

An appeal

- by -

Charles Bruce Wood,
a Director or Officer of Orion Truck Centre Ltd.

- 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: Ib S. Petersen

FILE No.: 2002/100

DATE OF DECISION: May 15, 2002

DECISION

SUBMISSIONS:

Mr. Dennis K. Fitzpatrick	counsel, on behalf of the Mr. Charles Bruce Wood
Mr. Brad Crowther	on behalf of himself
Ms. D. Lynne Fanthorpe	on behalf of the Director

OVERVIEW

This is an appeal by Mr. Wood pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) of a Determination of the Director’s Delegate issued on February 7, 2002 in the amount of \$60,139.08 (the “Determination”). In that Determination, the Delegate found that Mr. Wood was a director or officer based on the records available from the Registrar of Companies. As well, the Delegate found that Mr. Wood participated in the activities of the company at the time wages were earned.

Determinations were issued against Orion Truck Centre Ltd. (the “Employer”) on June 29 and November 23, 2001 (the “Corporate Determinations”). The amount owing under these Determinations was \$167,753.55. The Corporate Determinations were not appealed.

ISSUES

Mr. Wood takes issue with the Delegate’s conclusions. He argues:

1. He is not personally liable for vacation owed to complainant employees;
2. Others, who were directors at the material time, should share liability with Mr. Wood;
3. In the alternative, the Determination should be suspended pending the liquidation of the bankrupt corporate Employer.

FACTS AND ANALYSIS

The Appellant has the burden to persuade me that the Determination is wrong. For the reasons set out below, I am of the view that Mr. Wood has not met that burden and that the appeal, therefore, must be dismissed.

First, the Appellant argues that he is not liable for the vacation pay component of the award. The argument is based on the definition of “wages” in Section 1 of the *Act* which, he submits, makes no reference to vacation pay, and because it is calculated as a percentage of “total wages” cannot be wages. Rather is a benefit. He argues that the statute ought to be construed narrowly.

In my view, there is no merit to this argument. Section 1 defines “wages” broadly:

“Wages” *includes*

...

(c) money, including the amount of any liability under Section 63, required to be paid by an employer to an employee under this Act,

Vacation pay are “money ... required to be paid ... under this *Act*”. It is calculated as a percentage of “total wages” (see Section 58). In my view, the definition of wages must be given a broad and remedial construction. In short, I dismiss the appeal on this point.

Second, Mr. wood argues that the test for director or officer status depends on whether he, in fact, performed the functions of a director or officer. He relies on several decisions of the Tribunal in support of that argument. He argues that other persons were also directors or officers and should share in the liability.

I have some sympathy for Mr. Wood’s predicament. The Tribunal’s jurisprudence was with respect to director or officer status has recently been summarized in *Re Director of Employment Standards*, (BCEST #D047/01, reconsideration of BCEST #D056/00 (the “*Michalkovich* decision”):

In our view, in summary, the case law reviewed here and in *Wilnofsky* stands for the following propositions:

1. The corporate records, primarily those available through the Registrar of Companies or available at a corporation’s registered and records office, raise a rebuttable presumption that a person is a director or officer. In other words, the Director of Employment Standards may presumptively rely on those corporate records to establish director or officer status.
2. It is then open to the person, who, according to the corporate records, is a director or officer, to prove on the balance of probabilities that the company records are *inaccurate*, for example, because the person resigned and the documents were not properly processed, a person is not properly appointed etc.
3. There may well be circumstances where it would be inappropriate to find that a person is a director or officer despite being recorded as such. However, *it will be the rare and exceptional case to be decided on all the circumstances of the particular case and not simply by showing that he or she did not actually perform the functions, duties or tasks of a director or officer.*
4. The determination of director-officer status should be narrowly construed, at least with respect to Section 96. (Emphasis added)

If the argument is that he was not performing the duties or the role of an officer or a director, at the material time, that argument is, in my view, without merit. There is little factual basis--if any--in support. In fact, elsewhere in the appeal, Mr. Wood states that “he remained on as a director because he hoped to save the enterprise.” It cannot be seriously argued that this is one of the “rare and exceptional” cases contemplated by the *Michalkovich* decision. There is no dispute that Mr. Wood was listed as a “director and vice-president” at the relevant times. He was, on the available facts, a director or officer and, thus, liable as such.

If the argument is that liability must be shared among those said to be directors or officers, assuming that to be the case, I also disagree. Section 96 provides in part:

96. (1) A person who was a director or an 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 my view, the Adjudicator in *Re Douglas H. Corbett*, BCEST #D165/01, was correct in noting:

However, as I interpret subsection 96(1), the Director is free to collect--say, from 6 separate directors--the full amount of the employees' unpaid wage claims. The purpose of section 96 is to ensure that employees will recover at least some of their unpaid wages in the event their former corporate employer is unable to pay their wages in whole or in part. The Director can collect 2 months' wages from each and every director/officer but cannot, of course, collect, in total, *more* than the actual amount of the unpaid wages due to the various employees. This latter limitation with respect to *collection* does not, in my view, constrain the amount of a section 96 determination that may be *issued* at a time when, most often, no collection proceedings have yet been successfully effected. The only limitations governing the amount of unpaid wages for which a section 96 determination may be *issued* are those set out in section 96 itself.

This ground of appeal is, as noted, also dismissed. The Director is entitled to collect up to two months wages from each and every director or officer. There is nothing in the legislation to support the Appellant's contention that the liability must be shared. His liability is limited to "2 months' unpaid wages for each employee."

Third, Mr. Wood argues that the Determination be suspended pending the liquidation of the assets of the bankrupt Employer. He relies on Section 113 of the *Act*. The appeal notes, among others, that Mr. Wood "hopes that the sale of Orion's assets and real estate will generate enough money to pay the employees' wages." He suggests that \$10.00 is an adequate amount in the circumstances.

First, I am not convinced that I have the jurisdiction to do as Mr. Wood requests. My jurisdiction is the *Act*. The main purpose of Section 113, as I see it, is to grant relief from a determination pending the outcome of appeal proceedings to the Tribunal. Second, even if I did have the jurisdiction I would deny the request. The amount proposed does not have any relationship with what is owed under the Determination. Moreover, Mr. Wood's "hope" is less than a solid foundation for a suspension of the Determination. It is far from clear that there will be money for the complainant employees after the conclusion of the bankruptcy process. In the result, I will not exercise my discretion to grant the suspension.

At the end of the appeal, Mr. Wood raises two additional issues. He says, and that is disputed, that one employee worked, not for the Employer but for the receiver for some time and was paid in full. As well, Mr. Wood questions the Corporate determinations which were not appealed. He says that "he was not provided with the form of the June 29, 2001 Determination. He has, accordingly, had an opportunity to defend." I assume that the point is that he did not have an opportunity to defend. The point is that no appeal was filed with respect to either of the Corporate Determinations, copies of which, according to the Determination was served on the Employer's registered and records office and on Mr. Wood as a director or officer. These arguments relate to the Corporate Determinations which, in my view, the Appellant is not entitled to raise at this time. The issues arising under a director's determination is status as a director and the calculation of the amounts owed.

In my view, the onus is on the Appellant to show on the balance of probabilities that the Determination was wrong. The appellant has failed to do so.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated February 7, 2002 be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal