

An appeal

- by -

Conrad Lacker, a Director or Officer of Moustache Café – 5th Avenue (1996) Ltd.
("Appellant")

- 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.: 2002/065

DATE OF DECISION: May 24, 2002

The Director's Position

In a written submission dated March 12, 2002 and filed with the Tribunal on March 13, 2002 the Director says "the documents provided by Mr. Schachter do appear to show that Lacker resigned as a director/officer of Moustache on March 5, 2001. It also appears that the records of the Registrar of Companies, upon which the Delegate relied to issue the Determination, were not updated to reflect this. Based on this new evidence, the Director has accepted Lacker's evidence that he resigned as a director/officer of Moustache as of March 5, 2001."

THE FACTS

In a separate Determination dated January 24, 2001 under number ER105357 the Director's Delegate ruled that the subject company owed various employees a total of \$17,002.95 for wages, vacation pay, compensation for length of service and interest. In a Determination dated January 25, 2002 under number ER105357-1 the Director found that the Appellant was a director or officer and participated in the activities of the employer company during the time these wages were earned (between January 1 and April 24, 2001) and, as such, was personally liable for the sum of \$12,445.44. In a separate appeal the employer company has appealed the amount determined to be owed by it (\$17,002.95).

In support of the appeal, the Appellant filed a copy of the Form 8/9 Notice of Directors dated March 5, 2001 regarding the Appellant, Conrad Lacker, and a copy of the Deposit Account Transaction Form from the Ministry of Finance and Corporate Relations, Corporate Registry or Manufactured Home Registry dated March 6, 2001 confirming the filing of the Notice of Directors with the Registry of Companies. The Director accepts and it is clearly established that the Appellant resigned as a director of the employer company as of March 5, 2001.

ANALYSIS

As stated by the delegate at page 2 of the Determination, it is well established in previous decisions of this Tribunal and I agree that there are only two grounds for an officer or director of a corporate employer to appeal personal liability for wages owed. Those are:

1. Whether the Appellant was a director of the company at the time the wages were earned or should have been paid, and
2. Whether the calculation of the personal liability was correct.

Section 96 (1) and (2) of the Act say as follows:

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.*

In view of the Notice of Directors and Deposit Account Transaction Form provided by the Appellant and the Director's acknowledgement that it appears that the records of the Registrar of Companies which the delegate relied upon at the time of issuing the Determination had not been updated to reflect the filing of this resignation of the Appellant director, I find that the Appellant has met the onus upon it to demonstrate, on a balance of probabilities, that the Determination was in error to the extent that the Appellant was found to have been a director of the employer company for the entire period of time during which the wages were earned or should have been paid.

As the obligation of the employer company has been reduced on appeal of that separate Determination, this matter will have to be referred back to the delegate to recalculate the obligation of this Appellant based on the obligation of the employer company, less compensation for length of service, and the fact that the Appellant ceased to be a director on March 5, 2001.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination of this matter, dated January 25, 2002 and filed under number ER105357-1, be referred back to the Director to recalculate the obligation of the Appellant.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal