

An appeal

- by -

Scott Harry Herbert, a Director or Officer of H & H Logging Ltd.
("Scott Herbert")

- 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.: 2001/193 and 2001/204

DATE OF DECISION: June 7, 2001

DECISION

APPEARANCES:

David Herbert	on behalf of Scott Herbert
K.J. (Ken) MacLean	on behalf of the Director
Clint Campbell	an employee on his own behalf
No one appearing	on behalf of the employee, John Robinson

OVERVIEW

This is an appeal based on written submissions by Scott Herbert, a director or an officer of a corporate Employer, H & H Logging Ltd., pursuant to Section 112 of the Employment Standards Act (the “Act”), against a Determination of the Director of Employment Standards (the “Director”) issued on February 9, 2001, finding Mr. Herbert personally liable as a director or officer of the corporate Employer for the sum of \$14,710.59 due to two Employees, Clint Campbell and John Robinson. In an earlier determination issued by the Director against H & H Logging Ltd. on July 14, 2000 the Director found the Employees, Campbell and Robinson, were owed \$15,334.09. The Director subsequently recovered \$623.50 of that amount. The remaining sum due of \$14,710.59 remained unpaid and the determination of February 9, 2001 was issued accordingly.

ISSUES

1. In an appeal of a determination against a director/officer of a corporate Employer, can the director/officer appeal the issue of the corporation’s liability for wages, or is the director/officer limited to arguing the issues of whether he is a director/officer of the company (or whether he was at the material times) and whether the amount of the determination falls within the 2 months ceiling for a director/officer’s personal liability for unpaid wages under s. 96 of the Act?
2. Should the Director’s determination be suspended?

ARGUMENT

The Position of the Director/Officer of the Employer, Scott Herbert

In written submissions dated April 16, 2001, David Herbert submits that these two Employees were paid their wages and provided copies of cancelled cheques which had been considered but “disallowed” by the Director’s delegate is the determination. Mr. Herbert stated that, “it is our

intention to apply for a reconsideration in this matter” and that the determination is causing he and his company extreme financial hardship.

The Employee’s Position

Mr. Campbell provided a written submission received by this Tribunal on April 17, 2001 noting that he and Mr. Robinson performed their work and did not get paid. He submits that Mr. Herbert is simply “dragging this out”.

The Director’s Position

In a written submission dated March 28, 2001 the Director’s delegate states that this Tribunal has issued decisions that the directors and officers of a corporation cannot re-argue their liability once the quantum of a corporate determination has been confirmed. The Director’s delegate submits that the appeal should be dismissed.

THE FACTS

The Director issued a determination against a corporate Employer, H & H Logging Ltd. dated July 14, 2000 in favour of the complainants (Clint Campbell and John Robinson) in the sum of \$14,710.59. Subsequent to that, the Director recovered \$623.50 of that amount. An appeal of that determination was then dismissed by this Tribunal on September 25, 2000 (#387/00).

Subsequent to the determination against the corporate Employer, the Director issued a further determination dated February 9, 2001 against Scott Herbert as a director or an officer of the corporate Employer, H & H Logging Ltd. for the remaining sum due of \$14, 710.59.

The period within which to appeal the determination of February 9, 2001 expired on March 5, 2001. On that date, an appeal form was filed by P. J. MacAulay, a lawyer, on behalf of Scott Herbert. Mr. MacAulay attached a letter to the appeal form indicating a wish to appeal, but an inability to obtain full particulars from the appellant and also indicating that further submissions would be forthcoming at a later date along with an application for reconsideration (of the corporation’s liability). Nothing further was provided or filed by Mr. MacAulay as he then ceased acting for Mr. Herbert.

In a letter dated April 16, 2001, David Herbert submits that these two Employees were paid their wages and he provided copies of cancelled cheques which had been considered but “disallowed” by the Director’s delegate in his determination. Mr. Herbert also submits that, “it is our intention to apply for a reconsideration in this matter” and that the determination is causing he and his company extreme financial hardship. No application for reconsideration of the corporate Employer’s liability has in fact been filed.

ANALYSIS

Section 96 of the *Act* provides as follows:

s.96 Corporate Officer's liability for unpaid wages

- (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.

The issue of whether a Director/Officer of an employer corporation found liable for unpaid wages under section 96 of the *Act* can appeal the issues of the company's liability or whether that Director/Officer is limited to arguing the issues of whether the Director/Officer was a Director/Officer at the relevant times or whether the amount falls within the 2 month ceiling for such personal liability was squarely dealt with by this Tribunal in the case of *Steinemann, Kerry Director/Officer of Pacific Western Vinyl Windows & Doors Ltd.*, BC EST #D180/96 (Adjudicator N. Edelman) ("*Steinemann*")

In *Steinemann*, Adjudicator Edelman said, in part, as follows:

It is my opinion that the doctrine of *res judicata*, and particularly issue estoppel, operates to prevent Steinemann from arguing the issue of the company's liability for wages.

Res judicata provides that a thing or matter which has been previously decided should, as a matter of policy, be binding on the parties or their privies, which are persons who partake or have an interest in some act. Issue estoppel is a species of *res judicata*. It covers individual issues addressed in earlier proceedings which necessarily and fundamentally form the basis of the judgment delivered. The doctrine of issue estoppel applies to decisions of administrative tribunals as well as courts [*Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (C.A.)].

Issue estoppel operates to prevent a party from raising an argument at a later proceeding if the following conditions are present:

1. The same question has already been decided;
2. The previous decision was final; and
3. The parties to the decision, or their privies, were the same persons as the parties, or their privies, to the proceedings in which the estoppel is raised.

In *Stelmaschuk v. Dean* [(1995) 13 C.C.E.L. (2d) 220; [195] 9 W.W.R. 131] the Northwest Territories Supreme Court accepted that the doctrine of issue estoppel, in the context of an employment standards proceeding, applied to preclude a director from relitigating the issue of a company's liability.

Further on she continued saying:

Evans v. British Columbia (Employment Standard Board) (1983), 149 D.L.R. (3d) 1 (B.C.C.A.), the Court held that it was consistent with the aims of the legislation to impose liability on directors and to preclude them from relitigating the company's liability. The enforcement mechanisms of the legislation was meant to be quick and inexpensive and it would be counterproductive to those aims to have constant relitigation of the same issues.

In my opinion, it is wholly consistent with the purpose of the legislation, and the summary administrative enforcement scheme contained within it, to say that a director, on whom liability is imposed because of section 62 of the *Act*, should not be able to relitigate the underlying liability of the company.

The only exception would be in the case of fraud or collusion being shown, or the tendering of fresh evidence which would be decisive and was not available previously throughout the exercise of reasonable diligence. None of those factors are present here.

As in *Steinemann*, there is no evidence in this case of fraud or collusion or of fresh evidence which would be decisive and was not available previously. I agree with the Director's Delegate and, following *Steinemann*, find that, in the absence of fraud, collusion, or decisive fresh evidence not previously available, a Director/Officer of an employer company appealing a Determination of personal liability under section 96 of the *Act* is limited to arguing issues of whether he was a Director/Officer at the time the wages were earned and should have been paid or whether the amount of the Determination falls within the 2 month ceiling on such personal liability.

The comment of Ms. Edelman in *Steinemann* is apt:

The intent of Section 96 of the *Act* is to provide the Director of Employment Standards with a way of collecting wages that are owed by a company to its employees. It ensures that employees are protected against insolvent employers - which appears to be the case with Pacific Western - through making directors and officers liable, within limits, for the payment of wages. This section of the *Act* was not meant to provide a company with a further opportunity to dispute the company's liability for wages.

This appellant has not raised any issue as to whether or not he was a director or officer of the Employer at the relevant time or whether the amount of the wages due exceed the 2 month maximum. As a result of the foregoing I find that the appellant has not raised any question as to whether or not the determination was in error and confirm the determination.

In light of the above decision is not necessary to consider the application under Section 113 of the *Act* to suspend the effect of the determination.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination of this matter, dated February 9, 2001 be confirmed in the amount of \$14,710.59, together with any interest that has accrued pursuant to section 88 of the *Act*.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal