



An appeal

- by -

Robert H. Fulton, a Director or Officer of Consolidated Van-City Marble Ltd.
("Fulton")

- 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.: 2001/7

DATE OF DECISION: May 2, 2001

DECISION

SUBMISSIONS:

Robert H. Fulton	on his own behalf
Morry Levin	on behalf of the Director

OVERVIEW

This is an appeal based upon written submissions by Robert H. Fulton, a Director or Officer of Consolidated Van-City Marble Ltd. (“Mr. Fulton”), 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 and because he was only a director for 10 months of the employment period and wasn’t involved in the day-to-day running of the company.

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. Fulton 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 \$5,484.21) pursuant to section 96 of the *Act*.

ISSUE

1. Was Mr. Fulton 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 a written submission filed with an Appeal Form dated December 27, 2000, Mr. Fulton says that, because he wasn't involved directly in running the corporate employer, he refers to written submissions filed in the appeal by another director of the same company, Mr. George Stathis.

This adjudicator reviewed those submissions and rendered a decision regarding Mr. Stathis under file number EST 2000/878. In his appeal, Mr. Stathis submitted that he was not a director of the corporate employer at the time that the wages were earned or became due and that the determination was faulty because there were errors in the facts. Mr. Stathis said that information given and allegations made by the employee, Mr. Dhillon, in the investigation which led to the original determination against the corporate employer were false. Mr. Stathis further asserted that the employee was, in fact paid in full and he provided details of his reasons and supporting documents, such as cheques and correspondence, for that assertion.

Mr. Fulton says that, in view of Mr. Stathis' submission, it appears all overtime and holiday entitlement was paid. Mr. Fulton also says that he was only a director for 10 months of the employment period and wasn't involved in the day-to-day running of the corporate employer and so he should not be personally liable for unpaid wages.

The Employee's Position

Mr. Dhillon did not file a response to Mr. Fulton's appeal in particular. However, he did file a written submission in response to Mr. Stathis' submission in which he denied that he had been paid his wages or that an agreement had been reached regarding overtime wages. Mr. Dhillon there maintained that he had not been paid pursuant to the original determination of March 3, 2000 against the corporate employer.

The Director's Position

In a written submission dated February 12, 2001 the Director's Delegate says that a director/officer of a corporate employer is limited to appealing on the issues of whether the director was an officer of the corporate employer at the time the wages were earned or became due and whether the calculation of personal liabilities is correct. Thus to the extent that Mr. Fulton appeals on the basis that all overtime and holiday entitlement was paid, the appeal should be dismissed. Regarding Mr. Fulton's assertion that he was only a director of the corporate employer for 10 months of the employment period the Director's Delegate says that, as Mr. Fulton does not provide corporate records or the actual dates of his directorship (which would affect the extent of his liability), he has not met the onus on him to rebut the presumption of a corporate registry search that indicates he was a director at the relevant time.

The Director's Delegate also submits that there was a typographical error in the Determination on the first page where it was stated that the "Amount Owing" was \$4,924.56. The Delegate notes that the amount was correctly stated as \$5,484.21 in three other places in the Determination and requests that the Tribunal amend the amount stated as owing to be \$5,484.21 pursuant to the Rules of Procedure of the Employment Standards Tribunal: Appeals.

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. Fulton, 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 Robert Fulton 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 "Robert Fulton 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. Fulton 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 27, 2000 Mr. Fulton says, "I was only a director for 10 months of the employment period in 1998 and wasn't involved in the day-to-day running of the company." He does not provide extracts of the record book of the corporate employer (such as a resignation of director form or Registry of Directors) or other documentation to support his claim.

ANALYSIS

1. Was Mr. Fulton 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. Fulton says in his written submission of December 27, 2000 that he was only a director of the employer company for 10 months of the employment period in 1998. However, he does not provide the dates of his directorship. Furthermore, I agree with the submission of the Director's Delegate that, in the absence of extracts of the corporate record book demonstrating that Mr. Fulton was no longer a director, this bare assertion by Mr. Fulton does not rebut the evidence of the search of the Registry of Companies that indicates he was a director of the corporate employer during the employment period in 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. Fulton 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 and that the amount stated as owing on the first page of that Determination be amended to read "\$5,484.21".

W. GRANT SHEARD

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