

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-

Mark Graham Annable

(“Annable”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 98/285

DATE OF HEARING: July 20th, 1998

DATE OF DECISION: August 11, 1998

DECISION

APPEARANCES

Mark G. Annable on his own behalf

No appearance on behalf of Dix Developments Ltd.

No appearance on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal brought by Mark G. Annable (“Annable”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by the Director of Employment Standards (the “Director”) on April 27th, 1998 under file number 053549 (the “Determination”).

The Director’s delegate dismissed Annable’s claim for unpaid wages allegedly owed to him by his former employer, Dix Developments Ltd. (“Dix”). Dix’s sole officer and director, Kerry Dix, was found dead of an apparent drug overdose on October 29th, 1997 amid allegations of financial malfeasance on his part. Although I understand that Dix Developments Ltd. remains a registered B.C. Company, it is now moribund, apparently insolvent, and thus any monetary judgment that might be issued in Annable’s favour could prove to be worthless. Nevertheless, Annable is of the view that there may be some traceable assets and that his complaint ought not to have been dismissed by the Director’s delegate.

This appeal was heard at the Tribunal’s offices in Vancouver on July 20th, 1998. Despite being notified of the appeal hearing, neither the Director nor the employer chose to attend the hearing although the Director’s delegate did submit a brief (1-page) written submission.

In his original complaint, Annable sought the following amounts:

| Particulars | Amount Claimed (\$Cdn.) |
|--------------------------------------|-------------------------|
| Regular Wages July 16-17, 1997 | 480.00 |
| Compensation for length of service | 2,500.00 |
| Maui Court “bonus” | 20,000.00 |
| River Colony “bonus” | 30,000.00 |
| Christmas 1995 “bonus” | 2,500.00 |
| River Front “bonus” | 13,138.00 |
| Bay Villas “bonus” | 3,722.00 |
| Legal Expenses | 500.00 |
| Maui Court “bonus” interest (at 10%) | 570.00 |

| | |
|--|--------------------|
| River Colony “bonus” interest (at 10%) | <u>658.00</u> |
| TOTAL CLAIM | <u>\$74,068.00</u> |

At the outset of the appeal hearing, Annable advised me that he has was paid his compensation for length of service and that he was abandoning all other claims except for the Maui Court, River Colony, River Front and Bay Villas “bonus” claims--accordingly, Annable’s claim before me was reduced to \$66,860. Although the majority of these claims were characterized by the Director’s delegate as “director’s fees”, the evidence before me clearly shows that these claims are more properly characterized as claims for unpaid wages.

ISSUES TO BE DECIDED

Annable’s complaint was dismissed by the Director’s delegate for several reasons including:

- some of his claims fell outside the definition of “wages” contained in section 1 of the *Act*;
- Annable was a director or officer of Dix and therefore could not advance an unpaid wage claim under the *Act*; and
- Annable was not entitled to file a claim under the *Act* by reason of section 31(m) of the *Employment Standards Regulation* (the licensed real estate agent exclusion).

Annable submits that the delegate erred in reaching each of the above conclusions. It should be noted that the delegate dismissed some of his monetary claims for other reasons, but given that these other claims have now been abandoned (or paid, in the case of the section 63 claim), I have not set out the delegate’s reasons for dismissing those claims.

FACTS AND ANALYSIS

According to the uncontradicted evidence before me, Annable’s employment with Dix commenced in October 1995 and ended in mid-July 1997 when he was escorted from Dix’s office premises. Dix’s main business activity--or at least the activity with which Annable was involved--was the so-called “securitizing” of real estate. In essence, the company purchased multiple-unit residential complexes in the United States and then transferred title to the property into a limited partnership. Dix, or an affiliated company, acted as the general partner and limited partnership units were in turn sold to investors. For the most part, the limited partnership units were sold in British Columbia, Alberta and the Northwest Territories. The limited partnership units constituted “securities” for purposes of the three jurisdictions’ securities legislation.

Annable’s initial involvement with the Dix group of companies was in relation to a 217-suite complex known as the “Maui Court”, situated in Hawaii. Annable was hired, at an annual base salary of \$40,000 plus bonuses, to assist the limited partnership purchasers (or “investors” as they were styled) in obtaining mortgage financing for their purchase--the Maui Court project was sold

for some \$28 million (U.S.); individual units were sold for approximately \$66,000 (U.S.). Individual investors were registered on title by way of a trust agreement. In the province of British Columbia, the offering was made with specific regulatory exemptions from certain provisions of the *Securities Act* and the *Real Estate Act*. The units were sold through independent third-party brokers--Annable was not involved in the marketing of the units; his role only began once a sale was consummated and the investor wished to obtain financing. In effect, he was the "go-between" among the investor, his or her sales agent, the mortgage financing companies and Dix itself.

Annable testified before me that pursuant to his employment agreement with Dix, he was entitled to a \$20,000 bonus once all of the Maui Court units had been sold--this arrangement is confirmed by a letter dated March 13th, 1997 under the signature of Kerry Dix, president of "The Dix Group". The Maui Court project was fully subscribed by the end of March 1996 and thus, at that time, Annable was entitled to be paid a \$20,000 bonus.

It is clear that this \$20,000 "bonus payment" falls within the statutory definition of "wages" contained in section 1 of the *Act* inasmuch as the payment represented a "commission or money payable for work". The Director's delegate held that the payment did not meet the statutory definition of "wages"--I must confess a complete inability to fathom how or why the delegate reached such a conclusion. Payment of the bonus was *contractual obligation* on the part of Dix, not a matter of discretion and the bonus was clearly based on Dix's performance--had he been unsuccessful in arranging for mortgage financing, the project would not have been fully subscribed (the units were usually purchased subject to a condition precedent regarding financing) in which case the bonus would not have been payable.

The delegate also concluded that Annable was unable to claim the bonus by reason of section 31(m) of the *Employment Standards Regulation*. At all material times, Annable, through a company known as Annable Realty Ltd, was a licensed agent under the *Real Estate Act*; Annable held this license prior to joining Dix and maintained his status as a licensee throughout his employment by Dix. However, the regulatory exclusion only applies "so long as that person is carrying on the occupation governed by the [Real Estate Act]". The delegate appears to have proceeded on the fundamentally false assumption that one's mere status as a licensee is sufficient to exclude the individual from the operation of the *Act*. However, that is not the effect of the regulatory exclusion--the determination does not set out *any* facts which suggest that Annable was "carrying on the occupation" of a real estate agent while employed by Dix. The evidence before me is that he was *not* acting as a real estate agent while employed by Dix--indeed, he was not in any way involved in the sale of limited partnership units, that role was fulfilled by brokers licensed under the various provincial and territorial securities legislation. Dix, in fact, was not selling real estate; it was involved in the marketing of securities governed by an entirely separate enactment. Further, as noted above, these transactions were subject to a regulatory exclusion insofar as the *Real Estate Act* was concerned.

By reason of essentially the same analysis, I am of the view that Annable was also entitled to the \$30,000 bonus--this claim was incorrectly identified in the Determination as a claim for "director's fees"--(also confirmed by the March 13th Dix letter) relating to the San Diego "River

Colony” project. This bonus was payable on July 11th, 1997 when the sale of the last of the 360 units completed.

It was the employer’s failure to pay this latter bonus (as well as the employer’s continuing failure to pay the Maui Court bonus) that precipitated Annable’s constructive dismissal. On or about July 15th, 1997, when he observed that his paycheque failed to include either bonus, Annable contacted Kerry Dix and said that if he wasn’t going to be paid, he would have to stop working. Kerry Dix told Annable to “be patient” and that his bonuses would be paid shortly. On or about July 16th, when Annable reported for work, he was told to leave the premises and was purportedly put on “stress leave”. The employer never issued a Record of Employment and now apparently acknowledges that Annable was wrongfully dismissed inasmuch as it paid him his termination pay due under section 63 of the *Act*.

The delegate identified the bonuses payable on the “River Front” and “Bay Villas” projects as “director’s fees”--they were not. As again confirmed by the March 13th, 1997 letter, the River Front payment (\$30,000) was a bonus to be paid on the same terms and conditions as the earlier bonuses. The Bay Villas bonus is not referred to in the March 13th letter but I accept Annable’s uncontested evidence that this project was also subject to a \$30,000 completion bonus. The limited partnership units for both of these San Diego projects were not fully subscribed prior to Annable’s constructive dismissal in mid-July 1997. However, it seems to me that an employer cannot frustrate an employee’s entitlement to a bonus simply by the ruse of wrongfully terminating (or constructively terminating) the employee prior to the date when the bonus would otherwise be payable.

Annable advanced a proportionate claim based on the number of units sold at the time of his termination--I believe this to be an entirely reasonable approach and it is consistent with the approach taken by the Ontario Court of Appeal in *Postma v. Borg-Warner Acceptance Corp. Ltd.* (1982), 14 A.C.W.S. (2d) 415. Thus, based on the number of units sold by mid-July 1997, Annable was entitled to \$13,138 on account of the “River Front” project and \$3,722 on account of the “Bay Villas” project.

The final matter that needs to be addressed is whether or not Annable’s claim for unpaid wages is foreclosed by reason of his former status as a director or officer of a few companies (of the more than 70) that formed part of the “Dix Group”. Annable does not contest the delegate’s factual finding set out below:

“Annable provided a copy of his resume (attached) which describes his role in the Dix Group of Companies in 1997 as Vice President Operations and Finance. Annable also acted as a Director and Officer for three syndications: Dix (River Colony Estates) Capital Ltd.; Dix (River Front Court) Capital Ltd.; and Dix (Bay Villas) Capital Ltd.”

However, Annable does challenge the delegate’s legal conclusion that because he was a director or officer of some companies within the “Dix Group of Companies” he is thereby disentitled to file a claim for unpaid wages. The Determination states, at page 4, “As a director or officer of a

company, Annable is effectively liable for his own wages". From this statement, the delegate then concludes that Annable cannot claim unpaid wages under the *Act*.

I do not find any merit whatsoever in the position advanced on behalf of the Director in this case and, it should be noted, other cases. There is *nothing* in the *Act* that purports to exclude directors or officers from claiming unpaid wages. While it is true that directors or officers can be held liable for up to 2 months' unpaid wages for those employees who were not paid by the corporation, this provision does not act as a bar to any claim that might be advanced by a director or officer so long as that individual meets the statutory definition of "employee" (as Annable clearly does) and the claim is for "wages" as defined in the *Act* (as is the case here with respect to the claims now before me). Directors or officers are not listed among the various categories of individuals who are excluded from the provisions of the *Act* in sections 31 and 32 of the *Employment Standards Regulation*.

It may well be that in an appropriate case (and this is not that case), an officer or director will have his or her unpaid wages attached under section 89 in order to satisfy that individual's liability under a section 96 determination. However, there is a distinction to be drawn between wage *entitlement* and *enforcement*. Thus, an officer or director is not, by reason of that status alone, disentitled from claiming wages, provided that individual is an employee, and further provided that the claim is properly characterized as a claim for wages. However, those wages may, in turn, be attached by the Director in order to satisfy other employees' wage claims that have been crystallized into a section 96 determination. I would certainly reject the proposition, implicit in the instant Determination, that an employee, who may also have been a director or an officer of the employer--or some associated firm--cannot file a complaint under the *Act* for unpaid wages, particularly when that person has never been named in a section 96 determination.

It should be recalled that section 2 states that the purposes of the *Act* include the promotion of fair treatment of employees and the establishment of fair and efficient dispute resolution procedures. If the Director's position espoused in this case was upheld, employees who are also directors or officers of their employer (or of an associated firm) would be forced to file their wage claims in the courts and thus would be denied access to the inexpensive and comparatively expeditious wage recovery provisions contained in the *Act*. I, for one, do not believe that there is much to commend in such a policy; even less, when that policy is enunciated despite the complete absence of any legislative authority to do so.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be varied and that a new Amended Determination be issued as against Dix Developments Ltd. in the amount of **\$66,860** together with interest to be calculated by the Director in accordance with section 88 of the *Act*.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal