



An appeal

- by -

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

("Gatringer")

- 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.: 2000/848

DATE OF DECISION: April 9, 2001

DECISION

OVERVIEW

This is an appeal brought by Kurt Gatringer (“Gatringer”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”). Kurt Gatringer 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 Kurt Gatringer was ordered to pay the sum of \$18,552.97 on account of unpaid wages and interest owed to five former employees of Alya International Inc. and/or Alya Systems Inc.

The Determination was issued against Kurt Gatringer 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 Kurt Gatringer and by legal counsel for the Director. Although invited to do so (by letter dated December 15th, 2000 from the Tribunal’s Vice-Chair), none of the 5 respondent former 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.

As set out in the Determination now under appeal before me, the unpaid wages Gatringer has been order to pay consist of regular wages, vacation pay and compensation for length of service that were earned or became payable during the period May 21st to May 26th, 2000--a period of time during which Kurt Gatringer was an officer and director of Alya International Inc.

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.

As noted above, the section 96 Determination was issued against Gatringer by reason of his status as a director and officer of Alya International Inc. during the relevant period, namely, May 21st to 26th, 2000.

ISSUES ON APPEAL

Legal counsel for Gatringer advances several grounds of appeal which may be summarized as follows:

- While accepting liability for “regular wages” (subject, of course, to the statutory 2-month limit), counsel says that Gatringer is not liable “to the extent [the Determination] assesses overtime, if any, vacation pay, and termination pay”.
- Gatringer is not liable for “overtime pay which was earned before [Gatringer] became a director”.
- Gatringer’s liability for vacation pay should be assessed at the appropriate percentage only with respect to regular wages earned while Gatringer was a director--such vacation pay “should not be based on the total unpaid wages”;
- “With respect to termination pay, [Gatringer] submits that the amount assessed against him should be based on the proportion of such termination pay that is attributable to the length of employment during the period [Gatringer] was a director in comparison with the total length of employment of the individual complainant.”
- Counsel submits that “[I]t would be patently unfair and against natural justice to saddle a short-term temporary director with vacation and termination pay which had accrued prior to his assuming the position”.
- “The obligation to pay an employee wages arises as the work is done and the debt for vacation pay is incurred as the work is performed. On this basis the vacation pay and termination pay were already accrued and owing (apart from a very small proportion) when [Gatringer] became a director.”
- “[T]he equities of the situation demand that [Gatringer] be obliged to pay only that part of the Determination amount which can fairly be attributed to his term of office.”

ANALYSIS

“Wages”, as broadly defined in section 1 of the *Act*, includes “regular wages” (*e.g.*, an hourly wage or monthly salary) but also, *inter alia*, overtime pay, vacation pay and compensation for length of service (what counsel for the appellant somewhat inaccurately terms “termination pay”; group “termination pay”--payable under section 64--is not at issue here).

All unpaid wages--including “regular” wages, overtime pay, vacation pay and compensation for length of service--must be paid within 48 hours after termination of employment by the employer or within 6 days in the case of a voluntary resignation (see section 18). Arguably, compensation for length of service must be paid even sooner--immediately upon termination [see section 64(4)].

Under section 19 of the former Employment Standards Act, a director or officer was liable for unpaid wages that “should have been paid” while the individual was an officer or director. The former director/officer liability provision created a “payable” test and thus, in *Re Westar Mining Ltd.* (1996), 136 D.L.R. (4th) 564, our Court of Appeal held that directors were not liable for certain vacation pay that had accrued, but was not yet payable, when the directors resigned.

However, and undoubtedly as a result of the *Westar* decision, section 96 of the current *Act* states that directors and officers are personally liable for wages that “*were earned or should have been paid*” when the individual was a director or officer. Directors and officers are not liable for compensation for length of service in the event of a formal corporate insolvency, bankruptcy, or receivership [section 96(2)(a)], nor are directors/officers liable for vacation pay that becomes payable after resignation [section 96(2)(b)], but there is nothing in the material before me to suggest that either defence is open to Gatringer in this case.

Section 18 of the *Act* directed the employer to pay the five respondent employees, within 48 hours of their termination (given the absence of proper written notice), *all* of their accrued wages including regular wages, overtime pay, compensation for length of service and vacation pay [section 58(3)]. In the event of nonpayment by the employer, Gatringer, being a corporate director at the time these wages became payable, was personally liable under section 96(1) of the *Act* for the payment of such wages subject only, in this case, to the 2-month liability limit (which is not relevant here since the amount of unpaid wages for each employee falls below the 2-month threshold).

There is no provision in the *Act* that would permit, in effect, a “prorating” of a director’s/officer’s liability for unpaid wages based on some sort of formula that would compare the period of employment during which the wages were earned relative to the term of the director/officer.

In my view, this appeal is without merit and must be dismissed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$18,552.97** together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

KENNETH WM. THORNICROFT

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal