

An appeal

- by -

Howard I. Mott, a Director or Officer of United Used Auto & Truck Parts Ltd.
(“Mott”)

- 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: Paul E. Love

FILE No.: 2001/030

DATE OF DECISION: June 21, 2001

DECISION

OVERVIEW

A Determination in this matter was issued against United Used Auto & Truck Parts (“United” or “company”) on October 20, 2000 in favour of a number of employees in the amount of \$261,199.39, inclusive of interest by a Delegate of the Director of Employment Standards (the “Delegate”). Following the expiration of the appeal period, the Director issued a Determination on December 1, 2000, against each of three directors of the company. This appeal relates to a Determination issued against Howard I. Mott, a director of the company. On or about August 8, 2000, a receiver was appointed. The employees of United were discharged by the receiver, after appointment. The Delegate, imposed liability on Mr. Mott, pursuant to s. 96 of the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “Act”) in the amount of \$76,445.44. Mr. Mott argued that the amount of the Determination was incorrect, that the appointment of the receiver discharged the liability of the directors for payroll, and that vacation pay was included improperly in the Determination. I found that the appointment of a receiver did not discharge the directors from liability imposed under s. 96 of the *Act*. In reviewing the Determination, it was apparent that the calculations of the Delegate supported a liability of \$76,445.44, and that the Delegate had not included any wages earned after the appointment of the receiver, or any amounts for compensation for length of service. I determined that vacation pay was included in the definition of “wages” and accrued vacation pay became owing after the termination of the employees, while Mr. Mott remained a director of the company. I confirmed the Determination. Mr. Mott sought that the effect of the determination be stayed pending the sale of corporate assets. I held that while the Tribunal had a power to suspend the effect of a Determination during the appeal process, the Tribunal had no jurisdiction to supervise the enforcement powers given to the Director, after the Tribunal exercised its jurisdiction to confirm a Determination.

FACTS

This is an application by Howard I. Mott concerning a Determination issued by a Delegate of the Director of Employment Standards, on December 1, 2000, against him as a director of United Used Auto & Truck Part Ltd. (“United” or “company”) for two months unpaid wages. Two other directors of United have filed appeals, and these appeals will be dealt with in separate decisions. This application was decided upon the written submissions, filed by the parties. I note that counsel for Mr. Mott, was also counsel for another director, Ian G. Mott. The submissions made by counsel for Mr. Mott appeared identical on both files.

By way of background, the Determination against the company (“Corporate Determination”) was issued on October 20, 2000 in favour of a number of employees in the amount of \$261,199.39, inclusive of interest. The Delegate found that the employer had not paid wages owing at the date of service, compensation for length of service, union dues or pension contributions. The amounts were owing to Colin W. Beck, Terrence Coates, Edward Couture, Donald Harold Eckel,

Gordon W.J. Gibson, Gordon W. Gilbert, Howard R. Henderson, Laura L. King, Jeff B. Levinsky, David R. Parker, Jeff B. Podskalny, Morrie Roegele, Charles D. Ruzich, Barry C. Scriver, Alan G. Shirley, Frank Spear, Andreas W. Tielen, Einar A. Vennberg, Robert J. Ward, Steven J. Haberlin, Stuart MacInnes, Anne Murney, Rick Steel, Luis Orantes, Morley Kirkham, Paul Phelan, Steve P. Foreman, Robert Goodman, Douglas Mott (the “employees”). It is unnecessary for the purposes of this application to set forth the entitlement of each employee.

In a separate decision issued on April 23, 2001, I dismissed an appeal made by Julien Dawson of the corporate Determination. There is no evidence before me of Mr. Dawson’s connection to the employer, directors or officers of the company. There was no evidence before me that Mr. Dawson was authorized to proceed with the appeal by the Trustee in Bankruptcy. I held that Mr. Dawson did not have any standing to file the appeal on behalf of United.

On December 1, 2000, the Delegate issued a Determination against Howard I. Mott, as a director of United in the amount of \$76,445.44 which represented up to two months unpaid wages for each employee. The Delegate performed a BC Online Registrar of Companies Corporate Search and as at October 11, 2000 Mr. Mott was listed as a director/officer. The unpaid wages were earned between August 8, 1998 to August 8, 2000. There is no question that, at all times material, Mr. Mott was a Director of the company. It is unnecessary for me to set out the entitlements of each of the 29 employees of the company. Those entitlements are set out in as a schedule to the Determination. The issue raised in this appeal are common to all employees.

Mr. Mott alleges that the Director erred with regard to the calculation of the amount of the Determination, and alleges that the Director included wrongfully, vacation pay. I note that a substantial portion of the entitlement for each employee was vacation pay accrued to the date of the appointment of the receiver.

I note that the appeal materials contain also the grounds of appeal which were filed by Julien Dawson on December 27, 2000, and are as follows:

1. The Director failed to comply with the principles of natural justice in rendering the Determinations;
2. The Director fettered her discretion in failing to take into account relevant circumstances such as the solvency of the Appellant company;
3. The Director erred in her determination that the Appellant company had not paid the complainant’s wages;
4. The Director’s calculation of the monies owed by the Appellants was patently unreasonable and mathematically incorrect. As a result the Appellants seek a new hearing before a different Adjudicator.

Appellant's Argument:

Counsel for Mr. Mott submitted that on August 8, 2000 Price Waterhouse Coopers Inc. was appointed Receiver over the company (the "receiver") and terminated all employment contracts and took control of the company. It is submitted that the directors should not be held responsible for failures to pay payroll, which were not within their control. The directors were prevented from running the company by the receivers and from meeting the Company's payroll commitments after August 8, 2000. It is submitted that there is an error in the inclusion of vacation pay in the calculation of wages owing. It is requested that if the Determination is upheld, the effect of the Determination be suspended pending the sale of corporate assets. It is alleged that the company owns properties in the range of \$59 million. The appellant alleges that the total debt of the company was \$26.4 million at the time receiver closed the operations.

Director's Submission:

In a written submission dated January 24, 2001, the Delegate said as follows:

According to the payroll records and the records of employment the employees were not paid their accrued vacation pay or any wages earned after July 29, 2000. The monies determined to be owed in the above mentioned Determination are the wages owing and the accrued vacation pay for each employee. The amount for each employee is no more than 2 months' wages or the wages and accrued vacation pay which ever was the smaller amount. The amount determined to be owed is in accordance with the Section 96 of the *Act*.

ISSUES

Does the liability of a director cease because of the appointment of a receiver?

Did the Delegate err in the calculation of wages by including vacation pay?

Is the calculation incorrect?

ANALYSIS

In this appeal the burden rests with the appellant, in this case Mr. Mott, to establish an error in the Determination such that I should vary or cancel the Determination. I note that in assessing a director's Determination, the director must show that either he is not a proper director, or that there is some error in the assessment made against him as a director: *California Shutter Co. of Canada, BCEST #D 133/99 (Petersen)*. For the purposes of this appeal, it is convenient to deal with each issue, raised by Mr. Mott's counsel, under the sub-headings listed below:

Appointment of the Receiver:

In this case it is apparent from the calculations attached to the Determination, that the Delegate did not include any wage claims arising after the date of the appointment of the receiver. This is a question of fact, and Mr. Mott has offered no contradictory proof. I am satisfied by the Director's submission, and from my review of the Determination, including the calculations attached setting out the entitlements of the employees. I note that while the company may have been prevented from running its affairs and generating a cash flow to pay its employees, the appointment of a receiver cannot have the effect of extinguishing the director's liability to the employees under the *Act*, including liability for wages and vacation pay. It is clear that the basis for director's liability is different than the basis for the company's liability. The liability is derived from the status of being a director of a company at the time that the wages were earned or should have been paid. The directors of a company have a substantially lesser obligation than that of a corporate employer. In *Docherty, BCEST #D 248/99 (Thornicroft)*, the Tribunal held that s. 96 creates an unpaid wage liability ceiling for a director. The liability is limited to two months wages, or the lesser of the amount actually owing.

Incorrect Calculation:

While Mr. Mott alleges that the calculations were incorrect, there are no particulars given of the alleged errors, other than an error with regard to inclusion of vacation pay, which I deal with in a separate heading below. The calculation sheets attached to the Determination support an amount owing by the directors in the amount of \$76,445.44. I note that Mott did not challenge the amount due and owing by the company to the employees under the corporate determination. There is no information before me, from Mr. Mott to show that the amount set out in the director's Determination is incorrect. An appeal under the *Act*, is not a hearing *de novo*, or a fresh investigation. The appellant must show an error in the Determination, such that the Determination should be varied or canceled. A bare allegation of an incorrect calculation will not suffice.

The Delegate made the calculations under s. 96 of the *Act*. Section 96 reads as follows:

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' wages for each employee.

Section 96(2) makes it clear that the director is not liable for compensation for length of service (s.63). The entitlements found by the Delegate do not include any claim for compensation for length of service. From my review of the Determination, it appears that the Delegate took the view that the appointment of the receiver, and termination of the employees, terminated the obligation of the company's directors to pay wages accruing after the date of the termination of the employees. The company's directors have not become responsible for compensation for length of service because of any decision by the Receiver to terminate the employees.

It is clear, on an analysis of the facts in this case, that the liability contained within the Determination, is a liability for two months wages, or less.

Vacation Pay:

It is submitted by the employer that vacation pay, cannot be included in the entitlement and that would lead to some circularity in the definition of wages. This argument is not well developed in the appellant's materials. I do not accept this submission.

In s. 1 (a) "wages" are defined as including "salaries, commissions or money, paid or payable by an employer to an employee for work" and 1(c) "money, including, the amount of any liability under section 63, required to be paid by an employer to an employee under this Act." Certain types of payments made by employers are excluded expressly from wages. Vacation pay does not fall into any of the excluded categories of gratuities, money paid at discretion for production or efficiency, allowances or expense or penalties. Vacation pay is earned or accrued based on the earnings of the employee, and is payable for work. An employee does not receive vacation pay or an entitlement to vacation unless that person works for an employer

It seems to be the legislative intent the vacation pay earned or accrued is captured by s. 96 of the *Act*. Section 96 provides specific exemptions from personal liability of a Director for certain items - termination pay or compensation for length of service in the event of a receivership, insolvency or a proceeding under s. 427 of the Bank Act (Canada). A director is not liable for vacation pay that becomes payable after the director ceases to hold office. A director is not liable for money that remains in an employee's time bank after the director ceases office. If the legislature intended that a director was to be exempted from payment of vacation pay accrued or payable during office, one would require clear wording in the section, given the rather broad definition of wages set out in section 1 of the *Act*.

I note in this case, a substantial portion of the entitlement of each employee was vacation pay accruing up until the date of the appointment of the receiver, and termination of the employees. In my view, however, the accrued vacation pay forms part of the entitlement of the employees upon termination. This is apparent from a review of s. 58(3) and s. 18 of the *Act*.

Section 58(3) of the *Act* provides as follows:

Any vacation pay an employee is entitled to when the employment terminates must be paid to the employee at the time set by section 18 for paying wages.

Section 18 of the *Act* provides that:

18(1) An employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment.

An employer may pay vacation pay at least 7 days before the beginning of the employee's annual vacation, or, with the agreement of the employee (or by collective agreement), on the employee's scheduled pay date. For many employers, including this employer, the amount of the vacation pay is a liability which accrues and changes throughout the year.

When the receiver terminated the employees, the employees became entitled to payment of the vacation pay, within 48 hours of the date of termination. This amount can be considered to be wages falling within the definition of two months wages, and therefore the responsibility of the directors of the company, pursuant to s. 96 of the *Act*.

The submission of Mr. Mott, did not refer to any of the case law which has been developed by the Tribunal. The Tribunal decided in *Creative Screen Arts Ltd, BCEST #D024/98 (Collingwood)* that vacation pay was included within the definition of wages.

The argument raised by the appellant has been considered, in detail, previously by the Tribunal in *John Andrew, Director or Officer of Xinex Networks Inc., in Receivership, BCEST #D068/99 (Stevenson)*:

¶¶18 The definition of "wages" under the Act is inclusive. Vacation pay falls within the definition, as it is "money, paid or payable by an employer to an employee for work". I agree with the submission of the Director that all the employees of Xinex were terminated by operation of law on June 5, 1998, the date Xinex was placed in receivership. Any vacation pay owed at the time of termination became payable to the employees within 6 days of termination by application of Section 58(3) of the Act, which says:

58(3) Any vacation pay an employee is entitled to when the employment terminates must be paid to the employee at the time set by section 18 for paying wages.

¶¶19 Unpaid vacation pay falls quite comfortably within the concept of what would be "unpaid wages" under subsection 96(1) of the Act. Section 80 of the Act allows recovery of wages that became payable in the period beginning 24 months before the termination of employment.

For all the above reasons, I am not satisfied that Mr. Mott has shown any error in the Determination.

Suspension of the Effect of the Determination:

Mr. Mott asks that I suspend the operation of the Determination until the sale of the corporate assets, on the basis that there is ample security in lands owned by the company, and collection would pose a hardship to him based on his personal circumstances.

The suspension jurisdiction of the Tribunal, can be found in s. 113 of the *Act* which reads as follows:

- 113 (1) A person who appeals a determination may request the tribunal to suspend the effect of the determination.
- (2) The tribunal may suspend the determination for the period and subject to the conditions it thinks appropriate, but only if the person who requests the suspension deposits with the director either
- (a) the total amount, if any, required to be paid under the determination, or
- (b) a smaller amount that the tribunal considers adequate in the circumstances of the appeal

Section 115, however, sets out the relief that the Tribunal may grant. That jurisdiction is limited to confirming, varying or cancelling the determination, or referring the matter back to the director.

Under s. 91 of the *Act*, the Director is given the power to file a Determination or a Decision of the Tribunal and enforce the Determination or Decision as a judgement of the Supreme Court:

- 91 (1) The director may at any time file a determination or an order of the tribunal in a Supreme Court registry.
- (2) unless varied, cancelled or suspended under section 86, 113, 115, 116, or 119 a filed determination is enforceable in the same manner as a judgment of the Supreme Court in favour of the director for the recovery of a debt in the amount stated in the determination.
- (3) Unless varied or cancelled by the tribunal under section 116, a filed order of the tribunal is enforceable in the same manner as a judgement of the Supreme Court in favour of the director for the recovery of a debt in the amount stated in the order.
- (4) If a determination or order filed under this section is varied, cancelled or suspended, the director must promptly withdraw the determination or order from filing in the Supreme Court.

While the Tribunal has a power to suspend a Determination, it is a power which is given to the Tribunal to preserve a status quo, following the filing of an appeal from a Determination, or a reconsideration application, while there is an appeal in process. I have determined that the Delegate did not err in the Determination.

The Tribunal does not have any general supervision authority over the Director with respect to the exercise of her statutory powers of enforcement, other than to issue a suspension order pending appeal: *Cunliffe*, BCEST #D432/00 (*Thornicroft*). It is clear that the Tribunal has jurisdiction to suspend the effect of a Determination pending a reconsideration application: *New Westminster (City)*, BCEST #D118/99 (*Love, Edelman, Thornicroft*). In *New Pacific Limousine Service Inc.*, BCEST #D345/96 (*Edelman*), the Tribunal held that there was no jurisdiction, following the confirmation of a determination, to suspend enforcement of the determination by making an order that funds be held in trust, pending a small claims action between the parties, arising out of the employment relationship.

In my view, once the Tribunal makes an order confirming a Determination, the decision with regard to enforcement of a Determination or Decision lies with the Director. The Director has chosen thus far not to engage in any collection action to enforce the Determination until the Decision was rendered in this matter. If the appellant chooses to apply for reconsideration of my decision, he can apply to the Tribunal for a suspension order. It is of course open to the appellant to negotiate a “stay” with the Director.

ORDER

Pursuant to s. 115 of the *Act* I order that the Determination dated December 1, 2000, is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal