



An appeal

- by -

Milan Carnogursky, a Director or Officer of Alya International Inc. and Alya  
Systems Inc. (Associated Corporations)

("Carnogursky")

- 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.:** 2000/841

**DATE OF DECISION:** April 9, 2001

## DECISION

### OVERVIEW

This is an appeal brought by Milan Carnogursky (“Carnogursky”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Carnogursky appeals a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 15th, 2000 under file number 098-166 (the “Determination”) pursuant to which Carnogursky was ordered to pay the sum of \$295,605.34 on account of unpaid wages owed to 25 former employees of Alya International Inc. and Alya Systems Inc.

The Determination was issued against Carnogursky 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 Carnogursky and by legal counsel for the Director. Although invited to do so (by letter dated December 13th, 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 Carnogursky by reason of his status as a director and officer of both Alya International Inc. and Alya Systems Inc. Carnogursky apparently resigned his offices and directorships on May 21st, 2000, however, the unpaid wage claims set out in the Determination apparently crystallized either before or on May 19th, 2000.

In calculating Carnogursky's liability under section 96, the Director's delegate ordered Carnogursky 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 Carnogursky'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 Carnogursky's liability as \$10,833.33 for each firm and then, since the total amount exceeded the total wages owed to Abboud, reduced Carnogursky's liability to \$16,296.59. Thus,

as noted, Carnogursky'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 Carnogursky filed a joint notice of appeal and subsequent written submissions on behalf of Carnogursky as well as two other appellants, namely, Jaroslav Bucko (EST File No. 200/839) and Douglas H. Corbett (EST File No. 2000/840). The Director's delegate issued separate section 96 determinations against each of Messrs. Carnogursky, Bucko (issued November 20th, 2000 in the amount of \$310,161.74) and Corbett (issued on November 20th, 2000 in the amount of \$190,681.30) who were also former directors/officers of one or both of Alya International Inc. and Alya Systems Inc.

Legal Counsel for Carnogursky says that the section 96 Determination against Carnogursky 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. Carnogursky, Bucko and Corbett 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.
- "[the Determination] does not, in one instance, take into consideration, in the calculation of the wages owing to individual employees, the fact that Mr. Milan Carnogursky ceased to be a director and officer of the corporations as of May 21, 2000."
- "Milan Carnogursky 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. Carnogursky, Bucko and Corbett 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.

*The effect of Carnogursky's resignation as of May 21st, 2000*

Counsel for Carnogursky asserts that Carnogursky resigned his office and directorship in each of Alya International Inc. and Alya Systems Inc. on May 21st, 2000 and that Carnogursky's liability as set out in the Determination includes wages that were earned or payable after Carnogursky resigned. Carnogursky's resignation as of May 21st, 2000 is noted in the Determination. Although the actual resignation letter is not before me, I will accept counsel's assertion on that point. Counsel for the Director does not take issue with the assertion that Carnogursky resigned as of May 21st, 2000 but, rather, has provided an amended liability calculation (totalling \$188,242.84 including interest to November 15th, 2000) pursuant to which "Carnogursky has only been assessed liability for amounts earned or payable on or before May 21, 2000".

In a written submission to the Tribunal dated March 12th, 2001, counsel for Carnogursky states that "[Carnogursky] agrees that the [Determination] be varied in accordance with the revised calculations attached as Appendix 'A' to the Submissions of the Director".

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

In her submission to the Tribunal, dated January 25th, 2001, 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 pages 4-5) 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 [Carnogursky] 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, Carnogursky's liability under section 96 should be fixed at \$188,242.84 inclusive of interest to November 15th, 2000. For his part, counsel for Carnogursky accepts the Director's revised calculations (March 12th, 2001 submission, paragraph 5--see above).

**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*, Milan Carnogursky's liability to the 25 complainant employees named in the Determination is hereby determined to be **\$188,242.84** inclusive of interest payable under section 88 of the *Act* up to and including November 15th, 2000. In addition, Milan Carnogursky 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**