

An appeal

- by -

Duncan M. Anderson, a Director or Officer of 444983 B.C. Ltd.  
("Anderson")

- 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.:** 2002/097

**DATE OF DECISION:** May 7, 2002

## DECISION

### OVERVIEW

This is an appeal filed by Duncan M. Anderson (“Anderson”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Mr. Anderson appeals a Determination that was issued by a Delegate of the Director of Employment Standards (the “Director”) on February 5th, 2002 pursuant to which Anderson was ordered to pay the sum of \$38,673.21 on account of unpaid wages (predominantly, compensation for length of service) and section 88 interest to seven former employees of Anderson’s Engineering Ltd. (the “Determination”).

By way of a letter dated April 26th, 2002 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 have before me submissions from the appellant’s legal counsel and from the Director’s Delegate. Although invited to do so, none of the respondent employees filed a submission with the Tribunal.

The Determination was issued against Anderson in accordance with the provisions of section 96(1) of the *Act* by reason of his status as an officer and director of 444983 B.C. Ltd. This latter firm and Anderson’s Engineering Ltd. (“Anderson’s Engineering”) were declared to be “associated corporations” under section 95 of the *Act* by way of a previous Determination issued on May 30th, 2001. Sections 95 and 96(1) are reproduced below:

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

#### **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.

### PREVIOUS PROCEEDINGS

As noted above, a Determination was issued on May 30th, 2001 declaring 444983 B.C. Ltd. and Anderson’s Engineering to be “associated corporations” and, further, ordering those two firms to pay \$38,150.61 in unpaid wages and interest owed to seven former Anderson’s Engineering employees. The seven employees were awarded vacation pay and recovery of unremitted union dues, however, the bulk of the monies (approximately 90%) represented compensation for length of service payable under section 63 of the *Act*.

On June 1st, 2001, a separate section 96 Determination (in the amount of \$3,280.76) was also issued against Mr. Anderson personally given his status as an officer and director of Anderson's Engineering (note that the instant Determination was issued against Mr. Anderson as a director/officer of 444983 B.C. Ltd.). It should also be noted that section 96(2)(a) of the *Act* protected Mr. Anderson against any personal liability for unpaid compensation for length of service since Anderson's Engineering became bankrupt on or about November 28th, 2000. Section 96(2)(a) provides as follows:

96. (2) Despite subsection (1), a person who was a director or officer of a corporation is not personally liable for

(a) any liability to an employee under section 63, termination pay or money payable under a collective agreement in respect of individual or group terminations, if the corporation is in receivership or is subject to action under section 427 of the *Bank Act* (Canada) or to a proceeding under an insolvency *Act*...

The trustee in bankruptcy for Anderson's Engineering, namely, Barnes, Kissack, Henfrey & George, did not appeal the May 30th Determination. However, 444983 B.C. Ltd. did appeal the May 30th Determination and, further, Mr. Anderson appealed the June 1st section 96 Determination issued against him personally.

I heard the appeals filed by 444983 B.C. Ltd. and Mr. Anderson on September 21st, 2001 and issued reasons for Decision in both appeals on October 3rd, 2001. The appeal of 444983 B.C. Ltd. raised several issues including whether the Delegate conducted a fair investigation (see section 77), the correctness of the section 95 declaration and whether the employees' unpaid wages had been correctly determined. In Tribunal Decision BC EST # D531/01 (i.e., 444983 B.C. Ltd.'s appeal) I addressed these issues as follows:

...I am nonetheless satisfied that the Director's Delegate fully complied with the dictates of section 77 in this case.

It appears to me that the Delegate was endeavouring to conduct an investigation into the possible application of section 95 and, so far as he was able to do so, Mr. Anderson, on behalf of the appellant, did what he could to delay, or possibly even derail, that investigation. In the end, the Delegate did what he could with the limited information available to him...

. . . . .

In sum, I am not satisfied that the assertions contained in the Determination, standing alone, support a section 95 declaration with respect to Anderson's Engineering and the appellant. Nevertheless, the situation between the two companies is unclear and, to some degree, Mr. Anderson's own assertions to the Delegate about rent payments and a landlord-tenant relationship created some of the ambiguity.

In my view, the interrelationship between the appellant, Anderson's Engineering and Mr. Anderson himself has not been fully explored. To some extent, Mr. Anderson's failure to fully cooperate with the Delegate's investigation has hindered a full and complete understanding of the situation. I note that Mr. Anderson did not appear before me (nor was he obliged to do so) in order to provide relevant evidence and thus I am in no better position than was the Delegate to assess the true relationship between the parties.

In light of the above, I am of the view that the most appropriate order would be to refer the section 95 issue back to the Director for further investigation...

. . . . .

As noted above, the bulk of the monies payable under the Determination consists of compensation for length of service. I have nothing before me that would call into question the employees'

respective entitlements on that account. However, I do have before me a letter from one of the employees, Ms. Wiens, who was also Anderson's Engineering's office manager. She maintains that the employees' accrued vacation pay was paid on their last pay cheque and that their union dues were properly remitted to the union. She also says that Anderson's Engineering's payroll records did not reflect these payments because her employment was terminated (due to the bankruptcy) prior to her updating the employer's payroll records.

I am unable to determine, based on the information before me, whether the employees' received all of their accrued vacation pay or if their union dues were properly remitted to the union. Accordingly, these matters can also be addressed during the Director's further investigation.

In light of the above findings, I issued the following formal order:

#### **ORDER**

Pursuant to section 115(1)(b) of the *Act*, I order that the following issues be referred back to the Director for further investigation:

1. The section 95 declaration; and
2. The employees' claims for vacation pay and recovery of unremitted union dues.

In all other respects, the Determination is confirmed.

The outcome of Anderson's appeal of the June 1st section 96 Determination issued against him personally was predicated, in substantial measure, on the outcome of 444983 B.C. Ltd.'s appeal. Although Mr. Anderson did not contest his status as a director and officer of Anderson's Engineering, there was a *bona fide* issue about the quantum of his actual liability. Accordingly, in Tribunal Decision BC EST # D532/01 (i.e., the Anderson appeal) I made the following findings and order:

...there is a *bona fide* dispute about whether or not the employees were, in fact, paid their accrued vacation pay and whether the union dues in question were actually remitted.

I have before me a letter from Ms. Wiens, Anderson's Engineering's former office manager and a complainant who was awarded compensation under the corporate Determination. She maintains that the employees' accrued vacation pay was paid on their last pay cheque and that their union dues were properly remitted to the union. She also says that Anderson's Engineering's payroll records did not reflect these payments because her employment was terminated (due to the company's bankruptcy) prior to her updating the employer's payroll records.

I am unable to determine, based on the information before me, whether the employees received all of their accrued vacation pay or if their union dues were properly remitted to the union. Although it is clear that Mr. Anderson was, at all material times, a director and officer of Anderson's Engineering, he is, of course, only liable for unpaid wages. I ordered, in the numbered company appeal, that the matters relating to unpaid vacation pay and unremitted union dues be referred back to the Director for further investigation and, accordingly, it is appropriate to make a similar order in this appeal.

#### **ORDER**

Pursuant to section 115(1)(b) of the *Act* I order that Mr. Anderson's personal liability with respect to the employees' claims for unpaid vacation pay and recovery of unremitted union dues be referred back to the Director for further investigation.

#### **REASONS FOR APPEAL**

Mr. Anderson's reasons for appeal are set out in a letter from his legal counsel dated February 27th, 2002 and appended to his appeal form:

- “Making a finding against a director of [444983 B.C. Ltd.] when there exists no obligation by [444983 B.C. Ltd.] to the Complainants”;
- “Ignoring Mr. Anderson’s exemption from liability as set out in s. 96(2)(a) of the *Act*”;
- “Failing to recognize the fact that the [previous June 1st section 96 and May 30th section 95 Determinations) were not upheld in either of the Appeals”;
- “Even if one assumes that Anderson’s Engineering and [444983 B.C. Ltd.] are properly associated corporations pursuant to s. 95 of the *Act*, which they are not, there is still no basis in law for a s. 96 finding against Mr. Anderson as a director or officer of [444983 B.C. Ltd.]”.

## ANALYSIS

The Determination that is now before me (dated February 5th, 2002 and in the amount of \$38,673.21) was issued against Mr. Anderson personally by reason of his status as an officer and director of 444983 B.C. Ltd. I should note that this latter Determination was issued even though, so far as I can gather, the further investigations that I ordered via Decision BC EST # D531/01 and BC EST # D532/01 have not been completed, nor have any further investigation reports been filed with the Tribunal. In other words, the two earlier appeals, filed by 444983 B.C. Ltd. and Anderson respectively, have yet to be finally adjudicated.

### *The May 30th section 95 Determination*

Counsel for Mr. Anderson submits that my earlier decision with respect to the section 95 Determination “resulted in a clear and unambiguous finding by the Tribunal that insufficient evidence existed upon which to base a finding of association between Anderson’s Engineering and [444983 B.C. Ltd.]”. While I did not make a section 115 order cancelling the section 95 Determination, my reasons for decision clearly indicated that the evidence relied on by the Delegate, standing alone, did not support a section 95 declaration. I referred this latter matter back to the Director for further investigation and, although this matter has been in the Director’s hands since my reasons were released in early October 2001, the further investigation has yet to be completed.

As matters now stand, there is a very real question about the propriety of the section 95 declaration. Given the circumstances, it would appear that the issuance of the Determination now under appeal was, in some sense, premature. It may be the case that the instant Determination was issued so that the Director could take enforcement proceedings--I understand that the Director is currently holding the entire amount of the Determination in her trust account. Counsel for Mr. Anderson also seeks a direction that the funds currently being held by the Director be returned to Mr. Anderson.

### *Anderson’s director/officer liability*

Mr. Anderson’s counsel acknowledges that Anderson was an officer and director of 444983 B.C. Ltd. during the relevant time period. However, counsel also submits that, as a matter of law, Mr. Anderson cannot be held personally liable under section 96(1) for the employees’ unpaid wages simply because he was a director/officer of 444983 B.C. Ltd.--a firm that counsel says cannot be properly “associated”, under section 95 of the *Act*, with Anderson’s Engineering.

However, counsel further submits that even if there is a valid and subsisting section 95 declaration (and on this point, while I expressed some considerable reservations, I did not formally cancel the section 95 declaration), the instant Determination is nonetheless fatally flawed. This latter argument flows from my

decision in *ICON Laser Eye Centres Inc. et al.* (BC EST # D649/01). Counsel for Mr. Anderson submits that in view of the *ICON* decision, the instant Determination cannot, as a matter of law, stand. I agree.

In *ICON* I made the following findings:

...The personal liability imposed on directors and offices [sic] under section 96(1) flows from their having been a director or officer of the corporate employer when the employees' unpaid wage claims crystallized. ...

Given that section 96 must be construed narrowly, I fail to see how directors or officers of an associated corporation can be held personally liable for unpaid wages owed by another employer even if that other employer was "associated" with the firm of which the individual is a director or officer.

In order to interpret section 96(1) in a manner consistent with the Director's position, one must read in the following italicized words: "A person who was a director or officer of a corporation, *or of another corporation declared to be associated with that corporation under section 95*, 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." I do not think it appropriate to read in such language; such an approach, in my view, constitutes a very (perhaps even overly) liberal and generous interpretation rather than the narrow construction that section 96 must be given.

In this case, not only is personal liability inconsistent with the language of the statute, such liability is inconsistent with the underlying policy of section 96.

The Director's Delegate, in his submission to the Tribunal dated March 19th, 2002, states only "that the adjudicator in the *Icon* decision erred in fact and law and that decision is currently the subject of a Reconsideration Request". The Delegate does not, in any fashion, attempt to particularize the errors of law or fact contained in *ICON*.

As I have no basis before me to depart from the principles set out in *ICON* (which I continue to believe are sound), the instant Determination cannot stand as a matter of law and, accordingly, must be cancelled. In light that conclusion, I do not find it necessary to address counsel's argument with respect to section 96(2)(a) of the *Act*.

## **ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination be cancelled. Given that the Determination is cancelled, the monies currently held in trust by the Director (as security for payment of the Determination) should be released to Mr. Anderson forthwith.

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**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**