect to Law contain the following errors:

- 1) The Determinations name Blaine Howard Rowlett, The correct name is Blaine Harold Rowlett. The appellants request that the error be corrected.
- 2) The amount awarded to Law is incorrect.

The delegate argues, and it is not disputed by the appellants, that the Law Determinations should simply be amended to reflect the correct name. I so order.

With respect to the second aspect of the appeal of the Law Determination, Lee and Rowlett appear to be questioning the findings of the corporate determination which held that Dennis was owed \$19,022.09, including interest to June 4, 1999. In response to Posscan's appeal, the delegate amended the amount owing to \$18,315.06, including interest. This determination was confirmed on appeal. The grounds of appeal are not entirely clear and, insofar as they relate to the corporate determination, I dismiss them. It appears that Lee and Rowlett take issue with the inclusion of commissions in unpaid wages earned between September 1, 1997 and August 24, 1998. They say that all issues regarding commissions prior to April 1998 had been resolved. They further say that the "only amount of wages outstanding is for the period of August 1, 1998 to August 24, 1998, plus holiday pay on these amounts. ... With the exception of this period, Mr. Law was paid in full for all wages since the beginning of his employment..." Lee and Rowlett also appear to draw a distinction between wages and commissions. It is clear from the definition of "wages" in Section 1 of the Act that "wages" includes "commissions". In any event, in my view, this ground of appeal relates to the findings in the corporate determination. Those findings are not open to review here. The Tribunal has already upheld the determination that Posscan is liable for the amount in the corporate determination, \$18,315.06, including interest.

Lee and Rowlett also appear to argue that they should only be liable for the wages earned during the last two months' employment. In my view, this is not a correct interpretation of the *Act*. Section 96 provides:

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 two months' unpaid wages for each employee.

I agree with the Adjudicator in *Docherty*, BCEST #D248/99, that Section 96 simply creates a "ceiling" based on the employee's monthly wages. "Unpaid wages" in Section 96 do not refer to the balance owing on the wages for the last two months of employment. In *Docherty*, above, the appellant made that argument and I accept the comments by the Adjudicator in that case, at page 3 (QL version):

“If the appellant’s position ... was adopted, a truly absurd result would obtain. In circumstances where the employee’s wages had not been paid in full, the directors or officers of the company need only to ensure that the employee was underpaid, say by \$1 in each of the last two months of employment, and would thereby affix their personal liability under Section 96 at \$2, irrespective of the actual amount of the employee’s unpaid wages. I cannot conceive that this sort of manipulation could be lawfully accomplished using Section 96 as it is currently drafted. Section 96 simply restates what Section 19(1) of the former *Act* mandated, namely, a corporate officer or director may be held personally liable for employees’ unpaid wages, but such liability cannot exceed the equivalent of two months’ wages per employee.”

As noted by the Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd.*, <1992> 1 S.C.R. 986, an “interpretation ... which encourages employers to comply with the minimum requirements of the *Act*, and so extends its protection to as many employees as possible, is to be favoured over one that does not”.

The Determination uses the last four months of Law’s employment to calculate average earnings in order to determine the “ceiling” of two months’ wages. Lee and Rowlett argue that is incorrect. The salary is stated to be \$6,000 per month. Commissions earned are stated to be \$10,312.22 for the four month period. From that the delegate calculates monthly average wages of \$8,578.06 which multiplied by two is \$17,156.12. That amount, of course, is less than the amount awarded in the corporate determination. Lee and Rowlett argue that the selection of four months is arbitrary. The delegate responds that he selected four months because “the last four months ... was the period during which the bulk of the outstanding commissions were earned” and that it was, therefore, “reasonable” to use that period.

As far as I am aware, this is the first time the meaning of “2 months unpaid wages” has been before the Tribunal. However, in my opinion, the delegate does not have the discretion to arbitrarily select a period he finds “reasonable” for the purpose of calculating the monthly wage. The *Act* is silent on the meaning of “2 months unpaid wages”. The definition of “wages” is not particularly helpful here. It is clear, however, that wages include salaries and commissions (see Section 1). The *Act* defines “regular wage”, in the case of an employee paid a monthly wage, as would appear to be the case here, as the monthly wage multiplied by 12 and divided by the product of 52 times the lesser of the employee’s normal or average weekly hours of work”. The phrase “regular wage” is used elsewhere in the Act, for example, in Part 4 (Hours of Work and Overtime) and Part 8 (Termination of Employment). Section 40 provides that overtime wages are time and one half or double the employee’s “regular wage”. Section 64 provides a method of calculating the employee’s severance entitlement with reference to “regular wage” during the last 8 weeks in which the employee worked “normal or average hours of work”. The phrase “regular wage” is not used in Section 96. If the legislature had intended to define “2 months unpaid wages” with reference to “regular wage”, the *Act* presumably would have provided for this.

Given the remedial purpose of the *Act*, I do not accept that the legislature intended to define the “ceiling” on director/officer liability with reference to the actual earnings or wages in the last two

months. In my view, the legislature have intended to define “2 months unpaid wages” with reference to “normal” wages (see, for example *Kenpo Greenhouses Ltd. v. British Columbia (Director of Employment Standards)*, <1997> B.C.J. No. 541 (B.C.S.C.)). Unless an interpretation that is based on “normal” wages is adopted, truly absurd results would obtain. If an employee earned little in the last two months of employment compared to previous months the employee would lose, and the director or officer would benefit. On the other hand, if an employee earned high wages in the last two months of employment compared to previous months he or she would benefit, and the director or officer would lose. For example, if an employee has been employed for one year, earning \$4,000 per month for the first ten months of the year, but--for some reason--only, say, \$1,500 for the last two months of his or her employment, the director/officer liability would be \$3,000. If, on the other hand, the employee’s wages are \$1,500 per month for the first ten months of the year, but--for some reason--say, \$4,000 for the last two months of his or her employment, the director/officer liability would be \$8,000. The legislature cannot have intended this result. In other words, the ceiling must be established with reference to “normal” wages.

The Canadian Oxford Dictionary (Toronto: Oxford University Press, 1998) defines “normal” as follows (in part):

“**Normal** adj. & n. adj. **1** constituting or conforming to a standard; regular, usual, typical ... n. **1a** the normal value of a temperature etc. ... **1b** the usual state, level, etc. (*things have returned to normal*)...”

Black’s Law Dictionary (St.Paul, Minn.: West, 1979) provides the following definition of “normal”:

“According to, constituting, or not deviating from an established norm, rule, or principle; conformed to a type, standard or regular form; performing proper functions; regular; average; natural ...”

In my opinion, “normal” wages means the wages that are earned by an employee over a period of time and are reasonably reflective of the employee’s typical, regular or usual wages.

I take comfort in that interpretation in Section 2 of the *Act* which provides (in part):

2. The purposes of this Act are as follows:
 - (a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;
 - (b) to promote the fair treatment of employees and employers;

In my view, an interpretation of “2 months unpaid wages” that is based on the “normal” wages of an employee is fundamentally more fair to both the employer and the employee.

While I am reluctant to set aside the Determination, keeping in mind that the appellants have the burden to show that the Determination is wrong, I agree that the delegate erred when he

determined the “2 months unpaid wages” based on the last four months of employment for the purpose of liability under Section because “the last four months ... was the period during which the bulk of the outstanding commissions were earned” and that it was, therefore, “reasonable” to use that period. In the circumstances, the delegate may well have “overestimated” the director/officer liability and I refer the determination of liability with respect to the Law Determination back to the director based on the principles set out in this Decision.

ORDER

Pursuant to Section 115 of the Act, I order that the Determinations in this matter, dated October 25, 1999 be confirmed, except to the extent that I refer the matter of director/officer liability with respect to the Law Determination back to the Director for calculation in accordance with the principles set out herein.

IB S. PETERSEN

**Ib Skov Petersen
Adjudicator
Employment Standards Tribunal**