

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-

David Melnychuk
("Melnychuk")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	1999/338
DATE OF DECISION:	August 13th, 1999

DECISION

OVERVIEW

This is an appeal brought by David Melnychuk (“Melnychuk”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 6th, 1999 under file number ER091-884 (the “Determination”).

The Director’s delegate determined that Melnychuk was a director or officer of a company known as Christopher David & Co. Ltd. (the “employer”) when the employer became indebted to its former employee, Bruno Testini (“Testini”), in the amount of \$442.70, on account of unpaid vacation pay (see section 58) and interest (see section 88). In accordance with provisions of section 96 of the *Act*, the Determination was issued against Melnychuk in his personal capacity as a director or officer of the employer when the unpaid vacation pay was earned by Testini.

FACTS AND ANALYSIS

Testini was employed from early December 1997 until early April 1998 at a weekly salary of \$750--the payroll records (wage statements) produced by Testini do not indicate that he was paid an additional 4% of earnings as vacation pay on each paycheque, nor is there any evidence before me that vacation pay was paid to Testini at any other time.

On May 6th, 1999 the Director’s delegate also issued a determination against the employer pursuant to which the employer was held liable for \$442.70 in unpaid wages owed to Testini. This corporate determination has never been appealed and thus the question of Testini’s entitlement is now *res judicata*--see *Perfekto Mondo Bistro Corp.*, B.C.E.S.T. Decision No. D205/96. I understand that the employer has ceased operations and that its assets have been seized by a bailiff.

The record before me shows that during the course of the delegate’s investigation of Testini’s complaint, the delegate made several efforts during the period from early January to early May 1999 to contact Melnychuk to discuss Testini’s unpaid wage claim. The record also shows that Melnychuk simply refused to meaningfully participate in the delegate’s investigation. A demand for production of records was ignored as were several letters from the delegate to Melnychuk. I also note that the delegate advised Melnychuk, in writing, in early January 1999, that he was potentially personally liable for Testini’s unpaid wages by reason of section 96 of the *Act*.

The corporate determination not having been appealed, the only issue before me is whether or not Melnychuk was a director or officer at the relevant time and whether or not Melnychuk’s liability as set out in the Determination exceeds the 2-month unpaid wage threshold set out in section 96. None of the statutory defences set out in section 96(2) is relevant.

A B.C. On-line search of the companies' registry shows that, at all material times, Melnychuk was the sole director and officer of the employer. The amount of vacation pay found to be owing to Testini is well within the 2-month wage liability ceiling provided for in section 96(1) of the *Act*.

In his appeal documents, Melnychuk does not deny that he is an officer and director of the employer; rather, Melnychuk simply alleges that Testini was “overpaid” and thus not entitled to vacation pay, and that Testini absconded with some \$3,000 worth of merchandise belonging to the employer. As noted above, there is no evidence whatsoever before me to show that Testini was ever paid the vacation pay to which he was entitled by virtue of section 58 of the *Act*. If the employer is of the view that it has some sort of claim against Testini, the employer will have to pursue that claim in the courts.

Accordingly, in light of the foregoing, I must conclude that this appeal is entirely devoid of merit and the Determination be confirmed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$422.70** together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal