

An appeal

- by -

Glenn Ohlhauser, a Director or Officer of CathayOnline (Canada) Inc., CathayOnline Inc., CathayOnline (HK) Technologies Ltd., CathayOnline (BVI), Beijing CathayOnline Technologies Co. Ltd, Lothian Bancorp Ltd., Sichuan CathayOnline Technologies Co., Ltd., Torchmail.com Inc. and Via Technology Inc. Associated Corporations under Section 95 of the ES Act
("Ohlhauser")

- 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: Norma Edelman, Vice-Chair

FILE No.: 2002/034

DATE OF DECISION: May 30, 2002

DECISION

OVERVIEW

This is an appeal by Glenn Ohlhauser ("Ohlhauser") under Section 112 of the *Employment Standards Act* (the "*Act*") of a Determination, which was issued against him as a director or officer of CathayOnline (Canada) Inc., CathayOnline Inc., CathayOnline(HK) Technologies Ltd., CathayOnline (BVI), Beijing CathayOnline Technologies Co. Ltd., Lothian Bancorp Ltd., Sichuan CathayOnline Technologies Co. Ltd., Torchmail.com Inc. and Via Technology Inc., Associated corporations under Section 95 of the Act (collectively, the "Associated Corporations") by a Delegate of the Director of Employment Standards on January 11, 2002. The Determination requires Ohlhauser to pay \$53,149.15 as a result of a finding that he is personally liable for wages owing to 7 individuals (collectively, the "Respondents"). That liability arises from Section 96 of the *Act*. Counsel for Ohlhauser says the Determination should be overturned because the Delegate has made an error in the facts and an error in interpreting the law.

ISSUE TO BE DECIDED

Did the Delegate err in determining that Pedersen is liable to pay wages in the amount of \$53,149.15 to the Respondents?

FACTS AND ARGUMENTS

On September 25, 2001, the delegate issued a Determination against the Associated Corporations. I shall refer to this Determination as the corporate Determination. The delegate found the Associated Corporations owed the Respondents \$66,252.47.

CathayOnline (Canada) Inc. appealed the corporate Determination. On December 20, 2001 the Tribunal issued a Decision (Bcest #D682/01) which confirmed the corporate Determination in all respects, including the Section 95 declaration, except for the calculation of wages, where it was varied to show an amount owing of \$64,367.06, plus interest.

On January 11, 2002, as a result of not receiving full payment of the corporate Determination, the Delegate issued Determinations against 8 persons identified as officers/directors, including Ohlhauser.

In the Determination issued against Ohlhauser, the delegate says as follows:

Based on the evidence available from company records, you were a Director or Officer of this company at the time these wages were earned, or should have been paid. The evidence confirmed that you participated in the activities of the company during the time wages were earned.

The 2000 Annual Report CathayOnline Inc. indicates on pages 6 and 20: Glenn Ohlhauser, Chief Financial Officer. The Cathay Online Inc. website at August 28, 2001 showed Management/Directors/Business Alliances: Glenn Ohlhauser, Chief Financial Officer. Your business card provided by you to me on September 21, 2001 shows "Cathay Online Inc. Glenn Ohlhauser, Chief Financial Officer". Various employee's (sic) unpaid wages were earned between June 1999 to July 15, 2001. Glenn Ohlhauser was a Director/Officer of (the Associated Corporations) and was so appointed at the time wages were earned and became payable.

The Delegate found that Ohlhauser was liable under Section 96 of the Act for unpaid wages in the amount of \$53, 149.15.

The Tribunal received appeals against 5 of the "officer/director" Determinations, including this appeal. I am issuing, concurrent with this Decision, separate Decisions with respect to the other 4 appeals.

Counsel for Ohlhauser says the employer of the Respondents was CathayOnline (Canada) Inc. At all material times the wages owed to the Respondents were owed by CathayOnline (Canada) Inc. Further, although Ohlhauser was an officer of CathayOnline Inc. he was not a director or officer of CathayOnline (Canada) Inc. He enclosed a copy of a corporate search which shows the sole director of CathayOnline(Canada) Inc. to be Brian Ransom. Counsel says the delegate had no basis to find that Ohlhauser was a director or officer of any company but CathayOnline Inc. He says Ohlhauser is not liable under Section 96 of the Act for unpaid wages owed by Cathay Online (Canada) Inc. because he was not a director or officer of the employer, CathayOnline (Canada) Inc. Counsel cites Tribunal Decision *ICON Laser Eye Centers Inc. et al* BC EST # D649/01 in support of his position. He says this Decision stands for the proposition that the personal liability imposed on directors and officers under Section 96(1) flows from their having been a director or officer of the corporate employer when the employees unpaid wage claims crystallized.

The Delegate and the Respondents were invited to respond to the appeal. Only the delegate responded and the totality of his response is as follows:

I believe that my determinations stand and that the Employment Standards Tribunal should deny these appeals.

ANALYSIS

Under Section 96 of the *Act*, corporate officers and directors can be held personally liable for up to 2 months unpaid wages for each employee. Under Section 95 of the Act, the Director of Employment Standards can treat several separate entities as one person in which case each entity is jointly and separately liable for any unpaid wages that are owed to an employee of any of the entities.

In *ICON, supra* (recently upheld on reconsideration in Decision BC EST # RD201/02), the Tribunal addressed the interrelationship between Section 96 and Section 95 of the *Act*. In that Decision the Adjudicator stated:

(D)irectors and officers of associated firms are not liable for employees' unpaid wages absent their being personally designated in the section 95 declaration itself.

The personal liability imposed on directors and officers under section 96(1) is predicated on there being an employment relationship between the employee and the corporation of which the individual is a director or officer...As I have previously observed, a section 95 declaration does not make an associated firm an "employer" of the employees in question. Section 95 is unlike, say, section 38 of the Labour Relations Code which specifically states that several entities may be treated as one "employer" for purposes of the Code. Indeed, as I have also noted, if the associated firm is an "employer", there is no need for a section 95 declaration -- liability for unpaid wages can be imposed directly without having to resort to section 95. The personal liability imposed on directors and officers under section 96(1) flows from their having been a director or officer of the corporate employer when the employees' unpaid wage claims crystallized.

Given that section 96 must be construed narrowly, I fail to see how directors or officers of an associated corporation can be held personally liable for unpaid wages owed by another employer even if that other employer was "associated" with the firm of which the individual is a director or officer.

I agree with the Adjudicator's analysis and conclusions in the above decision concerning the issue of whether directors and officers of "associated corporations" are personally liable for the unpaid wages owed by the employer firm. In my view, unless the associated corporation can be characterized as the "employer" of the employees in question, the directors and officers of the associated corporation are not personally liable for the employees' unpaid wages, unless they were personally designated in a Section 95 declaration.

In this case, Ohlhauser was not personally designated as being "associated" in the corporate Determination.

Further, I accept that the Respondents' sole employer was CathayOnline (Canada) Inc. There is absolutely no information before me to show otherwise. As noted above, none of the Respondents replied to the appeal and the delegate's response contains no rebuttal to the Appellant's arguments. As well, in the corporate Determination the delegate appears to single out CathayOnline (Canada) Inc. as the employer insofar as he makes the point that it issued the Respondents' paycheques and, in his calculation sheets, he lists the employer as CathayOnline (Canada) Inc.

In addition, although there is no question that Ohlhauser was a director or officer of CathayOnline Inc. there is no evidence to support the position that he was appointed, elected or functioned as a director or officer of any of the other Associated Corporations, including the employer corporation, CathayOnline (Canada) Inc. Indeed the only corporate record provided to me shows Ohlhauser was not a director or officer of CathayOnline (Canada) Inc.

In light of the above, I am satisfied Ohlhauser is not liable for the wages set out in the Determination.

ORDER

I order under Section 115 of the *Act* that the Determination dated January 11, 2002 be cancelled.

**Norma Edelman, Vice-Chair
Adjudicator
Employment Standards Tribunal**