

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act S.B.C. 1995, C. 38

- by -

Kerry Steinemann Director/Officer of
Pacific Western Vinyl Windows & Doors Ltd.
("Steinemann")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO.: 96/272

DATE OF DECISION: July 16, 1996

DECISION

OVERVIEW

This is an appeal by Kerry Steinemann, Director/Officer of Pacific Western Vinyl Windows & Doors Ltd. (“Steinemann”), pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against Determination No. DDET 000208 issued by a delegate of the Director of Employment Standards (the “Director’s delegate”) on April 2, 1996.

The Director’s delegate determined that Steinemann owed wages to Kerry Whitters (“Whitters”) and Kelly Monych (“Monych”). In his appeal, Steinemann indicated that wages were not owed to Whitters, and Monych was not an employee but a self-employed contractor. Subsequently, the Director’s delegate objected to the appeal on the basis that an appeal by a director/officer of a company should be limited to the issues of whether the individual in question is a director/officer of a company and whether the amount of the Determination falls within the two month limitation on unpaid wages that a director/officer is liable for under the *Act*.

I have completed my review of the information provided by the parties on this appeal and I have decided to confirm the Determination.

FACTS

On April 2, 1996 the Director’s delegate issued Determination No. CDET 001839 against Pacific Western Vinyl Windows & Doors Ltd. (“Pacific Western”).

In the Reason Schedules attached to the Determination, the Director’s delegate states the following:

Kerry W. Whitters was employed with the company as a fabricator for the period July 2, 1995 to January 10, 1996. Mr. Whitters was employed to fabricate doors and windows for the company. He was employed at the business premises located at Unit #103, 6683 Oldfield Road, Victoria, B.C. The company admits that Mr. Whitters is owed wages but does not know exactly what amounts remain outstanding. The company indicates that the cheques for December 15, December 31, 1995, and January 10, 1996, may not have been issued. Mr. Whitters claims that he received his December 15, 1995 cheque but did not receive payment of his December 31, 1995 or January 10, 1996 cheque. An inspection of the company payroll records for Kerry Whitters showed no vacation pay being issued for the entire period of his employment.

Kelly R. Monych was employed with the company as the general manager for the period February 16, 1995 to December 6, 1995. Near the end of his employment, in approximately October Mr. Monych changed his job duties from that of the general manager to a commission salesperson. Mr. Monych ran the business for the owner. He could hire and fire and had signing authority on the company cheques. The business was located at Unit #103, 6683 Oldfield Road, Victoria, B. C. The business was involved in the manufacturing of vinyl windows and doors and operated on a normal business basis. Mr. Monych was not a director or officer of the company. He reported to the owner of the business Mr. Gordon Feil. The company disputes that Mr. Monych was an employee and claims that he was self-employed. I found no evidence to indicate that Mr. Monych was self employed but all of the normal tests indicated that he was an employee. Kelly R. Monych supplied two N.S.F. cheques to the Branch. The first cheque was dated November 1, 1995, in the amount of \$2,200.00 and the second one was dated November 7, 1995 in the amount of \$750.00. Mr. Monych also claims that he is owed commission of \$267.00 on a Glanford sale (Booth redo). No evidence was provided by the company to indicate that this amount was paid.

In the Calculation Schedules attached the Determination the Director's delegate calculated that Whitters was owed \$2,446.08 plus interest, which represents outstanding wages for the pay periods ending December 31, 1995 and January 10, 1996, and vacation pay, and Monych was owed \$3,345.68 plus interest, which represents outstanding wages as per the two N.S.F. cheques, wages for the commission job, and vacation pay.

The time limit for filing an appeal of Determination No. CDET 001839 issued against Pacific Western was April 25, 1996. That Determination was not appealed.

On April 2, 1996 the Director's delegate issued Determinations against the two directors of Pacific Western, Gordon Feil (Determination No. DDET 000207) and Steinemann (Determination No. DDET 000208).

The Reason and Calculation Schedules attached to Determination No's. DDET 000207 and DDET 000208 are identical to the Schedules attached to the Determination issued against the company.

The time limit for filing an appeal of Determination No's. DDET 000207 and DDET 000208 was April 25, 1996. Gordon Feil did not appeal the Determination issued against him. Steinemann submitted an appeal of the Determination issued against him which was received by the Tribunal on April 22, 1996. In his reasons for the appeal Steinemann writes:

Re: Kerry Whitters: Computer programs made by Kerry while employed by Pacific Windows were deleted from the computer. This program along with software has a value of 5,000 plus dollars and Kerry has access to this information. No action was taken against Kerry as he was owed wages, and if he has found a buyer for the program he should be well ahead of what was owed him for wages.

Re: Kelly Monych: As a self employed contractor Kelly had no deductions taken from his pay as he requested, so he could declare his own deductions and pay his own taxes. As you stated your normal test indicate that he was only an employee. If that were the case since Feb. 16/95 taxes, U.I.C. and C.P.P. would have to be paid from Kellys gross pay and he would be entitled to vacation pay. As your calculation schedule shows you have determined that Kelly was an employee only for pay periods November 1st and 7th 1995 and for a commission cheque.

On April 23, 1996 the Tribunal advised the Director's delegate of this appeal and asked him to forward any additional documents relevant to the appeal to the Tribunal by May 7, 1996. Additional documents were received by the Tribunal on May 6, 1996. Included in the documents were a copy of a company search indicating Feil and Steinemann are directors of Pacific Western, a copy of the complaint forms submitted by Whitters and Monych to the Employment Standards Branch and a note written by the Director's delegate which reads " Mar 25/96. Talked to employer who said...business went under on Jan/96 - Bank sold all assets didn't go into bankruptcy or receivership...told him of personal liability/director." All the additional documents received from the Director's delegate were then forwarded to Steinemann, Monych and Whitters on May 27, 1996. They were advised that if they wished to make a response then they should do so by June 17, 1996. No response was received.

On May 17, 1996 the Director's delegate forwarded a further submission to the Tribunal objecting to the Tribunal's proceeding with the appeal by Steinemann. He states:

I believe the issue that the tribunal is restricted to is the issue of whether or not Kerry Steinemann was a director/officer of the company as that is the only determination that has been appealed. The initial determination issued against the company was not appealed therefore suggesting that the amount of wages found to be owing was correct. Accordingly, the sole issue arising from the subsequent director/officer determination, based on the uncontested wages, is whether the named individual is in fact a director or officer of the body corporate. Company registry shows that Kerry Steinemann is a director of the company.

I would therefore suggest that the scope of an appeal of a director/officer determination only, is limited to the question as to whether the named individual is a director/officer and the quantum of the determination is not subject to review given that there was no dispute on the corporate determination. The only circumstances in which quantum would be an issue is respecting the amount of the director/officer's personal liability pursuant to Section 96 of the ...Act...(which) states that 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. In this particular case, the amount owing to...Whitters reflects wages owing to him for two pay periods, that being December 31, 1995 and pay period ending

January 10, 1996, plus vacation pay. The company records indicated that the wages earned by ...Whitters for the period December 1, 1995 to his termination on January 10, 1996 was in excess of \$3,000.00. The amount on the determination clearly falls below the 2 month liability. With respect to the amount owing to ...Monych the amounts owing reflect two N.S.F. cheques plus a small amount of commissions and vacation pay totalling \$3,371.96. ...Monych claims that his monthly salary was \$3,000.00. This too is below the 2 month director liability.

I would request that the tribunal restrict itself to the issue of whether or not Kerry Steinemann is a director/officer of Pacific Western ...and whether or not the amount of the determination falls within the 2 month director/officer liability.

A copy of this submission was forwarded to Steinemann, Whitters and Monych on June 13, 1996. They were advised that if they wished to reply they should do so by June 28, 1996. No reply has been received to date.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Steinemann, on an appeal of a Determination against him as a director of Pacific Western, can properly appeal the issue of the company's liability for wages, or whether he is limited to arguing the issues of whether he is a director of the company and whether the amount of the Determination falls within the 2 month limitation on unpaid wages for which he is personally liable under the Act.

ANALYSIS

It is my opinion that the doctrine of *res judicata*, and particularly issue estoppel, operates to prevent Steinemann from arguing the issue of the company's liability for wages.

Res judicata provides that a thing or matter which has been previously decided should, as a matter of policy, be binding on the parties or their privies, which are persons who partake or have an interest in some act. Issue estoppel is a species of *res judicata*. It covers individual issues addressed in earlier proceedings which necessarily and fundamentally form the basis of the judgment delivered. The doctrine of issue estoppel applies to decisions of administrative tribunals as well as courts [**Rasanen v. Rosemount Instruments Ltd.** (1994), 17 O. R. (3d) 267 (C.A.)].

Issue estoppel operates to prevent a party from raising an argument at a later proceeding if the following conditions are present:

1. The same question has already been decided;
2. The previous decision was final; and
3. The parties to the decision, or their privies, were the same persons as the parties, or their privies, to the proceedings in which the estoppel is raised.

In **Stelmaschuk v. Dean** [(1995) 13 C.C.E.L. (2d) 220; [1995] 9 W.W.R. 131] the Northwest Territories Supreme Court accepted that the doctrine of issue estoppel, in the context of an employment standards proceeding, applied to preclude a director from re-litigating the issue of a company's liability. There, a director who was the "operating mind" of a company was served with a certificate 6 years after a certificate had been issued to the company. The company had contested the original proceeding unsuccessfully, but had never appealed. The director sought to re-open the issue of the company's liability arguing that he was a separate party with an entitlement to due process. The Labour Standards Board rejected the director's request to reargue the merits of the case, holding that it would hear him only on the issues of whether he was a director or officer or whether the wages claimed fell within the 2 months' statutory limitation. On appeal, the Northwest Territories Supreme Court upheld the Board's decision.

The Northwest Territories Supreme Court accepted that the doctrine of issue estoppel applied, and in addressing the three conditions in the test for issue estoppel, it determined that the test had been met:

1. The same question had already been decided. In the previous proceeding between the company and the employees, the issue of liability had been argued on the merits and the Labour Standards Board had ruled against the company.
2. The decision was final. The company had not appealed the previous decision.

3. The parties or their privies were the same. The director was the operating mind of the company and clearly had an interest in the outcome of the original proceeding. However, even if there was not strict mutuality in the identity of the parties, Canadian courts had applied the doctrine of issue estoppel on the basis that it would be an abuse of process to permit relitigation.

In the **Stelmaschuk** case, the purpose of the local employment standards statute provided an additional basis for finding that relitigation would be an abuse of process. The purpose of that legislation was to ensure that employees were paid by their employers and to protect employees from insolvent employers. Relying upon a British Columbia Court of Appeal decision, **Evans v. British Columbia (Employment Standards Board)** (1983), 149 D.L.R. (3d) 1 (B.C.C.A.), the Court held that it was consistent with the aims of the legislation to impose liability on directors and to preclude them from relitigating the company's liability. The enforcement mechanisms of the legislation was meant to be quick and inexpensive and it would be counterproductive to those aims to have constant relitigation of the same issues.

In conclusion, the Court held:

*In my opinion, it is wholly consistent with the purpose of the legislation, and the summary administrative enforcement scheme contained within it, to say that a director, on whom liability is imposed because of s. 62 of the Act, should not be able to relitigate the underlying liability of the company. To do so would lead to the possibility of conflicting decisions. It would also undermine the protection afforded by the Act to employees where the employer becomes insolvent. This is reinforced in the case, as here, of a privately-held company and a director who is its operating mind. It would be an abuse of the process of the Labour Standards Board to allow the issue to be relitigated. As stated in the decision of Lord Maugham L.C. in *New Brunswick Railway Co. v. British & French Trust Corp.*, [1939] A.C. 1 (H.L.), at p. 20:*

If an issue has been distinctly raised and decided in an action, in which both parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them. (emphasis added)

The only exception would be in the case of fraud or collusion being shown, or the tendering of fresh evidence which would be decisive and was not available previously through the exercise of reasonable diligence. None of those factors are present here.

The issue before me in this appeal is whether it is proper to prevent Steinemann from seeking to relitigate the issue of Pacific Western's liability for wages. I find that the test for issue estoppel has been met in this case as follows:

1. The same question has already been decided. The Director's delegate decided, following his investigation, that wages were owed by Pacific Western to Whitters and Monych. As a result, he issued Determination No. CDET 001839 against the company.

2. The decision was final. Pacific Western did not appeal Determination No. CDET 001839.
3. The parties or their privies are the same. The employees are the same. Although the appellant is the individual director, and not the company, I am satisfied he is a privy to the company. As a director, Steinemann has an interest in the outcome of the Determination issued against the company. Like any director of any company he is responsible for managing the affairs and business of the company.

In the **Stelmaschuk** case, the Court held there were two exceptions where a director could engage in relitigation of a company's liability. A director may reargue the merits on liability where there has been 1) fraud, or 2) fresh evidence which is decisive and which was not previously available. There is no evidence that either of these factors are applicable in this case.

I conclude that Steinemann is precluded from arguing the issue of Pacific Western's wage liability. It is my decision that Steinemann is limited to arguing those issues which arise under Section 96 of the *Act*.

Section 96 of the *Act* states:

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.
- (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 an action under Section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act,
 - (b) vacation pay that becomes payable after the director or officer ceases to hold office, or
 - (c) money that remains in an employee's time bank after the director or officer ceases to hold office.
- (3) This *Act* applies to the recovery of the unpaid wages from a person liable for them under subsection (1).

The intent of Section 96 of the *Act* is to provide the Director of Employment Standards with a way of collecting wages that are owed by a company to its employees. It ensures

that employees are protected against insolvent employers - which appears to be the case with Pacific Western - through making directors and officers liable, within limits, for the payment of wages. This section of the *Act* was not meant to provide a company with a further opportunity to dispute the company's liability for wages.

Steinemann has provided no evidence to dispute that he was a director of Pacific Western at the time wages were earned or should have been paid to Whitters and Monych. He has provided no evidence to challenge the conclusion of the Director's delegate that the wages payable under the Determination are within the limit on wages for which a director is liable under the *Act*. Further, the exceptions set out in Section 96 (2) do not apply in this case. As a result, I conclude that the Determination issued against Steinemann is not in error.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination No. DDET 000208 be confirmed.

Norma Edelman
Registrar
Employment Standards Tribunal

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