

An appeal

- by -

Akbar Hassanally, a Director or Officer of Nexmedia Technologies Inc.  
(“Hassanally”)

- 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/112

**DATE OF DECISION:** June 27, 2003

## DECISION

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Akbar Hassanally, a Director or Officer of Nexmedia Technologies Inc. (“Hassanally”) of a Determination that was issued on March 18, 2003 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Hassanally was a Director or Officer of Nexmedia Technologies Inc., an employer found to have contravened provisions of the *Act*, and, under Section 96 of the *Act*, was ordered to pay an amount of \$11,041.64.

Hassanally says the Determination is wrong in law. He says the amount of the Determination is not all wages but also includes severance, or more accurately length of service compensation, and/or vacation pay. He also says there are other directors who should share equally in the liability. Hassanally has asked that the Determination be varied to adjust for the incorrect inclusion of length of service compensation and vacation pay in the amount found owing and that the resulting liability be split the equally among all the directors of Nexmedia Technologies Inc.

The Tribunal has decided an oral is not required in order to address this appeal.

### ISSUE

The sole issue in this appeal is whether there is any basis on which Hassanally might be relieved of a portion of his liability under Section 96 of the *Act*.

### FACTS

On September 26, 2002, the Director issued a Determination against Nexmedia Technologies Inc. In favour of two complainants in the amount of \$11,041.64. The complainants wages were earned between February 25, 2000 and September 30, 2001. That Determination was not appealed.

Hassanally was listed as a director/officer of Nexmedia Technologies Inc. during the period wages were earned by the complainants. Nexmedia Technologies Inc. is not in receivership, is not subject to an action under Section 427 of the *Bank Act (Canada)* and is not subject to a proceeding under an insolvency Act.

### ARGUMENT AND ANALYSIS

The relevant provision of the *Act*, subsection 96(1), reads:

- 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.

Hassanally says he should not be liable under Section 96 of the *Act* for length of service compensation or vacation pay. In reply, the Director notes the relevant part of Section 96 establishes a personal liability on

a director and/or officer of a corporation for “up to 2 months’ unpaid wages for each employee” and under the Act “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 . . .

The Director says both length of service compensation and vacation pay are amounts which were required to be paid by Nexmedia Technologies Inc. to the complainants under the *Act*. Length of service compensation is specifically included in the definition of wages.

I agree with the Director. The Director has made no error in law by including compensation for length of service and vacation pay in the liability imposed under Section 96. Both amounts are wages.

Nor do I find any error in the Director’s decision to proceed against Hassanally alone for the full amount of the corporate Determination. The *Act* does not prohibit the Director from imposing a personal liability on each director or officer of a corporation individually or require the Director to proceed against all directors or officers. The only limitation is that the Director cannot collect from directors or officers an amount greater than the total liability of the corporation under the *Act*. In *Douglas H. Corbett, a Director or Officer of Alya International Inc.*, BC EST # D165/01, the Tribunal said:

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.

The appeal is dismissed.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated March 18, 2003 be confirmed in the amount of \$11,041.64, together with any interest that has accrued pursuant to Section 88 of the *Act*.

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**David B. Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**