Employment Standards TRIBUNAL

An appeal

- by -

Serge Biln, 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

("Biln")

- 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.: 2001/766

DATE OF DECISION: July 10, 2002

DECISION

OVERVIEW

This is an appeal filed by Serge Biln ("Biln") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). Mr. Biln 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 Mr. Biln was a director and officer of a company known as Double D Holdings Ltd. ("Double D") and, accordingly, was personally liable for $37,510.56 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 30th, 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 delegate proceeded against Mr. Biln on the basis that he was both an officer and director of Double D, the material before me indicates only that he 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 Ms. Norma Kor, whom I understand to be Mr. Biln'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.

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).

In a memorandum appended to his appeal form Mr. Biln asserted, *inter alia:*

- "[Delphi Academy] was incorporated in 1992 as a non-profit society, operating a private school in Langley, B.C. under the direction of Todd, Al and Ruth Decker (the 'Deckers'). The school provided education targeted largely towards high school students and was forced out of business in the summer of 2001 due to continued, unsupportable losses."

- "In conjunction with [Delphi Academy], the Deckers also owned and operated [Delphi Development], a company incorporated in 1995 to facilitate the sports training and development for the [Delphi Academy] students. Lastly, the Deckers established Double D in 1996 as a holding company for minimal sundry equipment (i.e., computers, desks, tables, chairs etc.) which also leased and sub-let the Delphi premises."

- "My involvement with Double D and the associated companies was minimal. I have invested approximately $50,000 in the spring of 2000 for a 5% interest, largely as a silent investment while management was left with the Deckers, and I continued to pursue my fifteen year full-time banking career. The majority of my involvement with the company was focused on acting as a liaison for the Delphi Parents Advisory Committee, with occasional consultation/planning in other areas largely focused towards marketing."

- "The [Determination] appears to have included me with personal liability under the basis of section 96 (Corporate Officer's Liability for unpaid Wages) in conjunction with the inclusion of Double D an 'associated company', of which I am recorded as a Director."

- "...the Complainants were teachers operating under an annual contract providing education and sports training at [Delphi Academy], and allege that they were owed regular wages and severance compensation. The contracts in 2001 were with Delphi and Double D (unbeknownst to me) and I was found liable as a director of Double D. At no time died [sic, did?] Double D make any payments to the Complainants nor was Double D involved in the funding of the Complainants [sic] salaries."

- Double D was owned by the same shareholders and in the same portions as [Delphi Academy]. Double D however was not involved in the education of students but rather was a separate vehicle

established purposely for the sole purpose of financing certain assets required in the school operations of [Delphi Academy]. At no time did Double D have any control over or any legal authority or influence over the affairs of [Delphi Academy]."

REASONS FOR APPEAL

Mr. Biln's reasons for appeal set out a number of grounds and, in particular, he adopts several grounds that were advanced by Mr. Alan Decker on behalf of the three companies in the appeal of the section 95 determination. Specifically, 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. Accordingly, these issues cannot now be relitigated in these proceedings. In other words, these issues are governed by 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.

Mr. Biln says that the delegate erred in finding that the three firms were "associated corporations" within section 95--that issue was also determined in the appeal of the section 95 determination and, thus, is not properly before me in these proceedings.

Mr. Biln also says that he ought not to have been found liable under section 96(1) of the *Act* because, although conceding he was, in a formal sense, a director of Double D, he nonetheless says that he did not exercise "the typical functions, tasks or duties that a corporate director would exercise in the usual course of events". The very same argument was considered, and rejected, by the reconsideration panel in *Director of Employment Standards (Michalkovic)*, B.C.E.S.T. Decision No. RD047/01.

The records 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. Mr. Biln does not deny that he was, officially, a Double D director; indeed, he concedes as much. He acknowledges having attended at least one directors' meeting and states that his role was to "providing financing and assisting in the promotions of the business" and that he "honestly tried to add value to Delphi in some business areas" (see Biln's December 14th, 2001 submission).

However, Mr. Biln says that he is relieved from liability because he did not *function* as a Double D director. Even though Mr. Biln maintains that he, in essence, abdicated his duties and responsibilities as a director--and, based on the material before me, I must conclude that Mr. Biln's involvement was not nearly as peripheral as he would now have us believe--that state of affairs does not relieve him from liability under section 96(1): see *Michalkovic, supra* and *Brown,* B.C.E.S.T. Decision No. D193/99.

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.

I might add that Mr. Biln'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 Mr. Biln'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.

There are two further grounds of appeal that cannot be summarily dismissed. First, Mr. Biln says that he is not liable under section 96 since he is exempted by reason of section 45 of the *Employment Standards Regulation:*

> **Exclusion from liability provisions**
> 45. Section 96 of the Act does not apply to a director or officer of a charity who receives reasonable out-of-pocket expenses but no other remuneration for services performed for the charity.

Mr. Biln says that:

> "...[Delphi Academy] operated as a non-profit society, and any determination against it, including the inclusion of associated corporations, does not apply to directors and officers of a charity if they receive 'reasonable out-of-pocket expenses but no other remuneration' from the charity...I confirm that I have never received any remuneration from [Delphi Academy] of any of the associated corporations."

The second ground 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)

I shall deal with each of these two grounds in turn.

FINDINGS AND ANALYSIS

Section 45 of the Employment Standards Regulation

In assessing this ground of appeal, it must be remembered that Mr. Biln is a director of Double D--the so-called "asset holding company"--and is not a director of either of the other two firms. The notion that Double D was operated, or was intended to operate, as a "charity" appears to be inconsistent with Mr. Biln's assertion that he "invested" $50,000 in this company (he and his wife claim to have lost $100,000 as a result of their joint investment in Double D). Presumably, Mr. Biln expected, at some point, to earn a return on his investment. Double D may well have never earned a profit, however, dismal financial performance does not transform an ordinary company into a non-profit society.

"Charity" is specifically defined in section 1 of the *Regulation* as follows:

> "**charity**" means
>
> (a) a charity as defined in the *Income Tax Act* (Canada), or
>
> (b) a society incorporated under the *Society Act*...

There is no evidence before me that Double D was a registered charity under the federal *Income Tax Act.* Further, while it appears that Delphi Academy was incorporated under the *Society Act*, as previously noted, Mr. Biln's liability flows from his directorship in Double D, a company that was incorporated under the B.C. *Company Act* as was Delphi Development.

In my view, the section 45 regulatory exclusion does not apply to Mr. Biln's personal situation.

Directors of "associated corporations"

Counsel for Mr. Biln 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