Employment Standards TRIBUNAL

Appeals

- by -

International Steelworks Industries Ltd. and SWI Steelworks Inc.
(appeal by SWI Steelworks Inc.)
("SWI")

- of Determinations 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.s: 2002/134, 2002/135 and 2002/136

DATE OF DECISION: June 25, 2002

British Columbia

DECISION

OVERVIEW

I have before me three separate appeals all filed by SWI Steelworks Inc. ("SWI") pursuant to section 112 of the *Employment Standards Act* (the "*Act*"). SWI appeals three related determinations all of which were issued by a delegate of the Director of Employment Standards (the "Director") on February 22nd, 2002.

Further particulars regarding the three determinations are set out below:

Date of Determination	Amount	Subject Matter of the Determination
February 22nd, 2002	$109,777.65	s. 95; wages and vacation pay (ss. 18 & 58)
February 22nd, 2002	$136,177.03	s. 95; length of service compensation (s. 63)
February 22nd, 2002	$301,854.61	s. 95; group termination pay (s. 64)
TOTAL	$547,809.29	

The employees' wage claims span a period up to mid-October 2001 when their employment ended as a result of their employer entering into bankruptcy.

By way of a letter dated May 22nd, 2002 the parties were advised by the Tribunal's Vice-Chair that these appeals 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).

The three determinations contain an identical analysis with respect to section 95 (the "associated corporations" provision of the *Act*) and SWI's appeal submission with respect to the section 95 declaration contained in each of the determinations is also identical. Accordingly, I shall first turn to this issue.

THE SECTION 95 DECLARATION

Background Facts

By way of section 95 of the *Act*, the Director may declare two or more corporations (or other entities) to be "associated" in which case all of the associated entities are treated as one person for purposes of the *Act* and, as such, are jointly and severally liable for unpaid wages that may be owed by any one of the associated entities.

Section 95 reads as follows:

> Associated corporations
>
> 95. If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,

> (a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one person for the purposes of this Act, and
>
> (b) if so, they are jointly and separately liable for payment of the amount stated in a determination or in an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.

In each of the three determinations the Director's delegate declared that a firm known as International Steelworks Industries Ltd. ("ISI")--the employer of record--was associated with SWI. As noted in the three determinations, on October 18th, 2001, ISI was formally adjudged to be bankrupt and the firm KPMG Inc. was appointed as its trustee. Although well aware of these proceedings (indeed, it provided its full cooperation to the delegate during her investigation), I understand that ISI's trustee has not appealed any of the three determinations.

In each of the determinations, an order to pay was issued against not only SWI, but also against ISI. In my view, and in light of the provisions of the federal *Bankruptcy and Insolvency Act*, the order to pay, at least as it relates to ISI, is a nullity. Section 69.3(1) of the *Bankruptcy and Insolvency Act* ("*BIA*") states:

> Subject to subsection (2) and sections 69.4 and 69.5 on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,until the trustee has been discharged.

Claims "provable in bankruptcy" are defined, by section 121(1) of the BIA, as follows:

> All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge, by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

Undoubtedly, the unpaid wage and other monetary claims filed by ISI's former employees constitute "claims provable in bankruptcy" and thus the orders to pay issued against ISI are invalid inasmuch as such orders constitute, in each case, an "action, execution or other proceeding" against ISI. However, although the determinations (or at least the orders to pay) are a nullity as against ISI, the determinations may (assuming section 95 has been properly applied) nonetheless be valid as against SWI--see *ICON Laser Eye Centres Inc. et al.*, BC EST # RD201/02.

A review of the material before me discloses the following relevant facts and circumstances with respect to the Director's section 95 declaration:

- SWI was the "parent company" of ISI; ISI was a wholly owned subsidiary of SWI and was acquired by way of an acquisition agreement dated October 30th, 1998.
- In a public disclosure document dated September 30th, 2001 (Appendix D to the determinations), SWI declared:

  > "[SWI]...is a publicly traded company which has operated through a wholly owned subsidiary, [ISI], a metal fabrication and welding business, specializing in laser and robotic technologies...

> As a result of the discontinuance of ISI, and the inability of [SWI] to access the books and records of it's [sic] subsidiary ISI resulting from the appointment of a Trustee in bankruptcy, [SWI] has ceased to consolidate the results of ISI and has written off its investment in ISI...
>
> As a result of the bankruptcy of ISI and the appointment of a Trustee, [SWI] has written off its investment in and advances to ISI:

Original investment	$3,795,750
Advances and loans	$ 391,776
	$4,187,526

> On September 19, 2001, [SWI] received a formal demand from the Royal Bank of Canada for repayment of the outstanding balance due on the demand loan in the amount of $738,926 including interest. This loan was in fact used to operate [SWI's] wholly owned subsidiary ISI and was included in the accounts of ISI."

- In a "news release" dated October 16th, 2001 (Appendix D to the determinations), SWI declared:

> "[SWI] today announced that its subsidiary, [ISI], has stopped taking orders and has laid off all of its employees. [SWI] intends to undergo a comprehensive restructuring program that will include the closure of ISI's Kelowna manufacturing facility.
>
> Reduced demand for ISI's fabricated steel products has resulted in a decline in ISI's revenues. It was anticipated that ISI's revenues would suffer significantly from the recently announced closure of Western Star's Kelowna truck assembly plant as a significant portion of ISI's orders come from Western Star. [SWI] cites these factors as the principal reasons behind the decision to close ISI's Kelowna manufacturing facility.
>
> [SWI] is in discussions with ISI's major creditors regarding settlement of ISI's outstanding debts."

- ISI's former controller confirmed that ISI provided its internal financial statements to SWI which, in turn, prepared "consolidated" financial statements. Further, the former controller stated that SWI was responsible for issuing press releases relating to ISI's business affairs and, finally, that SWI appointed ISI's president.
- Prior to ISI's bankruptcy, ISI's three directors--Basil Carter, Sharon E. Constable and Stuart R. Ross--were also directors or officers of SWI.
- Mr. Carter was an officer (president) and director of ISI commencing in December 2000. Mr. Carter (who was ISI's chief operating officer) resigned his ISI directorship on June 11th, 2001 but continued as ISI's president until ISI's bankruptcy. Mr. Carter was also an officer and director of SWI; he resigned his SWI office on January 16th, 2001 and his SWI directorship on December 3rd, 2001 (in each case, after ISI's bankruptcy).
- As noted above, Mr. Carter was ISI's president during the material time frame and was appointed by SWI to that position. Counsel for SWI states, in his February 22nd, 2002 submission to the Tribunal, that Mr. Carter was ISI's "managing authority and guiding force" and that his appointment to the SWI board enabled the SWI board to be regularly informed, through Mr. Carter, about the business affairs of ISI.

- Ms. Constable and Mr. Ross served as ISI directors from December 31st, 2000 until they resigned on May 9th, 2001. Ms. Constable was an officer (secretary) and director of SWI from December 31st, 2000 until May 9th, 2001; Mr. Ross was an SWI director during the same time frame.
- ISI's former operations and personnel manager confirmed that at least some ISI managerial personnel were granted, as part of their compensation packages, options to purchase SWI shares ("stock options").
- SWI's president and other SWI officials frequently attended at ISI's offices and were in regular contact (both in person and by telephone) with the members of ISI's senior management team. SWI was, both internally and externally, referred to as ISI's "head office". Documents, each described as an "interoffice memorandum", and other electronic communications were regularly transmitted between ISI's and SWI's offices

Findings

Counsel for SWI submits that the delegate erred in making a section 95 declaration because, among other things, ISI and SWI were "operated autonomously and independently". Counsel notes that although the companies shared the same registered and records office location, the business operations of the two firms were located in separate cities; the companies had different bankers although counsel concedes that certain SWI officers may have also been signing officers on ISI's bank accounts; ISI owned or leased all of its plant and equipment and SWI had no interest in any of those assets and relied, primarily, on external sources of financing. I might add that some of the material before me calls into question the accuracy of this latter statement at least as it relates to ISI's assets.

"Common direction or control" of the constituent business enterprises is a prerequisite to a section 95 declaration. However, there is no statutory requirement that the constituent business components be similar or to have the same business objective (see e.g., *Brunswick Avenue Holdings Ltd.*, BC EST # D705/01), only that there be "businesses, trades or undertakings" carried on by one or more entities all of which are under common, but not necessarily identical, direction or control (*Brunswick Avenue Holdings, supra*; see also *Invicta Security Systems Corp.*, BC EST # D349/96; *Top Gun Entertainment Ltd.*, BC EST # D646/01).

In this case, the evidence clearly shows that ISI's metal fabricating business was under SWI's ultimate direction and control and that the SWI's principals had the legal authority to direct and control the business affairs of both companies. SWI reported (on September 30th, 2001) that it "operated" "a metal fabrication and welding business, specializing in laser and robotic technologies" "through a wholly owned subsidiary, [ISI]". In effect, this appeal represents an ex post facto attempt by SWI to disassociate itself from a prior public declaration. Further evidence of integration of the two firms' business operations can be found in SWI's loan agreement with the Royal Bank of Canada; as stated by SWI, the loan proceeds were "used to operate [SWI's] wholly owned subsidiary ISI".

In my view, it is not particularly relevant that ISI was the "operating" company and SWI (vis-à-vis ISI) was the "holding" company--businesspeople are free to adopt whatever corporate structure they choose. However, any particular structure of interrelated entities under common direction or control may be, in appropriate cases, treated by the Director as "one person for the purposes of [the] *Act*".

There were common directors and officers as between the two firms. SWI's principals effectively arranged for Mr. Carter to be appointed as ISI's president. Strictly speaking, Mr. Carter was appointed to

his office by ISI's directors, however that does not change the *de facto* circumstance that SWI's principals directed and controlled that appointment. Further, SWI then required Mr. Carter to regularly report to SWI's board (of which Mr. Carter was also a member) regarding ISI's business affairs. SWI controlled the information flow from ISI to the public--press releases and other public statements relating to ISI's business affairs emanated from SWI. SWI "consolidated", for reporting purposes, ISI's financial performance within its own (i.e., SWI's) financial statements. In other words, the two firms presented a common financial "face" to the larger business community.

Although the business locations of the two firms may have been situated in different locales, it was SWI that made the business decision to close ISI's Kelowna plant. Further, SWI took it upon itself to "stop taking" ISI orders, to lay off ISI's employees and to negotiate "with ISI's major creditors regarding the settlement of ISI's outstanding debts" prior to ISI's bankruptcy. Each of the foregoing decisions is indicative, in my view, of a substantial degree of control being exercised by a parent corporation over a subsidiary corporation. SWI was not a disinterested (in terms of its desire to be involved in ISI's business affairs) "mere investor" in ISI and to the extent that counsel for SWI asserts otherwise, I consider that assertion to be entirely inconsistent with the evidence before me.

Summary

I am not satisfied that the Director's delegate erred in finding that ISI and SWI (the constituent entities) were associated corporations as defined in section 95 of the *Act*. In my view, the evidence clearly shows that SWI was carrying on a metal fabrication business through its wholly-owned subsidiary, ISI. Indeed, a recent Toronto Stock Exchange-CDNX search record for SWI, dated April 25th, 2002, states that SWI is in the "Fabricated Metal Product Manufacturing" industry. SWI retained, at all times, the ultimate right to direct and control ISI's business operations although, from time to time, the level of direction or control actually exercised by SWI may have varied. I might add, although I do not make any finding in this regard, that the level of control exercised by SWI over the business affairs of ISI was of such a degree that, arguably, the Director did not even have to resort to section 95 since SWI might have been characterized as an "employer"--along with ISI--of at least some of the employees in question (especially ISI's senior managerial staff): see the section 1 definition of "employer"; see also *McPhee*, BC EST # D183/97.

In my view, a section 95 declaration was entirely appropriate in this case.

I now turn to the matter of the employees' unpaid wages and vacation pay claims (Tribunal File # 2002/134).

WAGES AND VACATION PAY

As recounted in the "wage" determination (at page 4), SWI's legal counsel "did not present any arguments with respect to the calculation provided (Appendix E) regarding the outstanding wages and vacation pay owed". I might add that the delegate relied on information provided to her by ISI's bankruptcy trustee (who is turn relied on ISI's payroll records). In the absence of an appeal by the trustee, presumably the trustee was satisfied that the amounts determined to be owing on account of unpaid wages and vacation pay are accurate.

In any event, counsel for SWI has not presented even a *prima facie* argument that the delegate's calculations are incorrect. Rather, counsel simply says that "SWI has not had sufficient opportunity to verify and review the calculations of the Director" because, *inter alia*, the relevant records are in the possession of the trustee and SWI officials have yet to review them. Further, certain relevant documents may have been discarded. Thus, "SWI seeks leave of the Tribunal to continue its review and investigation into the financial and payroll records of [ISI] and upon completing its review to make further written submissions to the Tribunal on the issue of whether wages and annual vacation pay are owed to the former employees of [ISI], and if so, the amount thereof." Counsel's final reply submission to the Tribunal, dated May 15th, 2002, did not address the wage issue at all.

ISI's bankruptcy occurred on October 18th, 2001. The three appeals were filed on March 18th, 2002, five months after the bankruptcy. On May 15th, 2002, after another two months had passed, counsel still did not have any concrete information that would call into question the delegate's calculations.

In my view, SWI has had ample time to review and evaluate the delegate's calculations in light of the payroll records held by the trustee. I have no evidence before me regarding what efforts, if any, SWI has undertaken with respect to the collection and evaluation of relevant payroll information. In the absence of any reason to question the delegate's calculations, I do not think it appropriate for the Tribunal to, in effect, suspend its adjudicative function until such time as the appellant can determine if, in its view, one of its grounds of appeal has any merit whatsoever. I do not think that would be fair to the employees, who are entitled to have their unpaid wage claims finally determined with all reasonable dispatch and, further, such a suspension would not be in keeping with the dictates of section 2 of the Act.

COMPENSATION FOR LENGTH OF SERVICE (SECTION 63) & GROUP TERMINATION PAY (SECTION 64)

Separate determinations were issued awarding ISI employees individual compensation for length of service (see section 63 of the *Act*) and group termination pay (see section 64 of the *Act*). SWI appeals both determinations (Tribunal File Nos. 2002/135 and 2002/136, respectively).

A total of 71 employees on ISI's payroll as of the date of the bankruptcy were entitled to, but did not receive, compensation for length of service. None of these 71 employees received prior written notice of termination in lieu of compensation. Accordingly, a total of $136,177.03 was awarded to them (including section 88 interest) under section 63 of the *Act*.

Since more than 50 (but less than 101) employees were terminated as a consequence of the bankruptcy, the group termination provision contained in section 64 of the *Act* was triggered. Given the number of affected employees, the employer was obliged to give those employees 8 weeks' prior written notice of termination or pay an equivalent amount of termination pay in lieu of written notice. It should be noted that this latter obligation was in addition to the obligation imposed under section 63--see section 64(5). The employer did not give prior written notice nor did the employer pay any termination pay in lieu of written notice. Thus, the delegate issued a separate determination (in the amount of $301,854.61 including section 88 interest) on this latter account.

Legal counsel's argument with respect to the delegate's determinations under sections 63 and 64 of the *Act* is essentially identical to that advanced with respect to the employees' unpaid wage and vacation pay claims. Counsel says that although he cannot, at present, say that the delegate's calculations are incorrect, he asks that these two matters be set aside pending "further review and investigation".

In my view, this latter request must be refused for the very same reasons given with respect to the appeal of the determination dealing with the employees' unpaid wage claims. If there was some reason to question the delegate's calculations, I might be inclined to allow the appellant some further time to make submissions or, perhaps, refer any *bona fide* questions back to the Director for further investigation. However, in the absence of any reason to query the delegate's calculations, I see no option but to dismiss the appeals as they relate to sections 63 and 64.

ORDER

The appeals are dismissed.

Pursuant to section 115 of the *Act*, I order that each of the three determinations now under appeal before me be confirmed as issued as against SWI. In addition to the separate sums awarded by way of the three determinations, the employees are also entitled to 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