

An appeal

- by -

Leonard W. Hester, a Director or Officer of A.K.A. Rhino Prepress & Print Inc.
and a Director or Officer of Sudden Fine Printing Ltd.

("Hester")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2002/190

DATE OF DECISION: June 25, 2002

DECISION

OVERVIEW

This is an appeal filed by Leonard W. Hester (“Hester”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Mr. Hester appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “delegate”) on March 11th, 2002 (the “Determination”) pursuant to section 96(1) of the Act which provides as follows:

Corporate officer’s liability for unpaid wages

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.

By way of the Determination, the Director’s delegate ordered Mr. Hester to pay the sum of \$7,078.66 on account of unpaid wages (vacation pay) and section 88 interest owed to five former employees of a firm known as A.K.A. Rhino Prepress & Print Inc. (“Rhino”).

By way of a letter dated May 29th, 2002, the parties were advised by the Tribunal’s Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575).

BACKGROUND FACTS

As noted above, the Determination was issued pursuant to section 96(1) of the *Act*. On November 19th, 2001, some four months prior to the issuance of the Determination now under appeal, the Director issued a section 95 (the “associated corporations” provision) determination against Rhino and two other firms (namely, Sudden Fine Printing Ltd. and Pacific Image Color Inc.) ordering those firms to pay the sum of \$14,586.59 on account of unpaid wages and interest owed to former Rhino employees. This latter determination was not appealed and the governing appeal period has now expired.

It is my understanding that all three companies named in the November 19th section 95 determination were formally declared to be bankrupt on or about April 25th, 2001.

Since the employees’ unpaid wage claims were not satisfied, and in light of the bankruptcy, the instant section 96 Determination was issued against, inter alia, Mr. Hester. The Determination was issued against Mr. Hester on the basis that he was a director and officer of both Rhino and Sudden Fine Printing Ltd.

I should note, at this point, that the BC OnLine corporate search record relied on by the delegate (and appended to the Determination) shows that Mr. Hester was an officer (president) and director of Sudden Fine Printing Ltd. The search record with respect to Rhino, however, shows that Mr. Hester was an officer (secretary) but not a director of the latter company.

The particulars of the unpaid wage claims now before me [after giving full effect to the 2-month wage liability ceiling set out in section 96(1) of the *Act*] are set out below:

<u>Employee</u>	<u>Vacation Pay</u>	<u>Interest</u>	<u>Total Award</u>
Stanley Chan	\$1,728.04	\$84.57	\$1,812.61
Seth McNamara	\$ 989.89	\$48.44	\$1,038.33
James Oldman	\$ 798.61	\$39.08	\$ 837.69
Scott Watson	\$2,019.80	\$98.85	\$2,118.65
Lorne Wedley	\$1,212.06	\$59.32	\$1,271.38
Totals	\$6,748.40	\$330.26	\$7,078.66

REASONS FOR APPEAL

The only document filed by Mr. Hester in support of his appeal is a letter dated April 3rd, 2002 which letter was appended to his notice of appeal. In his April 3rd letter, Mr. Hester states, among other things, that:

- "I was not a Director or an officer of AKA Rhino Prepress & Print Inc. at the time of involuntary Receivership. I had resigned effective February 14, 2001. This information is on file with the company's record office. I am enclosing a copy of my resignation letter."
- "I was denied the opportunity to respond to the investigation."
- "I was FIRED from AKA Rhino Prepress & Print Inc. on October 14, 2000 and had no opportunity to attend the Director's meetings or be involved in any way in any decisions that were made."

Mr. Hester's April 3rd letter also contains a number of other assertions, none of which is relevant to the issues that can be properly brought before the Tribunal by way of an appeal of the Determination (for example, alleged incompetence of corporate officers and the Director; background information with respect to the appointment of a receiver).

Thus, Mr. Hester's appeal raises two fundamental issues. First, whether he was an officer of Rhino when the employees' wage claims crystallized and, second, whether the delegate complied with section 77 of the Act which states that the Director "must make reasonable efforts to give a person under investigation an opportunity to respond". I shall deal with each of these two issues in turn.

FINDINGS

Section 96

At the outset, I wish to note that Mr. Hester's liability under section 96(1) of the *Act* can only flow from his status as an officer of the employer firm, namely, Rhino. Although the delegate stated in the Determination that Mr. Hester was a Rhino director, that finding is not supported by the corporate search record upon which the delegate relied--that record clearly states that Mr. Hester was not a Rhino director.

Mr. Hester cannot be held liable under section 96(1) of the Act simply because he was, at the material time, an officer and director of Sudden Fine Printing Ltd. Only directors and officers of an “employer” firm may be held personally liable under section 96(1) of the *Act*--see *ICON Laser Eye Centres Inc. et al.*, Reconsideration Decision BC EST # RD201/02. There is no evidence before me indicating that Sudden Fine Printing Ltd. was the employer; indeed, the available evidence is to the opposite effect. Directors and officers of corporations that are associated with the employer firm under section 95 of the *Act* are not, solely by reason of their director/officer status with the associated firm, liable for employees’ unpaid wages.

As noted above, the evidence relied on by the delegate only shows that Mr. Hester was a Rhino officer (secretary). Mr. Hester appended to his April 3rd letter a form of resignation dated February 14th, 2001. This document states that as of February 14th, 2001, Mr. Hester is resigning as a director and officer of Rhino. It would appear, assuming that the resignation is a bona fide document, that this resignation was not filed with the Registrar of Companies given that the Registrar’s records indicate that Hester continued to be a Rhino officer as of June 26th, 2001. There is nothing before me (say, from a person in authority at the law firm where Rhino’s registered and records office was maintained) to show that this resignation was ever formally tendered to the company.

As noted in the Determination, the employees’ unpaid wages were earned during the period from January 5th, 1998 to April 25th, 2001. Thus, even if Mr. Hester resigned his office as of February 14th, 2001 he would nonetheless be liable for any vacation pay that was payable to the employees prior to February 14th, 2001 [see subsection 96(2)(b)].

However, the partial defence (in this case) afforded by subsection 96(2)(b) is only relevant if, in fact, Mr. Hester resigned his office on February 14th, 2001. As previously mentioned, there is no evidence before me--other than Mr. Hester’s assertion--that his resignation was actually delivered to the company’s registered office or to any person in authority with the company (such as a board member or the president). Further, Mr. Hester’s assertion that he resigned his office on February 14th, 2001 is completely inconsistent with his other assertion (see above) that he was “fired” by Rhino on October 14th, 2000. If the latter was true, then no resignation with respect to his corporate office would have been required. Mr. Hester does not even attempt to explain this glaring inconsistency.

The Registrar of Companies’ records may be presumptively relied on by the Director--see *Wilnofsky*, BC EST # D106/99. It then falls to the person identified in those records as a director or officer to show, by clear and cogent evidence, that the Registrar’s records are inaccurate (*Michalkovic*, BC EST # RD047/01). I am not satisfied, on a balance of probabilities, that Mr. Hester has met his evidentiary burden in this latter regard. There is absolutely no corroborative evidence before me with respect to Mr. Hester’s assertion that he lawfully resigned his office on February 14th, 2001.

Section 77

The material before me plainly shows Mr. Hester’s assertion “I was denied the opportunity to respond to the investigation” to be entirely devoid of merit.

The delegate spoke with Mr. Hester on April 4th, 2001 about his possible liability under section 96; this conversation was followed by a letter to Mr. Hester dated April 20th, 2001--which he received by fax--in which the delegate specifically solicited Mr. Hester’s written submissions with respect to section 96 (to be

delivered by May 3rd). Mr. Hester chose not to reply. Finally, the delegate wrote to Mr. Hester once more, on June 25th, 2001, and again Mr. Hester chose not to reply.

Summary

Mr. Hester has not met his evidentiary burden of proving that the Registrar's records--which show him to be a Rhino officer as of June 26th, 2001--are inaccurate. Further, Mr. Hester was given a fair and reasonable opportunity to participate in the delegate's investigation but, it would appear, he chose not to avail himself of the opportunity that was afforded to him

In the result, I am dismissing this appeal.

ORDER

Pursuant to sections 114(1)(c) and 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of \$7,078.66 together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal