



An appeal

- by -

George Stathis, A Director or Officer of Consolidated Van-City Marble Ltd.
("Stathis")

- 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: W. Grant Sheard

FILE No.: 2000/878

DATE OF DECISION: May 2, 2001

DECISION

SUBMISSIONS:

George Stathis	a director or officer of the Employer company, on his own behalf
Tarsem Dhillon	the Employee, on his own behalf
Morry Levin	on behalf of the Director

OVERVIEW

This is an appeal based upon written submissions by George Stathis, a Director or Officer of Consolidated Van-City Marble Ltd. (“Mr. Stathis”), pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination of the Director of Employment Standards (the “Director”) issued on December 1, 2000. In this appeal Mr. Stathis claims that the Determination was faulty because there were errors in the facts.

In a Determination dated March 3, 2000 the Director ruled that the corporate employer owed the Employee \$10,790.25 for unpaid overtime, annual vacation pay, and entitlement to compensation for length of service. The corporate employer attempted to appeal that determination, but this Tribunal declined to grant an extension of time to file and that appeal was dismissed on August 2, 2000. In the Determination of December 1, 2000 now appealed from, the Director found that Mr. Stathis was a director or officer of the corporate employer at the time the wages were earned and therefore found him personally liable for up to 2 months of unpaid wages (overtime and vacation pay of \$4,924.56 plus interest of \$559.63 for a total due of \$5484.21) pursuant to section 96 of the *Act*.

ISSUE

1. Was Mr. Stathis a director or officer of the corporate employer at the relevant time?
2. In an appeal of a Determination against a Director/Officer of a corporate employer, can the Director/Officer appeal the issue of the corporation’s liability for wages, or is the Director/Officer limited to arguing the issues of whether he is a Director/Officer of the company (or whether he was at the material times) and whether the amount of the Determination falls within the 2 month ceiling for a Director/Officer’s personal liability for unpaid wages under section 96 of the *Act*?

ARGUMENT

The position of the Director/Officer of the Employer

In an appeal form dated December 19, 2000 filed electronically on December 20, 2000, Mr. Stathis claims that he resigned in 1996 as a director of the Employer company and so he should not be held responsible for these wages which accrued due between January 1997 and December 1998.

In a further appeal form dated December 26, 2000 and filed in hard copy on December 27, 2000, Mr. Stathis says that the determination was faulty because there were errors in the facts. He claims that the information and allegations given by the employee to the Director in the investigation which led to the original determination against the corporate employer were false. Mr. Stathis further asserts that the employee was, in fact, paid in full and he provides detailed reasons with supporting documents, such as cheques and correspondence, for making that assertion.

The Employee's Position

In written submissions dated January 15, 2001, Mr. Dhillon denies Mr. Stathis' assertion that he was paid in full or that there was any agreement made regarding overtime wages. Mr. Dhillon maintains that he has not been paid pursuant to the original determination of March 3, 2000 against the corporate employer.

The Director's Position

In written submissions dated January 11, 2001, the Director's delegate submits that Mr. Stathis has only argued the same issues or merits of the original decision made against the corporate employer while a director or officer of a corporate employer is limited to disputing the issues of whether he or she was a director or officer at the time the wages were earned or should have been paid or whether the calculation of personal liability is correct. The Director's delegate says that, as the appeal is not directed to either of these latter two questions, the appeal should be dismissed.

THE FACTS

The Director issued a Determination against a corporate Employer, Consolidated Van-City Marble Ltd. on March 3, 2000 in favour of an employee, Mr. Tarsem Dhillon, for non-payment of overtime, annual vacation pay and entitlement to compensation for length of service. That Determination was sent to Mr. Stathis, among others, as a Director or Officer of the corporate employer.

In the Determination dated December 1, 2000 now appealed from, the Director's Delegate found that no settlement of the previous Determination has been received from the corporate employer.

The Delegate further found that a search of the BC Online Registrar of Companies indicated as at August 20, 1999 that Consolidated Van-City Marble Ltd. was incorporated on August 20, 1987 and that George Stathis was listed as a Director/Officer. Tarsem Dhillon's unpaid wages were earned between January 1, 1997 and December 23, 1998. The Directors Delegate found that "George Stathis was a Director/Officer of Consolidated Van-City Marble Ltd. and was so appointed at the time the wages were earned and became payable".

The corporate employer attempted to appeal the original determination, but this Tribunal declined to extend the time for filing that appeal and that appeal was dismissed. In the Determination dated December 1, 2000 now appealed from the Director's Delegate found that the amount determined to be owing by Mr. Stathis as a director or officer of the corporate employer, exclusive of compensation pay, is as follows:

Overtime pay	\$1,435.77
Vacation pay	<u>3,488.79</u>
Sub Total	\$4,924.56
Interest	<u>559.65</u>
Total Due	<u>\$5,484.21</u>

In his appeal form dated December 19, 2000 filed electronically December 20, 2000, Mr. Stathis says, "In 1996 I resigned as a director of the company. I submitted a letter of resignation that was forwarded to the company's lawyer. A press/news release was issued and was carried in the VSE reporting "Marketwatch" or whatever the stock market news entity is called."

ANALYSIS

1. Was Mr. Stathis a director/officer of the corporate employer at the relevant time?

The onus is on an appellant to demonstrate on a balance of probabilities that the determination was in error. Mr. Stathis says in his appeal form of December 19, 2000 that he submitted a letter of resignation to the company's lawyer. However, no copy of that letter or a formal "Resignation of Director" form from the Records Book of the company is provided. This bare assertion of Mr. Stathis that he had resigned does not establish on a balance of probabilities that the Director's search of the BC Online Registrar of Companies as at August 20, 1999 was erroneous in indicating that he was a director of the corporate employer at the time the wages were earned or became due between January 1997 and December 1998.

2. In an appeal of a Determination against a director/officer of a corporate employer, can the director/officer appeal the issues or merits of the corporation's liability for wages, or is the director/officer limited to arguing the issues of: 1) whether he/she was a director at the time the wages were earned or became due and, 2) whether the amount of the Determination falls within the maximum of 2 months of wages for a director's personal liability under section 96 of the Act?

Section 96 of the *Act* provides as follows:

s.96 Corporate Officer's liability for unpaid wages

- (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.

The issue of whether a Director/Officer of an employer corporation found liable for unpaid wages under section 96 of the *Act* can appeal the issues of the company's liability or whether that Director/Officer is limited to arguing the issues of whether the Director/Officer was a Director/Officer at the relevant times or whether the amount falls within the 2 month ceiling for such personal liability was squarely dealt with by this Tribunal in the case of *Steinemann, Kerry Director/Officer of Pacific Western Vinyl Windows & Doors Ltd.*, BC EST #D180/96 (Adjudicator N. Edelman) ("*Steinemann*")

In *Steinemann*, Adj. Edelman said, in part, as follows:

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; [195] 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 relitigating the issue of a company's liability.

Further on she continued saying:

Evans v. British Columbia (Employment Standard 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 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 section 62 of the *Act*, should not be able to relitigate the underlying liability of the company.

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 throughout the exercise of reasonable diligence. None of those factors are present here.

As in *Steinemann*, there is no evidence in this case of fraud or collusion or of fresh evidence which would be decisive and was not available previously. I agree with the Director's Delegate and, following *Steinemann*, find that, in the absence of fraud, collusion, or decisive fresh evidence not previously available, a Director/Officer of an employer company appealing a Determination of personal liability under section 96 of the *Act* is limited to arguing issues of whether he was a Director/Officer at the time the wages were earned and should have been paid or whether the amount of the Determination falls within the 2 month ceiling on such personal liability.

The comment of Ms. Edelman in *Steinemann* is apt:

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.

For all the foregoing reasons, I find that Mr. Stathis has failed to meet the burden upon him to demonstrate on a balance of probabilities that the Determination of December 1, 2000 was made in error.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination of this matter, dated December 1, 2000 and filed under number 035-186, be confirmed.

W. GRANT SHEARD

**W. Grant Sheard
Adjudicator
Employment Standards Tribunal**