Employment Standards TRIBUNAL

An appeal

- by -

Bruce Davies, Dana Epp, Kevin Traas, Chad Northcott, Ross Mrazek and Stephen Hemenway, Directors or Officers of Merilus Technologies Inc.

(the "Appellants")

- 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: David B. Stevenson

FILE No.: 2003A/67, 2003A/68, 2003A/69, 2003A/70, 2003A/71 and 2003A/72

DATE OF DECISION: May 27, 2003

DECISION

OVERVIEW

This decision addresses appeals brought pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Bruce Davies, Dana Epp, Kevin Traas, Chad Northcott, Ross Mrazek and Stephen Hemenway), Directors or Officers of Merilus Technologies Inc. ("Merilus") (collectively, the "appellants") of Determinations that were issued on January 13, 2003 by a delegate of the Director of Employment Standards (the "Director") against each of them. The Determinations concluded that Davies, Epp, Traas, Northcott, Mrazek and Hemenway were Directors or Officers of Merilus, an employer found to have contravened provisions of the *Act*, and under Section 96 of the *Act*, each was ordered to pay an amount of $40,599.34.

On February 3, 2003, the Determination was varied by the Director to show the each of the appellants was ordered to pay as $38,449.24.

The grounds of appeal for all the Determinations are identical and raise the same factual and legal issues. The Tribunal's conclusion on those issues will apply to each of the appeals and will have the same effect on each appeal. On that basis, the Tribunal has decided to consolidate the appeals and issue one decision on all of them.

The appellants allege an error of law in the Determination, based on new evidence becoming available that was not available at the time the Determination was being made.

ISSUE

The issue is whether the appellants have shown an error in the Determinations sufficient to justify the intervention of the Tribunal under Section 115 of the *Act*.

FACTS

There is no dispute on the facts, although there is some dispute about their relevance to the appeals:

1. The Determinations under appeal were issued on January 13, 2003;

2. On January 20, 2003, Merilus made an assignment in bankruptcy pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA");

3. On February 3, 2003, each of the Determinations was varied by the Director to show an amount owing of $38,449.24;

4. On February 13, 2003, the appellants asked the Director to cancel the Determinations;

5. On February 17, 2003, the Director expressed an intention to proceed with the Determinations against the appellants.

ARGUMENT AND ANALYSIS

Fresh Evidence

Subsection 112(1) of the *Act* sets out the grounds upon which an appeal may be made to the Tribunal from a Determination of the Director. That provision reads:

112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

(a) the director erred in law;

(b) the director failed to observe the principles of natural justice in making the determination;

(c) evidence has become available that was not available at the time the determination was being made.

The appellants have identified paragraph 112(1)(c) as one of the grounds for their appeals and seek to submit fresh evidence. The other ground of appeal in each of the appeals is that the Director erred in law, but the validity of that ground of appeal is dependent on the acceptance by the Tribunal of the fresh evidence.

We take this opportunity to provide some comments and guidance on how the Tribunal will administer the ground of appeal identified in paragraph 112(1)(c). This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions:

(a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;

(b) the evidence must be relevant to a material issue arising from the complaint;

(c) the evidence must be credible in the sense that it is reasonably capable of belief; and

(d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

The proposed evidence is to establish that Merilus made an assignment in bankruptcy on January 20, 2003. In this case, the proposed evidence did not exist at the time the Determination was made and could not, with any degree of diligence, have been provided to the Director. The first condition of the test is met. The Director does not dispute the veracity and credibility of the proposed evidence. The third condition of the test is also met.

The Director does, however, say that the proposed evidence is not relevant to the issue of the appellants' liability under Section 96 issue and is of no probative value because it could not have led the Director to a different conclusion on that issue. The position of the Director is captured in the following submission:

> . . . the occurrence of a subsequent event does not constitute "new evidence" having a bearing on the correctness of the Determinations at the time they were made.

In response, the appellants say that submission could only be correct if an assignment in bankruptcy subsequent to the issuance of a Determination does not affect the liability imposed on a director or officer of a corporation under Section 96 of the *Act*. I agree with the appellants on this point. The evidence of the assignment in bankruptcy of Merilus is both relevant and probative if it bears on the liability of the appellants under Section 96 of the *Act*. I turn to that question.

Section 96 appears in Part 11 of the *Act*, the "enforcement" provisions. Section 96 is an essential component of the wage recovery scheme created by the *Act*. The relevant parts of Section 96 of the *Act* state:

96. (1) A person who was a director of 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.

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

. . .

(b) any liability to an employee for wages, if the corporation is subject to an action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act, . . .

The appellants argue that the assignment of Merilus into bankruptcy on January 20, 2003 nullified the liability imposed on them in the Determinations issued January 13, 2003; that Section 96(2)(b) applies even though the assignment occurred after the Determinations were issued. The appellants refer to the view expressed by the Tribunal in *Albert Kenneth Archibald*, BC EST #D090/00; [2000] B.C.E.S.T.D. No. 134 that provisions of the *Act* imposing personal liability on corporate directors and officers are an extraordinary exception to the general principle that such persons are not personally liable for corporate debts and such provisions should be narrowly construed. That being so, they argue, it would be inappropriate to interpret paragraph 96(2)(b) as applying only if the corporation is subject to an insolvency proceeding when the Determination is issued.

In reply, the Director refers to comments from the Supreme Court of Canada decision *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 endorsing an approach to statutory interpretation stated by Elmer Driedger in Construction of Statutes (2nd ed. 1983):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The Director says it would produce absurd consequences to interpret paragraph 96(2)(b) in a way that would allow directors and officers to avoid liability for wages by assigning the corporation into bankruptcy after a Determination has been issued and such consequences are to be avoided. The Director points to comments made by Mr. Justice Iacobucci in *Re Rizzo & Rizzo Shoes Ltd.*, *supra*:

> It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes, supra*, at p. 88).

The Director says the statutory objective of Section 96 is to ensure at least some personal liability for wages falls to the directors or officers of a corporation. The Director submits that interpreting paragraph 96(2)(b) to give effect to an assignment in bankruptcy made after a Determination was issued would undermine that objective and render Section 96(1) pointless or futile, as it would become commonplace for directors faced with a Determination under Section 96 of the *Act* to assign the corporation into bankruptcy as a means of avoiding personal liability.

In response to this submission, the appellants do not disagree that the objective of Section 96, clearly expressed in subsection 96(1), is to impose some personal liability for unpaid wages on directors and officers of corporations, but say it is equally clear that the legislature intended to establish exceptions to that personal liability and those exceptions are expressed in subsection 96(2).

Next, the Director submits that excerpts from the legislative debate on Bill 48, which introduced the current version of paragraph 96(2)(b), support the argument that the legislature intended that provision to apply only where no Determination had been issued against a director or officer of a corporation. I have given no consideration to this part of the Director's argument. The law is well established that the record of the legislative debates can only be referred to for the purpose of determining the mischief sought to be addressed by the legislature. The record may not be looked at as an aid to the interpretation of what the legislature meant by the words used, see *Wall and Redekop Corporation -and- International Brotherhood of Carpenters and Joiners of America, 27 Locals and British Columbia Labour Relations Board*, [1986] B.C.J. No. 3170.

The Director also argues that there is a presumption, similar to the presumption against the retroactive application of legislation, against allowing facts occurring after the issuance of a Determination to operate retroactively and impact the liability imposed in the Determination. I agree, however, with the appellants that this is not a case involving principles applicable to the retroactive application of legislation; this is a case involving the interpretation of paragraph 96(2)(b) of the *Act*.

Having said that, I agree with the Director on the interpretive issue. The legislature could not possibly have intended that the liability of directors and officers of a corporation under Section 96 would be nullified by an assignment in bankruptcy regardless of when that assignment occurred. There are several reasons for reaching this conclusion.

First, the interpretation advanced by the appellants is unreasonable and could lead to the absurd result of allowing directors and officers of a corporation which became subject to insolvency proceedings after a Determination had been issued to bring action to recover wages which had been collected by the Director and distributed to the employees. An interpretation that could lead to such a consequence is inconsistent

with many of the purposes of the *Act* set out in Section 2 and with the objective of the prohibition found in Section 22. I note the following comment from *Archibald*, *supra*:

> It should be recalled that Centrux was already in bankruptcy (for over 3 months) when the Archibald director/officer Determination was issued. This is not a case where the director/officer determination was issued--and the monies owed pursuant to that determination collected--prior to the corporate employer's bankruptcy. In the latter circumstances, I have no doubt that the section 96(2)(a) defence has no application whatever.

Second, there is no issue that the appellants were personally liable upon the issuance of the Determinations on January 13, 2003. Consequently, these appeals do not raise a question of whether, or when, the personal liability of the appellants crystallizes. While I agree with the appellants, consistent with the Tribunal's decision in *Archibald*, *supra*, that provisions imposing personal liability should be narrowly construed, this is not a case where there is any doubt about the appellants' personal liability at the time the Determinations were issued. Rather, these appeals raise a question of whether the *Act* can be read to nullify their personal liability by events occurring after that liability has been established. In a real sense, the appellants' position is that paragraph 96(2)(b) should be interpreted to remove a benefit from employees that had accrued under the *Act*. If the legislature had intended such a result, the opening words of subsection 96(2) should have provided some indication that a director or officer could cease to be personally liable after the personal liability was imposed and paragraph 96(2)(b) should read, *" . . . any liability to an employee for wages, if the corporation is,* ***or becomes,*** *subject to an action . . ."*.

Third, the appellants argue that the interpretation proposed by the Director would require the addition of the words "at the time of the determination" to be read into paragraph 96(2)(b), such that the provision would read: *"any liability to an employee for wages, if,* ***at the time of the determination,*** *the corporation is subject to an action . . ."*. I disagree.

It is recognized, as it was in *Archibald*, *supra*, that imposing personal liability for unpaid wages on directors and officers of a corporation is a statutory creation and an extraordinary exception to common law principles. Accordingly, that liability is not created generally, but only upon the issuance of a Determination under the *Act*. The language creating the liability under Section 96 is framed in the present tense. To reiterate, subsection 96(1) says:

> *96. (1) A person who was a director of 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.*
> (emphasis added)

Because the liability of a director or officer only arises upon issuance of a Determination, it is unnecessary, and would be redundant, to require the expression "at the time of the determination" be specifically included in subsection 96(1). It is a necessary inference arising from a reading of Section 96(1) that it only speaks as of the date of the Determination.

Other elements of Section 96 relating to the liability created, and specifically paragraph 96(2)(b), are also framed in the present tense. To reiterate, paragraph 96(2)(b) states:

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

> *(b) any liability to an employee for wages, if the corporation* ***is*** *subject to an action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act, . . .* (emphasis added)

As with subsection 96(1), it is unnecessary, and redundant, to require any specific reference in subsection 96(2) to the time a Determination is issued because the absence of any personal liability imposed is similarly intended to be decided as of the issuance of the Determination. In other words, a director and officer of a corporation, other conditions being present, "is liable" for wages, but if the corporation "is subject to" insolvency proceedings, "is not liable". All of those conclusions speak to the same point in time, the date of the Determination. Subsections 96(1) and 96(2) must be read in the same context. It would not be logical for the legislature to have intended subsection 96(1) to speak to one point in time and subsection 96(2) to speak to another point in time in without making that intention clear on the face of the provision.

For the above reasons, I agree with the Director that evidence of an assignment in bankruptcy subsequent to the Determination is neither relevant nor probative and will not be admitted on appeal.

The appeals are dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determinations under appeal, all of which are dated January 13, 2003, be confirmed as varied on February 3, 2003, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal