

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

Alan M. Bruyneel

(“Bruyneel”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 98/168

DATE OF DECISION: July 8, 1998

DECISION

OVERVIEW

This is an appeal brought by Alan M. Bruyneel (“Bruyneel”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by the Director of Employment Standards (the “Director”) on March 9th, 1998 under file number 088066 (the “Determination”).

The Director determined that Bruyneel was obliged to pay \$30,912.93 on account of unpaid wages owed to 18 former employees of Pacific Armoured Car (Vancouver Island) Ltd. (“Pacific”). The employees’ wage claims span the period December 14th, 1997 to January 8th, 1998. The Determination was issued against Bruyneel pursuant to section 96 of the *Act* by reason of his status as the sole director and officer (president/secretary) of Pacific.

ISSUES TO BE DECIDED

Bruyneel’s appeal is based on certain alleged calculation errors contained in the original two determinations issued against Pacific. Bruyneel also says that he intended to appeal the two original corporate determinations and in fact did so by way of two faxed communications sent to the Director’s delegate on January 30th and 31st, 1998. In effect, Bruyneel’s appeal is exclusively predicated on grounds that more properly relate to an appeal of the two corporate determinations.

Bruyneel does not deny that is the sole officer and director of Pacific. He does not say that any of the employees’ claims exceeds the 2-month wage liability ceiling set out in section 96(1) of the *Act* and, on the face of it, all of the claims are well within the 2-month threshold.

FACTS AND ANALYSIS

On January 26th, 1998, the Director issued two determinations against Pacific (one covering the employees working in the Victoria area; the other covering employees in the Nanaimo area). So far as I can gather, neither of these two corporate determinations was ever formally appealed to the Tribunal and thus the 18 employees’ total wage entitlement is now *res judicata* (i.e., conclusively and finally determined) and cannot be challenged by Bruyneel on his appeal of a determination issued against him under section 96 of the *Act*.

The Tribunal has consistently held that a director or officer is not entitled, in an appeal of the determination issued against them in their personal capacity under section 96 of the *Act*, to in effect litigate (or re-litigate) the issues that more properly ought to be dealt with in the appeal of the underlying corporate determination (see *e.g.*, *Steinemann*, EST Decision No. 180/96 and *Perfekto Mondo Bistro Corporation*, EST Decision No. D205/96). The policy underlying these latter

decisions is that there should only be one appeal on the substantive question of the employees' wage entitlement and that appeal ought to be brought by the employer--in this case, Pacific.

As noted above, Bruyneel maintains that he intended to appeal the two corporate determinations and in fact did so by way of two faxed transmissions sent to the Director's delegate on January 30th and 31st, 1998, respectively. I have reviewed these two faxes. These two faxes are not addressed to the Tribunal and cannot in any fashion be considered to be proper appeals of the corporate determinations; they appear to be more in the nature of a request to the delegate, pursuant to section 86 of the *Act*, to vary the corporate determinations.

It should also be noted that the corporate determinations both contained, on their face (as does the Determination now before me), a statement regarding the deadline for appealing to the Employment Standards Tribunal. If Bruyneel intended to appeal the corporate determinations he was obliged to file proper and timely appeals with the Tribunal; the time for filing such appeals has now long since expired.

Section 96 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.

(2) Despite subsection (1), a person who was a director or officer of a corporation is not personally liable for

(a) any liability to an employee under section 63, termination pay or money payable under a collective agreement in respect of individual or group terminations, if the corporation is in receivership or is subject to action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act,

(b) vacation pay that becomes payable after the director or officer ceases to hold office,
or

(c) money that remains in an employee's time bank after the director or officer ceases
to hold office.

(3) This Act applies to the recovery of the unpaid wages from a person liable for them under subsection (1).

None of the limitations set out in subsection 96(2) is relevant here and there is no evidence before me that any of the various employees' claims exceed the statutory 2-month threshold. Given the clear evidence that Bruyneel was both an officer and a director of Pacific, the Determination must be confirmed.

Finally, it should be noted that on May 5th, 1998 Bruyneel filed a proposal with his creditors under section 50.4(1) of the federal *Bankruptcy and Insolvency Act*--this proposal lists the Victoria office of the Employment Standards Branch as a creditor in the amount of \$30,000. Since this proposal was filed subsequent to the issuance of the Determination, it has no impact on the validity of the Determination but the Director should note that it may now be subject to the "stay of proceedings" provisions of the *Bankruptcy and Insolvency Act* and thus may not be in a position to take any enforcement procedures under Part 11 of the *Act*.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$30,912.93** together with whatever further interest that may have accrued, pursuant to 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal