

An appeal

- by -

Robert Prasloski, a Director or Officer of Burgess Agri Supplies Ltd.
(“Prasloski”)

- 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: John M. Orr

FILE No.: 2002/271

DATE OF DECISION: July 18, 2002

DECISION

OVERVIEW

This decision relates to an appeal filed by Robert Prasloski (“Prasloski”) pursuant to section 112 of the *Employment Standards Act* (“the *Act*”) from a determination dated April 23, 2002 against him personally as a director of Burgess Agri Supplies Ltd. (Burgess”) by the Director of Employment Standards (“the Director”).

On January 22, 2001 Burgess discontinued business without paying certain employees their last week’s wages, their accrued vacation pay, or their compensation for length of service. Prasloski was a director of Burgess at the time the wages were earned and therefore the Director issued the determination against him personally in accordance with the provisions of section 96 of the *Act*.

Prasloski has appealed the determination on the grounds that the assets of Burgess were sold prior to Burgess going into bankruptcy. He submits that, if the assets were sold, the liability for wages goes with the assets. He asserts that if the sale is still being investigated then the determination should be cancelled pending the outcome of the investigation.

ANALYSIS

In his appeal Prasloski submits a letter from a trustee in bankruptcy confirming that a Notice of Intention to Make a Proposal was filed with the Office of the Superintendent of Bankruptcy on January 17 2002. The letter goes on to state that the company must file a statement of projected cash flow no later than January 28 and that the proposal must be filed no later than February 18. The letter continues, "If you fail to meet either of these deadlines the company will be deemed to be bankrupt".

There is no information in the filed material as to whether the proposal to the creditors was accepted or whether Burgess became bankrupt. However, the status of Burgess subsequent to the last day of employment is not relevant except as to liability for compensation for length of service under section 63 of the *Act*. The determination did not include any such payments.

With respect to the determination against Prasloski as a director or officer of Burgess, 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 a corporation were earned or should have been paid is personally liable for up to two months unpaid wages for each employee.
- (2) Despite section (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 an 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,

While subsection (2) of section 96 provides that a director or officer is not personally liable for some specified payments if the corporation is in receivership those exceptions have no application to the amounts claimed in the determination and wages generally are not exempted by subsection (2). A director is exempted from liability for amounts owing under section 63 -- compensation for length service -- or other sums of money related to termination of employment if the corporation is in receivership but there is no such exemption for wages earned and owing despite the receivership.

Prasloski does not dispute that he was a director or officer of the corporation at the time that the wages in question were earned. He does not dispute the quantum of the wages claimed or that they are justly owing to the employees. The Director has only calculated those actual wages and vacation pay owing to the employees and has not included severance pay under section 63. There is no doubt that section 96(1) applies in this case to make Prasloski liable for those unpaid wages.

The only substantial issue raised in the appeal is that the assets of the business were sold. Although it is not stated in the appeal it appears that Prasloski is relying on the provisions of section 97 of the *Act*, which provides that:

97. If all or part of a business or a substantial part of the entire assets of a business is disposed of, the employment of an employee of the business is deemed, for the purposes of this act, to be continuous and uninterrupted by the disposition.

In my opinion this provision does not exempt the directors from personal liability for wages earned before the sale of the assets. In this case, Prasloski says that the assets were sold on February 15, 2002. On these facts alone the sale did not complete until after the wages were earned and payable to the employees. It is the obligation of the directors to ensure that wages are paid or face the risk that they may be held personally responsible for those unpaid wages.

I must conclude that, despite the involvement of a trustee in bankruptcy, the proposal to creditors or even a subsequent bankruptcy, Prasloski remains personally liable for payment of the employee wages that were earned prior to any sale of the business. I do not mean to decide, in this decision, that the earlier sale of the assets would have had any significant impact upon the directors' liability. It simply is not relevant in this case as the sale occurred some weeks after the wages were earned and payable.

ORDER

Pursuant to section 115 of the *Act* I order that the determination dated April 23, 2002 is confirmed.

John Orr
Adjudicator
Employment Standards Tribunal