Employment Standards TRIBUNAL

An appeal

- by -

Norma Kor, a Director or Officer of Delphi International Academy, Delphi Student Development Inc. and Double D Holdings Ltd. associated companies pursuant to section 95 of the Employment Standards Act

("Kor")

- 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.: 2001/890

DATE OF DECISION: July 10, 2002

DECISION

OVERVIEW

This is an appeal filed by Norma Kor ("Kor") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). Ms. Kor appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on October 10th, 2001 (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.

The Director's delegate determined that Ms. Kor was a director and officer of a company known as Double D Holdings Ltd. ("Double D") and, accordingly, was personally liable for $37,755.86 in unpaid wages and section 88 interest owed to nine former employees of Delphi International Academy ("Delphi Academy"). The employees' unpaid wage claims span the period from September 2000 to June 29th, 2001 and include unpaid regular wages and, for seven of the nine employees, compensation for length of service.

I wish to note, parenthetically, that although the Director's delegate proceeded against Ms. Kor on the basis that she was both an officer and director of Double D, the material before me indicates only that she was a director.

Several other determinations were also issued by the delegate on October 10th, 2001 including a section 95 (the "associated corporations" provision of the *Act*) determination issued against Delphi Academy, Double D and Delphi Student Development Inc. ("Delphi Development"). This latter determination was appealed to the Tribunal (by the three associated firms and by two of the employees) and the employees' appeal was allowed, in part. In my view, the delegate may have incorrectly calculated the employees' respective entitlements to compensation for length of service (see section 63) and, thus, I issued the following order (see *Delphi International Academy et al.*, B.C.E.S.T. Decision No. D166/02):

> **ORDER**
>
> Pursuant to section 115(1)(b) of the *Act,* the matter of the employees' entitlement to compensation for length of service is referred back to the Director for further investigation and determination in accordance with these reasons for decision.
>
> In all other respects, the Determination is confirmed.

I understand that the Director's delegate has completed her further investigation and that the parties are now reviewing the delegate's recalculations.

With the concurrence of the parties, I ordered that this appeal (together with a separate but related appeal filed by Mr. Serge Biln, whom I understand to be Ms. Kor's spouse) be adjudicated based on the parties' 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). A timetable was established for

the delivery of the parties' submissions which have now been filed with the Tribunal and exchanged between the parties.

Ms. Kor and Mr. Biln are jointly represented by legal counsel who filed common submissions on their behalf. The reasons for appeal in this matter are, for the most part, identical to those advanced in the "Biln" appeal. My reasons for decision in the Biln appeal (EST File No. 2001/766) are being issued concurrently with these reasons.

BACKGROUND FACTS

Delphi Academy operated a now defunct independent school that offered a curriculum tailored to the needs of student-athletes, particularly hockey and baseball players. The respondent employees are former members of Delphi Academy's teaching staff. Delphi Academy, Double D and Delphi Development were closely interrelated, subject to common direction and control and jointly operated a common business enterprise, namely, the independent school. Delphi Academy was the entity that formally operated the school, the school's athletic programs were operated through Delphi Development and Double D was the "holding company" and "landlord" that owned, *inter alia*, the shares of the other two firms. So far as I am aware, none of the three firms is in bankruptcy or subject to any other formal insolvency proceeding although I understand that all three firms are "insolvent" and not in good standing with the Registrar of Companies (by reason of a failure to file annual reports).

ISSUES AND ANALYSIS

As noted, Ms. Kor's reasons for appeal are almost identical to those advanced by her husband, Mr. Biln, in his appeal. Briefly, it is asserted that the employees were employed under "definite term" contracts and that they all received written "working notice" in compliance with section 63 of the *Act.* Further, it is asserted that one of the employees, namely, David Tanner, voluntarily quit his employment and thus was not entitled to any compensation for length of service.

All of the foregoing issues were addressed (and found to without merit) in the appeal of the section 95 determination and cannot now be relitigated in these proceedings due to the doctrine of *res judicata* and, more specifically, the principle of issue estoppel--see *Pacific Western Vinyl Windows & Doors Ltd.*, B.C.E.S.T. Decision No. D180/96; *Penner & Hauff*, B.C.E.S.T. Decision No. D371/96; *Perfekto Mondo Bistro Corp.*, B.C.E.S.T. Decision No. D205/96; and *Leon Hotel Ltd.*, B.C.E.S.T. Decision No. D201/99.

Similarly, Ms. Kor's challenge of the section 95 determination has been previously addressed in the appeal of that latter determination. The correctness of the section 95 determination is not properly before me in these proceedings.

Ms. Kor also says that she ought not to have been found liable under section 96(1) of the *Act* because, although conceding she was listed as a director of Double D, she nonetheless says that she did not exercise "the typical functions, tasks or duties that a corporate director would exercise in the usual course of events". Ms. Kor says that she "was never actively involved in the management or supervision of the management of the affairs and business of the company". She says, in her February 19th, 2002 submission to the Tribunal, that she "was never a real director" and that her role in the affairs of Double D was that of an "investor" who had only "occasional input and opinions" about the business affairs of that company.

On the other hand, the material before me shows that she was more actively involved in the affairs of the company than she would now care to admit. She participated in staff selection interviews and she frequently met with teaching staff to update them on the school's situation. However, irrespective of her actual functions, the fact remains that she was a Double D director. I have before me her signed consent to act as a Double D director and an e-mail from Ms. Kor dated July 9th, 2001 in which she admits to being a "board member". There is no credible evidence to suggest that Ms. Kor was incorrectly identified in any corporate record as a Double D director.

Even if her involvement in the affairs of Double D was very limited, this lack of involvement could not be nullify her directorship: *Director of Employment Standards (Michalkovic)*, B.C.E.S.T. Decision No. RD047/01. The so-called "functional test" may be relied on to impose a section 96 liability on a person who is otherwise *not* named as a corporate officer or director (see *Penner & Hauff, supra*); however, a director or officer cannot escape liability under section 96 simply because they displayed a "hands-off" attitude regarding the business affairs of the company of which they were a director.

Corporate records and those maintained by the Registrar of Companies are rebuttably presumed to be accurate (*Wilinofsky*, B.C.E.S.T. Decision No. D106/99). The Director may issue a section 96 determination relying on the corporate records filed with the Registrar of Companies; the person challenging those records must prove, by credible and cogent evidence, that the records are inaccurate. Ms. Kor has not proven that the records identifying her as a director are inaccurate; indeed, the evidence overwhelmingly suggests that the records are correct.

Ms. Kor's position is quite unlike that of the directors in *Bristow* (B.C.E.S.T. Decision No. D063/02) *Gates* (B.C.E.S.T. Decision No. D064/02)--cases cited by Ms. Kor's legal counsel--where the individuals in question only agreed to serve if directors' liability insurance was obtained within a specified time period. This "condition precedent" not having been satisfied, the individuals thus did not "consent" to serve as directors. Thus, the Registrar's records, indicating that they were directors, were incorrect. Once the adjudicator found that the Registrar's records were incorrect--in the sense that the two individuals did not agree to act as directors unless liability insurance was obtained--he then turned his mind to the functional test. However, as noted above, the functional test has no application where, as here, the individual is *correctly* identified as a director in the Registrar's (or other corporate) records.

Mr. Biln, in his appeal, relied on the regulatory exclusion contained in section 45 of the *Employment Standards Regulation*--this provision states that, in certain circumstances, directors of "charities" are exempted from liability section 96. Ms. Kor's appeal documents do not raise this issue. However, in the event that this omission was inadvertent, I would nonetheless reject the argument for the reasons given in the Biln appeal.

The final ground of appeal arises from the Tribunal's decision in *ICON Laser Eye Centres, Inc.* (B.C.E.S.T. Decision No. D649/01; confirmed on reconsideration: B.C.E.S.T. Decision No. RD201/02) where it was held that individuals who are directors or officers of a "associated corporation" that is not otherwise an "employer", cannot be held liable under section 96 for the unpaid wage claims of employees of the employer corporation.

I stated in the original *ICON* appeal decision:

> "The personal liability imposed on directors and officers under section 96(1) is predicated on their being an *employment* relationship between the employee and the corporation of which the individual is a director or officer--"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." 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 offices under section 96(1) flows from their having been a director or officer of the corporate employer when the employees' unpaid wage claims crystallized." (*italics* in original text)

Counsel for Ms. Kor quite correctly notes that the *ICON* decision holds that directors of "associated corporations" (where the associated firm cannot be lawfully characterized as an "employer" of the employees in question) are not personally liable under section 96 for unpaid wages owed by the "employer" firm.

Although Delphi Academy was, at least nominally, the "school" for whom the teachers provided service, some, if not all of the teachers had written contracts of employment with both Delphi Academy and Double D pursuant to which, for example, both firms could direct and control the teacher's duties. The agreements state, in some provisions, that the employer is Delphi Academy; in other provisions, both Delphi Academy and Double D are said to constitute the employer. The agreements state that the paymaster is Double D. By way of the agreement, the employee agrees to faithfully serve both entities; a confidentiality agreement protects both entities.

It is, of course, quite possible under both the common law and the *Act* for an individual to be "employed" by more than one "employer" (see *e.g.*, *McPhee*, B.C.E.S.T. Decision No. D183/97). It may well be the case that Double D meets the statutory definition of "employer" set out in section 1 of the *Act.* This latter question was not specifically addressed in the original section 95 determination nor is it addressed in the section 96 Determination now under appeal before me.

In light of the fact that the delegate did not specifically determine that Double D was an "employer" as defined in section 1 and given the uncertainty surrounding this issue (I am unable to unequivocally determine the matter based on the material before me), I am of the view that the most appropriate disposition of this particular issue is to refer the matter back to the Director for further investigation.

ORDER

Pursuant to section 115(1)(b) of the *Act,* I order that the issue of whether or not Double D Holdings Ltd. was an "employer" of some or all of the respondent teachers be referred back to the Director for further investigation.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal