

An appeal

- by -

Rocerick J. Horte, a Director or Officer of Abeda Wood and Marine Products  
Ltd.  
("Horte")

- 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:**

**FILE No.:**

**DATE OF HEARING:**

**DATE OF DECISION:**

## DECISION

Roderick J. Horte, a former Director or Officer of Abeda Wood and Marine Products Ltd. (“Horte”) has appealed a decision of the Director of Employment Standards (the “Director”) dated February 6, 2002 (the “Determination”). The Determination concluded that Horte, as a Director or Officer of Abeda Wood and Marine Products Ltd. at the time wages of employees of Abeda Wood and Marine Products Ltd. were earned, was liable under Section 96 of the *Act* in an amount of \$26,057.54.

Horte says the Determination is wrong and has provided several reasons for that assertion:

1. The amounts set out in the Determination are a duplication of amounts found to be owing in another Determination, also issued on February 6, 2002;
2. The amounts found owing are for annual vacation pay for salaried employees and the calculation of those amounts failed to take into account that these employees had received time off with pay when the mill was closed in late December;
3. The calculations failed to take into account that one of the employees, Daniel Almond, was absent from work due to illness for an extended period of time in 2000 and 2001, during which the company continued to pay his salary and such period should be considered as paid annual vacation.
4. He ceased to be a director and officer of Abeda Wood and Marine Products Ltd. On August 14, 2001.

## ISSUE

The issue in this appeal is whether Horte has shown the director/officer Determination was wrong in a manner that justifies the intervention of the Tribunal under Section 115 of the *Act* to cancel or vary the Determination, or to refer it back to the Director.

## FACTS

Abeda Wood and Marine Products Ltd. (“Abeda”) operated a value added wood product manufacturing plant in Kelowna, BC. On September 11, 2001, Abeda was assigned into bankruptcy and Arthur Andersen Inc. was appointed as the Trustee.

On August 20, 2001, the Director issued a Determination against Abeda in favour of 31 employees for wages and benefits for the pay periods July 15, 2001 to July 28, 2001 and July 29, 2001 to August 10, 2001. The amount found owing was \$55,556.37, including interest accrued to that date. The Determination was sent to Abeda, with copies to the registered and records office of Abeda and to Horte. That Determination was not appealed and a partial settlement of it was received by the Director and distributed.

On January 30, 2002, a Determination was issued against Abeda in favour of six employees for annual vacation pay in the amount of \$9,753.47, including interest accruing that date. The Determination was sent to Abeda, with copies to the registered and records office of Abeda and to Horte. That Determination was appealed and the appeal was dismissed (BC EST # D215/02) because neither Abeda nor Horte had the legal authority appeal the Determination.

The Determination under appeal found that Horte was a director and officer of Abeda and that he had participated in the activities of Abeda at the time wages were earned and should have been paid.

## ARGUMENT AND ANALYSIS

Section 96 of the Act states:

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 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.
- (2.1) If a corporation that is a talent agency has received wages from an employer on behalf of an employee and fails to pay those wages, less any fees allowed under the regulations, to the employee within the time required under the regulations,
- (a) a person who was a director or officer of the corporation at the time the wages were received is personally liable for the amount received by the corporation from the employer, less any fees allowed under the regulations, and
  - (b) that amount is considered for the purposes of subsection (3) to be unpaid wages.
- (3) This Act applies to the recovery of the unpaid wages from a person liable for them under subsection (1) or (2.1).

In reply to the appeal, the Director says that the Determination upon which the 'duplication' argument is based was a Determination issued against the corporate entity, Abeda Wood and Marine Products Ltd., while the Determination under appeal has been issued under Section 96 of the *Act*. In other words there are separate Determinations under different provisions of the *Act* against different persons. The Director says Horte has not provided any evidence to support the assertion that the payroll records do not accurately reflect employees' annual vacation pay entitlement. In reply to the argument concerning Daniel Almond, the Director refers to the provisions of Section 59 of the *Act*, which says:

59. (1) An employer may not reduce an employee's annual vacation or vacation pay because the employee
- (a) was paid a bonus or sick pay, or
  - (b) was previously given a longer vacation than the minimum required under section 57.

- (2) Despite subsection 1(b), an employer may reduce an employee's annual vacation or vacation pay because at the written request of the employee the employer allowed the employee to take an annual vacation in advance.

In other words, Horte may not use the fact that Mr. Almond was paid sick pay to reduce his annual vacation pay entitlement. The Director says that except for the partial settlement of the Determination issued on August 20, 2001, he is unaware of any other payment made to satisfy the outstanding amounts owing by Abeda under the various Determinations and Horte has provided no evidence to show any other outstanding wages have been paid. The Director notes there was no appeal of the August 20, 2001 Determination. Finally, the Director notes that the definition of wages includes, "in Parts 10 and 11, money required under a contract of employment to be paid, for an employees benefit, to a fund, insurer or other person".

A reply to the appeal was also filed by the British Columbia Provincial Council of Carpenters and by Daniel Oldfield, one of the employees potentially affected by the 'vacation at Christmas' argument. The former is consistent with the position taken by the Director and the latter says, whatever the merits of the 'vacation at Christmas' submission generally, that argument does not apply to him because, as a maintenance millwright, he never had time off during that period.

Final comments were made by Horte.

At the outset I will state that I agree with the Director and the Carpenters that there is no duplication in the Determination under appeal with any other Determination. Suffice to say the *Act* allows for Determinations of the same amounts to be made against different persons. It is not an error the Director has issued Determinations against Abeda and Horte that include the same amounts.

In an appeal from a director/officer Determination, the Tribunal has stated that absent special circumstances, which do not exist in this case, a person named in a director/officer Determination is limited to arguing only those issues that arise under Section 96, whether the person was a director or officer at the time the wages were earned or should have been paid and whether the amount of the Determination falls within the scope of the liability described in Section 96, see *Kerry Steinemann, a Director or Officer of Pacific Western Vinyl Windows & Doors Ltd.*, BC EST # D180/96. This approach applies to the arguments related to the August 20, 2001 Determination. That Determination was never appealed to the Tribunal by any person and it is too late for Horte to now challenge its correctness.

On the Section 96 issues, Horte has failed to show he was not a director and officer of Abeda when the wages included in the Determination were earned and should have been paid. He has further failed to show that the amount of the Determination contains amounts which do not fall within the scope of the liability described in Section 96 of the *Act*. I agree with the argument of the Director that health and welfare benefits are wages under the *Act* and were properly included in the scope of the liability described in Section 96.

There are two arguments in this appeal that arise from the Determination issued on January 30, 2002. The first is the 'vacation at Christmas' argument and the other relates to Mr. Almond's sick leave and pay.

I agree completely with the position of the Director that Section 59 of the *Act* provides a complete answer on the issue concerning Mr. Almond's sick pay.

Turning to the 'vacation at Christmas' argument, the Tribunal does not exercise its authority under Section 112 without being shown there was an error in the Determination. The burden to show an error in

the Determination is on Horte. He has failed to do so. It is not enough for him to say, as he does throughout his appeal submissions, that he does not have the records to support the appeal, but the Trustee in Bankruptcy does, but if you look at this record or that record they will all support his argument. Former directors and officers of bankrupt companies are not legally barred from having access to payroll and employee records. While it is correct that the Trustee in Bankruptcy will have control of most, if not all, the relevant records, and will have some discretion in deciding who may view the records, the Tribunal's experience is that Trustees are prepared, everything else being equal, to allow persons in the position of Horte to examine the records where there is a legitimate concern about the correctness of a Determination. Nothing in this appeal suggests Horte has made any effort to seek access to review the company's records in an attempt to find support for his arguments. He cannot be heard to say he is unable to meet his burden when he has made no apparent effort to do so.

There being no basis for concluding the Determination was wrong, the appeal is dismissed.

### **ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated February 6, 2002 be confirmed in the amount of \$26,057.54, 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**