

An appeal

- by -

Michael Stoker, a Director or Officer of 518238 B.C. Ltd.
(operating as Central Canada Contact Lenses Inc.)
("Stoker")

- 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: Paul E. Love

FILE No.: 2001/161

DATE OF DECISION: May 16, 2001

DECISION

OVERVIEW

This is an appeal by the employer of a Determination dated February 6, 2001, issued by a Delegate of the Director of Employment Standards pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “Act”). Mr. Stoker was found liable as a director or officer of 518238 B.C. Ltd. (“company”), for two months unpaid wages, vacation pay and interest, arising from a corporate determination in favour of Michael Hurd (“employee”), issued on August 23, 2000. Mr. Stoker alleged that there was a bankruptcy and his liability as a director under s. 96 was discharged. Mr. Stoker further provided information and records in an attempt to show an error in the underlying Determination, however, he did not particularize any error made by the Delegate. The employee submitted that Mr. Stoker had provided partial records which did not show any error in the Determination. I held that s. 96(2) of the Act did not apply in this case, as the claim in the Determination was for unpaid wages, not a claim for compensation for length of service, and in any event the employee was employed by 518238 B.C. Ltd., a company related under s. 95 to Central Canada Contact Lenses Inc.. Any bankruptcy of Central Canada Contact Lenses Inc did not discharge the liability of 518238 B.C. Ltd. to Mr. Hurd. Further, Mr. Stoker failed to produce records, which he had in his possession to the Delegate during the course of the investigation. The records produced were a partial record, which did not show any error in the Determination. I considered the merits of Mr. Stoker’s submission, because the appeal that the company filed of the corporation determination, was filed by Uno Leis, who at the material time was not a director of the company.

ISSUE TO BE DECIDED

Did the Delegate err in finding that Mr. Stoker was a director or officer of 518238 B.C. Ltd., with liability for the payment of wages pursuant to s. 96 of the Act?

THE FACTS

This case is decided upon written submissions of Michael Stoker, Michael Hurd, and the Delegate of the Director of Employment Standards.

On August 23, 2000, the Delegate issued a Determination against 518238 B.C. Ltd. operating as Central Canada Contact Lenses Inc. in favour of Michael Hurd in the amount of \$8,757.26. I note that company, through Mr. Leis, did file an appeal of the Determination, and the Determination was confirmed by me in *BCEST #D007/01*. The company did not pay the Determination. On February 5, 2001, the Delegate issued a Determination against Mr. Leis, as a director of the company, in the amount of \$6,302.88, representing two month wages, annual vacation pay plus interest from the date of termination. The Delegate issued the Determination on the basis of a BC Online Registrar of Companies Corporate Search performed on June 12,

2000. The Search revealed that all material times (June 1, 1998 to June 1, 2000), Mr. Stoker was a director and officer of 518238 B.C Ltd.. On February 6, 2001, the Delegate issued a determination against Mr. Leis as a director of the company in the amount of \$6,302.88, representing two month wages, annual vacation pay plus interest from the date of termination. The Delegate issued the Determination on the basis of a BC Online Registrar of Companies Corporate Search performed on June 12, 2000. The Search revealed that all material times (June 1, 1998 to June 1, 2000), Mr. Stoker was a director and officer of 518238 B.C Ltd..

Both Mr. Stoker and Mr. Leis filed appeals. I dealt with Mr. Leis appeal on this date in BC EST # D224/01. I found that Mr. Leis was not a director of the company at the time the company accrued its liability to Mr. Hurd because he had resigned from the company. Mr. Leis was registered as a Director and Officer of 518238 B.C Ltd. at the time of the issuance of the corporate determination.

Stoker's Argument:

Mr. Stoker filed an appeal indicating that Central Canada Contact Lenses Inc was in bankruptcy as of July 5, 2000, by the filing of an assignment in bankruptcy. He alleges that he is discharged from responsibility under s. 96(2) of the *Act*. He also filed records which he alleges show an error in the amount of the Determination issued on August 23, 2000. The particulars of the errors and the amount are not set out in his submissions. Mr. Stoker also alleges that Mr. Hurd was a manager and not a technician and could schedule holidays as and when he wished. I note that this latter argument, is irrelevant, and therefore I do not consider it further.

Delegate's Argument:

The Delegate says that the records which Mr. Stoker now produces were not available to him at the time of the investigation. The Delegate made an inquiry with the Trustee in Bankruptcy and the Company and no records were forthcoming. The Delegate says that the claim under s. 96 is not for compensation for length of service, but for wages and vacation pay, and s. 96(2) does not afford to Mr. Stoker any defence.

ANALYSIS

The burden rests with the appellant, in this case the Mr. Stoker, to establish an error in the Determination such that I should vary or cancel the Determination. I note that liability of corporate officers under s. 96 of the *Act* is a departure from the usual situation of corporate responsibility for corporate liabilities. The Tribunal has held in the past that the Corporate Registry records are proof of the facts, but an appellant can attempt to show that the records were incorrect. In this case Mr. Stoker has not alleged that there was any error in the records showing him as a director and officer of 518238 B.C. Ltd.. I therefore proceed on the basis that he is a director and officer of 518238 B.C. Ltd..

Mr. Stokes major point on appeal seems to be that as Central Canada Contact Lenses Inc. went into receivership and bankruptcy that s. 96 of the *Act* applies, and there is no liability. Section 96(1) and (2) of the *Act*, however, read 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

96(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 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act.

I note that the finding in *BCEST #D007/01* was that Mr. Hurd was an employee of 518238 B.C. Ltd., which was found to be a related company to Central Canada Contact Lenses Inc under s. 95 of the *Act*. Any bankruptcy of Central Canada Contact Lenses Inc does not affect the liability of 518238 B.C. Ltd. to Mr. Hurd. In any event, the exemption from director liability set out in s. 96(2) of the *Act*, applies to a liability to an employee under s. 63 of the *Act* for compensation for length of service. The Determination issued in this case against 518238 B.C. Ltd., did not involve a claim for compensation for length of service, but for unpaid wages and vacation pay.

I am satisfied that the company and Mr. Stoker were afforded an opportunity to question the amount claimed by Mr. Hurd in the appeal. Mr. Leis made some submissions on behalf of the company. Mr. Stoker made no submissions. In my view the entitlement of Mr. Hurd is *res judicata*, and there is issue estoppel in this matter.

I do not base my decision, however, entirely on the concepts of *res judicata*, and issue estoppel, given the unusual facts in this case, which emerged after the issuance of my decision in *BC EST # D007/01*, and my decision in a related matter, BC EST # D224/01. I note that in decision, *BC EST # D007/01*, the submission of Mr. Leis was treated as the submission of the company as Mr. Leis was a director of the company. In a decision issued concurrently with this decision in BC EST # D224/01 I found that Mr. Leis was not a director of the company at the time the company accrued its liability to Mr. Hurd because he had resigned from the company. I will consider the merits of Mr. Stoker's submission.

I note that this Tribunal has had a practice of dealing with evidence introduced on appeal, which should have been introduced at an earlier stage. I indicated in the earlier decision in this matter:

I note that the submission made by Mr. Leis, dated September 15, 2000, does not contain any documentary evidence supporting his submission. The company did

not produce any documentation to the Delegate during the course of the investigation. A party who fails to co-operate in an investigation, and attempts to raise an issue on appeal which should have been raised by the Delegate is in a difficult position. The purpose of a hearing before the Tribunal is to correct errors made by the Delegate. An appellant cannot lie in the weeds and make a submission to the Tribunal on a point which it did not raise with the Delegate: Tri-West Tractor Ltd., BCEST #D268/96, Re Kaiser Stables Ltd., BCEST #D058/97. There is no evidence in this case that supports any allegation that the Delegate erred in this matter.

Mr. Stoker did provide further information to the Delegate in this appeal, which he had in his possession at the time of the Delegate's investigation of the corporate matter. It is clear that Mr. Stoker withheld evidence from the Delegate. Mr. Hurd in his written submission suggests that the information provided by the company is a partial record, which shows payments made in 1998 and 1999 for commissions owing in 1996 and 1997. Mr. Stoker has not produced the records for 1996, 1997 and 2000. I am satisfied that Mr. Stoker has not produced full information in this matter, and on the information produced by Mr. Stoker, I am not satisfied that he has shown any error in the underlying corporate determination.

ORDER

Pursuant to section 115(a) of the *Act*, the Determination dated February 6, 2001 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal