Employment Standards TRIBUNAL

An appeal

- by -

Deborah Naomi Blanchard a.k.a. Debbie Krell
("Krell")

- 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 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2005A/160

DATE OF DECISION: November 10, 2005

DECISION

SUBMISSIONS

Deborah Naomi Blanchard a.k.a. "Debbie Krell"	on her own behalf
John Isaac Tierney	on his own behalf
Chelsie Cholana Krell	on her own behalf
Joe LeBlanc	for the Director of Employment Standards

INTRODUCTION

1. This is an appeal filed by Deborah Naomi Blanchard a.k.a. Debbie Krell ("Krell") pursuant to section 112 of the *Employment Standards Act* (the "*Act*"). Ms. Krell appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on August 23rd, 2005 pursuant to which she was ordered to pay $10,492.45 on account of unpaid wages and section 88 interest (the "Determination").

2. The Determination and accompanying "Reasons for the Determination" were issued following an investigation into certain unpaid wage complaints that were filed by former employees of a corporation known as M.V. Usher 2002 Corporation Inc. (the "Employer"). That latter investigation resulted in a determination being issued against the Employer on September 16th, 2004 in the amount of $10,492.45 (the "Corporate Determination"). The Employer appealed the Corporate Determination and on January 13th, 2005, Tribunal Member Savage issued reasons for his decision dismissing the appeal and confirming the Corporate Determination (see BC EST # D011/05).

3. It is my understanding that no monies have been paid under the Corporate Determination and, accordingly, the Determination now under appeal was issued pursuant to the provisions of section 96(1) of the *Act*:

> **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.

4. The Director's delegate issued the section 96 Determination against Ms. Krell on the basis of a Corporate Registry search that indicated Ms. Krell was a director and officer of the Employer when the employees' unpaid wage claims crystallized. I should add that the corporate search indicated that Ms. Krell ceased being a director/officer on December 3rd, 2002, however, the employees' wages were earned and/or became payable during the period from July 31st to November 2nd, 2002.

5. By way of a letter dated October 19th, 2005, the parties were advised by the Tribunal's Vice-Chair that this appeal would be adjudicated based solely on their written submissions (none of the parties requested

an oral appeal hearing). In addition to the Determination, Reasons for the Determination, Ms. Krell's Appeal Form (and attachments) and the section 112(5) record, I also have before me submissions filed by:

- the Director's delegate (dated September 23rd, 2005);
- John Isaac Tierney (former employee; dated September 25th, 2005);
- Chelsie Cholana Krell (former employee; dated September 25th, 2005); and
- Ms. Krell (dated October 5th, 2005).

REASONS FOR APPEAL

6. Ms. Krell appeals the Determination on the ground that she has "new evidence" that was not available at the time the Determination was being made [section 112(1)(c) of the *Act*]. More particularly, Ms. Krell says "I declared Division 1 Bankruptcy which became final on Feb 25/2003. I have attached the relevant information. I was not aware of the Determination."

7. Strictly speaking, the "new evidence" that Ms. Krell has tendered does not constitute "evidence that was not available when the determination was being made" since the documents in question pre-dated the issuance of the Determination by some 2 1/2 years. On the other hand, it is clear that the delegate was not aware, when he issued the Determination, that Ms. Krell had, quite some time earlier, made a filing under the federal *Bankruptcy and Insolvency Act* ("*BIA*").

8. In my view, it would be more accurate to characterize Ms. Krell's appeal documents as raising an alleged error of law, namely, that the prior proceedings under the federal *BIA* gave her absolute immunity from liability under section 96(1) of the *Act*. Thus, and in accordance with the principles espoused in *Triple S Transmission Inc.*, BC EST # D141/03, I propose to deal with this appeal under section 112(1)(a) [error of law] rather than section 112(1)(c) [new evidence].

9. Ms. Krell attached to her Appeal Form a copy of her Proposal filed on January 29th, 2003 under the *BIA* and a copy of a B.C. Supreme Court (In Bankruptcy and Insolvency) Registrar's Order issued February 21st, 2003 approving the Proposal. I note that none of the respondent employees' unpaid wage claims was listed in the "Claims Register" that was prepared by Ms. Krell's Trustee on February 25th, 2003; on the other hand, the Proposal was prepared approximately 2 1/2 years before the Determination was issued—i.e., when Ms. Krell's liability under section 96(1) of the *Act* had not yet been formalized.

THE PARTIES' POSITIONS

10. Mr. Tierney and Ms. Chelsie Krell filed essentially identical one-paragraph notes stating they agreed with the delegate's findings.

11. The delegate, in his submission, noted that he "does not dispute that Debbie Krell (the Appellant) made an Assignment into bankruptcy on January 13, 2003 [and that] The Appellant then received her discharge from the bankruptcy proceedings on April 15, 2003". The delegate's submission continues:

> The Appellant was however Director or Officer [sic] of [the Employer] at the time that the wages of the employees were earned or should have been paid.

> The Register of Directors shows that the Appellant was Vice-President and Secretary of [the Employer] as of September 24, 2002. The business closed in mid to late October 2002 when the founder of the company Michael Usher vanished. The employee's [sic] wages became due 48 hours after the business closure.
>
> > [Note: this latter submission appears to be inconsistent with the delegate's Reasons which state that the employees' wages were earned between July 31st and November 2nd, 2002].
>
> …The Appellant did not make the assignment into bankruptcy until better then [sic] two months after the business closure. By that time the *Corporate Officer Liability For Unpaid Wages* had already crystallized under section 96 of the [*Act*].
>
> The Director recognizes that the debt created by the operation of section 96 of the *Act* would be captured by the January 13, 2003 assignment into bankruptcy proceedings and as such the debt would not be collectable from the Appellant. The discharge received by the Appellant on April 15, 2003 relieved her from the obligation to pay for debts that existed up to the point of making the assignment.
>
> The Director takes the position that the liability created by section 96 on the Appellant was not extinguished by the assignment into bankruptcy because it was the Appellant that went bankrupt not the corporation.
>
> Section 96(2)(b) is clear in that,
>
> *"…a person who was a director or officer of a corporation is not liable for any liability to an employee for wages, if the corporation is subject to action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act"*.
>
> [The Employer] has never gone into bankruptcy so the liability on the directors and officers remains for the purposes of the *Act*. However the effect of the Appellant going bankrupt and receiving the discharge prior to the issuance of the determination makes collection from this director/officer a nullity.
>
> Therefore the Director is of the position that the determination should not be cancelled as requested by the Appellant as it is correct under the legislation. The Appellant was a director or officer at the time the wages of the employees were earned or should have been paid, and none of the exemptions to liability apply [sic] as the corporation has never been in receivership, bankruptcy or subject to an action under section 427 of the *Bank Act*.
>
> > (underlining and *italics* in original text)

12. In her brief October 5th reply submission, Ms. Krell simply asserted: "I have been instructed by my Trustee in Bankruptcy to confirm to you, that, as stated in my previous correspondence, I declared bankruptcy, and will not be responsible for the liability on this determination".

FINDINGS AND ANALYSIS

13. I must admit to some confusion regarding the delegate's September 23rd submission. He submits:

> The Director recognizes that the debt created by the operation of section 96 of the *Act* would be captured by the January 13, 2003 assignment into bankruptcy proceedings and as such the debt would not be collectable from the Appellant. The discharge received by the Appellant on April 15, 2003 relieved her from the obligation to pay for debts that existed up to the point of making the assignment.

14. The delegate also concedes "the effect of the Appellant going bankrupt and receiving the discharge prior to the issuance of the determination makes collection from this director/officer a nullity". However, the delegate also submits "the determination should not be cancelled as requested by the Appellant as it is correct under the legislation". I am not quite sure if the delegate is saying that the Director properly issued the Determination but cannot now take any enforcement proceedings or is saying that the Determination was properly issued and can be enforced.

15. In any event, I agree with the delegate that none of the statutory defences set out in subsections 96(2)(a) or (b) of the *Act* applies since these latter provisions are only triggered by a formal receivership or other insolvency proceeding as against the corporate employer. I am satisfied—and indeed, Ms. Krell does not dispute—that she was a corporate director when the employees' wage claims crystallized. In the absence of the prior proceedings under the *BIA*, I would be obliged to summarily dismiss this appeal. However, in light of these prior proceedings, the issue in this appeal is whether the court-approved Proposal under the provisions of the *BIA* constitutes a complete defence to what would otherwise be her liability under section 96(1) of the *Act*.

16. A corporate director or officer's liability under section 96(1) is crystallized by the issuance of a determination; prior to a section 96 determination being issued, the director or officer's liability is "indirect" and "contingent" on the corporate employer's default. Further, "the mechanism for enforcing the s. 96 obligation is through a determination by the Director" and such a determination is issued only if the Director exercises his discretion to do so (the Director's power to issue a section 96 determination is "permissive rather than mandatory")—see *Canadian-Automatic Data Processing Services Ltd. v. Bentley*, 2004 BCCA 408 at para. 67.

17. However, in my view, a corporate director or officer's personal liability under section 96(1) of the *Act*, even if such liability has not been crystallized into a determination, nonetheless gives rise to a "claim provable in bankruptcy" and that an unpaid employee in such circumstances would have an "unsecured claim" as against the insolvent debtor. A "claim provable in bankruptcy" as defined in section 1 of the *BIA* "includes any claim or *liability* provable in proceedings under this *Act* by a creditor" and a "creditor" "means a person having a claim, unsecured, preferred…or secured, provable as a claim under [the *BIA*]" (my *italics*).

18. An insolvent person may, as Ms. Krell did here, make a Proposal under Part III, Division 1 of the *BIA* (section 50.4). A Proposal under the *BIA*, if accepted by the creditors and approved by the court, is not a formal adjudication that the debtor is "bankrupt"—that state of affairs only occurs if the creditors refuse to accept the Proposal [see *BIA*, section 57(a)]. Rather, the Proposal, once accepted and approved by the court, has been described as a new "contract" between the debtor and his or her creditors regarding the payment of the debtor's debts and allows the insolvent person to avoid a formal declaration of "bankruptcy".

19. Further, "on the filing of a notice of intention under section 50.4 by an insolvent person" section 69(1) of the *BIA*—the stay of proceedings provision—is triggered. Section 69(1) states that none of the debtor's creditors "has any remedy against the insolvent person or the insolvent person's property, or shall

commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy". In light of this latter provision, the Director may not have had any jurisdiction to issue a section 96 Determination as against Ms. Krell.

20. A Proposal that has been accepted by the creditors and approved by the court [as was apparently the situation here—see *BIA*, section 60(5)] "is binding on creditors in respect of all unsecured claims…but does not release the insolvent person from debts and liabilities referred to in section 178, unless the creditor assents thereto" [*BIA*, section 62(2)(a)].

21. Section 178(1) of the *BIA* provides that certain debts are not released by an order discharging a bankrupt. None of the debts listed in section 178(1) is relevant here except section 178(1)(f): "An order of discharge does not release the bankrupt from liability for the dividend that a creditor would have been entitled to receive on any provable claim not disclosed to the trustee, unless the creditor had notice or knowledge of the bankruptcy and failed to take reasonable action to prove his claim".

22. There is nothing in the material before me to indicate that the respondent employees were given any notice of Ms. Krell's Proposal nor, as noted above, were they listed by her in her *BIA* section 50.4(1)(c) list of creditors. Of course, at the time Ms. Krell filed her notice of intention to make a Proposal, the employees' unpaid wage claims had not been formalized into a section 96 determination. However, Ms. Krell, as a corporate director of the Employer, should have been aware of her existing liability under section 96 of the *Act* and could have listed unpaid employees of the Employer as claimants (or least ensured that some effort was made to give those persons formal notice of her Proposal).

23. There is nothing in the record before me to indicate that the respondent employees were listed in, or otherwise given notice of, Ms. Krell's Proposal nor is there any evidence before me that the respondent employees failed to take reasonable steps to prove their claims to the Trustee's or court's satisfaction. Had the respondent employees been included in the Proposal, or otherwise failed to take reasonable steps to protect their interests in the face of notice, I would have cancelled the Determination. It may be that the Director had no jurisdiction to issue the Determination. It may be, in light of the combined effect of sections 62(2)(a) and 178(1)(f) of the *BIA*, that the respondent employees are entitled to recover some monies from Ms. Krell, although perhaps not the amount set out in the Determination. Accordingly, I am referring this matter back to the Director so that he may take appropriate legal advice and reconsider this matter especially in light of the *BIA* provisions that I have referred to in the course of my reasons.

ORDER

24. Pursuant to section 115(1)(b) of the *Act*, I order that the Determination be referred back to Director.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal