

An appeal

- by -

Brian W. Smith, Director/Officer of Colorworks Reproduction & Design Inc.,
in Bankruptcy
("Smith")

- 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.: 2001/246

DATE OF DECISION: June 11, 2001

DECISION

OVERVIEW

This is an appeal filed by Brian W. Smith (“Smith”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Mr. Smith appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”), pursuant to section 96(1) of the *Act*, on March 6th, 2001 under file number ER81-928 (the “Determination”). Section 96(1) of the *Act* 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, Smith was ordered to pay \$1,700 to three former employees of a bankrupt company of which he was an officer and director, namely, ColorWorks Reproduction & Design Inc. (“ColorWorks”). The monies in question represent certain R.R.S.P. contributions that were deducted from three former ColorWorks’ employees’ wages but were not actually remitted to the administrator of the employees’ respective R.R.S.P. plans. The former ColorWorks employees, and their respective unremitted R.R.S.P. contributions, are set out below:

<u>Employee</u>	<u>Unremitted R.R.S.P. contribution</u>
Jenni Ambrose	\$ 400.00
Gerrard Duggan	\$ 300.00
Joceline Heersink	<u>\$1,000.00</u>
TOTAL	<u>\$1,700.00</u>

As I understand the situation, a ColorWorks cheque, which included the above-noted employees’ remittances as well as certain other remittances, was forwarded to the R.R.S.P. administrator but this cheque did not clear because the ColorWorks bank account upon which it was drawn was closed on January 12th, 1999.

By way of a letter dated May 29th, 2001 the parties were advised by the Tribunal’s Vice-Chair that this appeal would be adjudicated based on the parties’ written submissions and that an oral hearing would not be held (see section 107 of the *Act*). The only submission that I have before me is that of the appellant, Smith, dated March 21st, 2001 and appended to his appeal form. None of the employees filed a submission with the Tribunal and the Director filed a 2-paragraph letter stating only that “the Director has nothing further to add beyond what is discussed in the determination”.

REASONS FOR APPEAL

The relevant portions of Smith's March 21st submission (much of which is not relevant in terms of the issues that are properly before me) are reproduced below:

- "...I discovered that due to an administrative oversight, the RRSP payment for October had not been made. I immediately processed a payment for both October and November and had a cheque prepared. The signed cheque was left with [ColorWorks' president] for his second signature and I left on my trip. For some reason this cheque was not presented to the bank for honouring until the very day of the bankruptcy (January 7th, 1999)."
- "At the time of the bankruptcy on January 7th 1999, ColorWorks had \$22,023.40 in cash available...and an unused line of credit from the Bank of Nova Scotia of \$100,000. In other words, [ColorWorks] had over \$120,000 available to make any outstanding payments to employees."
- "[ColorWorks' president] sought legal advise [sic] from the company lawyers...During that time, there was ample time for both [ColorWorks' president] and his legal advisors to identify what employee liabilities existed and to take steps to satisfy them prior to the planned date of the bankruptcy. Even if [ColorWorks' president] was unaware of the potential liabilities, certainly the company's lawyers should have been aware and should have advised him."

FACTS AND ANALYSIS

Smith and ColorWorks' former president (who was also Smith's former son-in-law) were the two principals of ColorWorks. ColorWorks was incorporated on February 8th, 1993. Smith was a director and officer of ColorWorks until his resignation on December 9th, 1998.

ColorWorks made a voluntary assignment into bankruptcy on January 7th, 1999. On March 23rd, 1999 a determination was issued against ColorWorks in the amount of \$91,516.71 on account of unpaid wages (including unremitted R.R.S.P. contributions, commissions, vacation pay and compensation for length of service) owed to 25 former ColorWorks employees.

So far as I can gather, although the ColorWorks "corporate determination" was served on the latter's Trustee in Bankruptcy, the corporate determination was never appealed. Certain dividends were issued to the employees by the Trustee out of the ColorWorks estate.

The deductions (\$1,700 in total) made on account of the three former employees' R.R.S.P. contributions were deducted from their respective paycheques issued on October 16th, 1998. However, those monies--as Smith himself acknowledges--were not remitted to the plan

administrator within the 30-day (maximum) period (or, indeed, at any other time) provided for in section 23 of the *Act*.

Section 96(1) of the *Act* creates a personal statutory liability on the part of corporate officers and directors for up to 2 months' unpaid wages per employee. Section 96 appears in Part 11 of the *Act*. "Wages" are defined in section 1 as including, for purposes of Parts 10 and 11, "money required under a contract of employment to be paid, for an employee's benefit, to a fund, insurer or other person." Thus, the unremitted R.R.S.P. contributions constitute "wages" for which a corporate director/officer may be held liable. None of the defences set out in section 96 applies here. Smith was a ColorWorks director and officer when the remittances ought to have been paid to the R.R.S.P. plan administrator. The amounts in question are well within the 2-month wage liability ceiling set out in section 96(1).

Although Smith may have acted in good faith in attempting to ensure that the employees' R.R.S.P. contributions were paid to the plan administrator, the fact remains that the contributions were not paid within the 30-day statutory period or at any other time. The fact that the payments might have been made to the plan administrator (assuming ColorWorks had the financial wherewithal to do so) is irrelevant.

Nor is it relevant that ColorWorks' solicitors did not (assuming they did not) advise that the payments be made prior to bankruptcy--if Smith is of the view that he or ColorWorks did not receive appropriate advice from legal counsel, that is a matter for a separate legal claim against the solicitors. Further, if Smith is of the view that ColorWorks' former president failed to live up to some sort of duty that he owed Smith, that is also a matter for a separate civil action. In making the foregoing comments, I wish to make it clear that I am not passing any judgment regarding the legal merits of such potential actions.

In my view, this appeal is wholly without merit and must be dismissed

ORDER

Pursuant to subsections 114(1)(c) and 115(1)(a) of the *Act*, I order that this appeal be dismissed and that the Determination be confirmed as issued in the amount of **\$1,700** together with whatever interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal