

An appeal

- by -

Jaroslav Bucko, a Director or Officer of Alya International Inc. and Alya
Systems Inc. (Associated Corporations)
("Bucko")

- 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.: 2000/839

DATE OF DECISION: April 9, 2001

DECISION

OVERVIEW

This is an appeal brought by Jaroslav Bucko (“Bucko”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Bucko appeals an “Amended Determination” issued by a delegate of the Director of Employment Standards (the “Director”) on November 20th, 2000 under file number 098-166 (the “Determination”) pursuant to which Bucko was ordered to pay the sum of \$310,161.74 on account of unpaid wages owed to 25 former employees of Alya International Inc. and Alya Systems Inc.

The Determination was issued against Bucko under section 96(1) of the *Act* which provides as follows:

Corporate officer’s liability for unpaid wages

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.

Pursuant to section 107 of the *Act*, this appeal is being adjudicated based on the written submissions of the parties. I have before me written submissions submitted by legal counsel for Bucko and by legal counsel for the Director. Although invited to do so (by letter dated December 12th, 2000 from the Tribunal’s Vice-Chair), none of the 25 complainant employees filed a submission with the Tribunal.

BACKGROUND FACTS

On September 29th, 2000, the Director’s delegate issued a determination declaring Alya International Inc. and Alya Systems Inc. to be “associated corporations” as defined by section 95 of the *Act*. Further, by way of this latter determination, both corporations were held “jointly and separately [severally]” liable for \$340,576.43 in unpaid wages and interest owed to 25 former employees of one or both of the two firms. The former employees’ unpaid wage claims included regular wages, vacation pay and, in some instances, overtime pay and compensation for length of service. I shall refer to the September 29th, 2000 determination issued against Alya International Inc. and Alya Systems Inc. as the “Corporate Determination”.

According to the information set out in the Corporate Determination, the two firms--which were in the business of developing, marketing, installing and servicing computer-controlled building security and access systems--ceased operations on May 26th, 2000.

The relevant portion of the Corporate Determination (found at page 2) dealing with the former employees' wage claims is reproduced below:

Employer's Position

Alya International, Inc. and Alya Systems Inc. (the "employer") acknowledge regular wages, overtime wages, and vacation pay entitlement are owing. The majority of the employees resigned due to not being paid. For some, compensation for length of service is owing because the decision was made to close down the operation to stem further liabilities. Employees were "laid off" without notice at the end of May 2000.

The Employer has provided copies of Records of Employment which itemize the wages owing to each employee. The Employer confirmed the amounts owing the employees as the complaints were received. The complaints were filed by the employees either when they left because they could no longer continue to work without being paid, or when they were laid off as the company closed down. My calculation sheets, prepared as the complaints were filed, were reviewed for accuracy by the employer...

Complainant's Position

The Complainants agree with the amounts outstanding as provided to me by the Employer.

So far as I can gather, based on the material before me, neither Alya International Inc. or Alya Systems Inc. has entered bankruptcy nor is either firm in receivership. Thus, the liability exemption set out in section 96(2)(a) of the *Act* is not relevant here.

The limitation period governing an appeal of the Corporate Determination expired on October 23rd, 2000 without an appeal being filed; since that time, neither firm has applied for an extension of the appeal period and, as noted above, the two corporations do not apparently dispute their liability as set out in the Corporate Determination.

The section 96 Determination now under appeal before me was issued against Bucko by reason of his status as a director and officer of both companies. Bucko apparently resigned his offices and directorships on August 18th, 2000, however, the unpaid wage claims set out in the Determination crystallized either before or on May 26th, 2000.

In calculating Bucko's liability under section 96, the Director's delegate ordered Bucko to pay, in effect, the lesser of 4 months' wages or the total amount of unpaid wages owed to each employee on the basis that Bucko's unpaid wage liability flowed from his status as a director or officer of each of the two firms. For example, according to the schedule appended to the Determination, Anwar Abboud was owed \$16,296.59 in unpaid wages and interest as of November 15th, 2000; 2 months' wages amounted to \$10,833.33. The delegate calculated Bucko's liability as \$10,833.33 for each firm and then, since the total amount exceeded the total

wages owed to Abboud, reduced Bucko's liability to \$16,296.59. Thus, as noted, Bucko's liability for each and every complainant employee was fixed at the lesser of 4 months' wages or the actual amount of unpaid wages due to the employee.

ISSUES ON APPEAL

Legal counsel for Bucko filed a joint notice of appeal and subsequent written submissions on behalf of Bucko as well as two other appellants, namely, Douglas H. Corbett (EST File No. 2000/840) and Milan Carnogursky (EST File No. 2000/841). The Director's delegate issued separate section 96 determinations against each of Messrs. Corbett (issued on November 20th, 2000 in the amount of \$190,681.30) and Carnogursky (issued on November 15th, 2000 in the amount of \$295,605.34) who were also former directors/officers of one or both of Alya International Inc. and Alya Systems Inc.

Legal Counsel for Bucko says that the section 96 Determination against Bucko is incorrect and ought to be varied. Counsel says that the Determination is incorrect because:

- the sum of the three section 96 determinations issued against Messrs. Bucko, Corbett and Carnogursky exceeds (collectively, the three section 96 determinations total \$796,448.38), the total amount of the unpaid wages and interest set out in Corporate Determination (*i.e.*, \$340,576.43). Counsel submits that "[T]he total of personal determinations should not exceed the amount of the Corporate Determination" and cites *TSI Telequip Services Inc.* (B.C.E.S.T. Decision No. D221/99) for that proposition.
- "Jaroslav Bucko is assessed to pay more than the wages owing, including interest as at November 15, 2000, for a former employee, Margaret Chik."
- "Jaroslav Bucko is assessed to pay wages up to the equivalent of four months' wages, which contravenes Section 96(1) of the Act."

I shall address each of these issues in turn.

ANALYSIS

Can the sum of the various section 96 director/officer determinations exceed the amount of unpaid wages fixed by the Corporate Determination?

It is, of course, arithmetically correct to observe that the total amount of the three section 96 determinations referred to by counsel for Messrs. Bucko, Corbett and Carnogursky exceeds the total amount of the Corporate Determination. However, it does not follow from that observation that the Director is entitled to *collect* the higher sum nor is it correct to say, in my view, that when *issuing* section 96 determinations against more than one corporate officer or director, the

total amount of such determinations cannot exceed the amount set out in a previously issued corporate determination.

An individual corporate director or officer cannot be held liable for more than 2 months' unpaid wages. The Director cannot collect anything more than the total amount of unpaid wages due to a particular employee. However, I see nothing in the *Act* limiting, at the point of issuance, the total of all section 96 determinations to the limit of the unpaid wages due to the corporate employees as set out in an underlying corporate determination. Giving effect to the appellant's submission regarding the scope of section 96 liability would create a *collective* "liability ceiling" for *all* directors/officers with respect to the employees' unpaid wage claims rather than, as is the present drafting, an *individual* director/officer "liability ceiling" for 2 months' wages owed to each employee.

It is important to note that the director/officer personal liability provision (section 96) appears in Part 11 of the *Act*--the "Enforcement" provisions. The legislative intent of section 96 is to create a form of statutory "vicarious liability" on the part of directors/officers for unpaid wages but that liability is limited to 2 months' wages per employee and is subject to other limitations and exemptions (primarily, though not exclusively, set out in subsection 96(2)).

However, as I interpret subsection 96(1), the Director is free to collect--say, from 6 separate directors--the full amount of the employees' unpaid wage claims. The purpose of section 96 is to ensure that employees will recover at least some of their unpaid wages in the event their former corporate employer is unable to pay their wages in whole or in part. The Director can collect 2 months' wages from each and every director/officer but cannot, of course, collect, in total, *more* than the actual amount of the unpaid wages due to the various employees. This latter limitation with respect to *collection* does not, in my view, constrain the amount of a section 96 determination that may be *issued* at a time when, most often, no collection proceedings have yet been successfully effected. The only limitations governing the amount of unpaid wages for which a section 96 determination may be *issued* are those set out in section 96 itself.

In my view, nothing that I have said to this point conflicts with the *TSI Telequip Services Inc.* decision. In *TSI*, a corporate determination was issued for \$16,960.61, however, separate section 96 determinations were issued against the two TSI principals each in the amount of \$20,918.29. Quite properly, the adjudicator in that case ordered that the two section 96 determinations "each be reduced to the lesser of the amount of the corporate determination or two months' unpaid wages". In other words, subject to the 2-month limitation, it was entirely appropriate for the Director to issue separate section 96 determinations that, when considered together, might exceed the total amount of the corporate determination.

Bucko's unpaid wage liability to Ms. Margaret Chik

Counsel for the Director concedes that the section 96 Determination issued against Bucko contained a clerical error with respect to Ms. Chik. Ms. Chik's unpaid wages, including interest, and Mr. Bucko's concomitant liability to Ms. Chik, ought to have been fixed at \$8,311.44;

counsel for Bucko has now accepted, in a submission to the Tribunal dated March 12th, 2001, that this latter figure is correct.

Can Bucko be held liable for the equivalent of four months' wages?

In her submission to the Tribunal counsel for the Director submits, and I entirely agree, that the delegate incorrectly interpreted section 96 on this point. It should be noted that the effect of the "associated corporations" declaration (see section 95) set out in the Corporate Determination was to legally reconstitute Alya International Inc. and Alya Systems Inc. into "*one person* for the purposes of [the] Act". Counsel for the Director's submission states (at page 5) that:

"...in cases in which a single individual is a director of more than one corporation which has been associated under s. 95 of the Act...the liability of that individual under s. 96 of the Act is limited to two months' wages, rather than two months' in respect of each corporation.

The Director submits that the Director's Determinations against [Bucko] should be reduced to a maximum of two months' wages in respect of each employee, as outlined in the revised calculation attached as Appendix 'A' to this submission."

According to the revised calculations, Bucko's liability under section 96 should be fixed at \$190,665.61 inclusive of interest to November 15th, 2000. For his part, counsel for Bucko accepts the Director's revised calculations (March 12th, 2001 submission, paragraph 5).

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be varied as set out in these reasons for decision. Accordingly, and pursuant to section 96 of the *Act*, Jaroslav Bucko's liability to the 25 complainant employees named in the Determination is hereby determined to be **\$190,665.61** inclusive of interest payable under section 88 of the *Act* up to and including November 15th, 2000. In addition, Jaroslav Bucko is also liable for whatever additional interest that may have accrued since the date of issuance of the Determination.

KENNETH WM. THORNICROFT

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal