

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-

George E. Austin

(“Austin”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 98/340

DATE OF DECISION: August 11, 1998

DECISION

OVERVIEW

This is an appeal brought by George E. Austin (“Austin”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by the Director of Employment Standards (the “Director”) on May 8th, 1998 (the “Determination”).

FACTS

The Director dismissed Austin’s complaint for unpaid wages allegedly owed to him by Protective Strategems Incorporated. Austin’s complaint was dismissed solely because “A person who is a director or officer of a company is not an employee within the meaning of the Employment Standards Act”.

ANALYSIS

I have recently issued a decision on this very point, *Annable* (B.C.E.S.T. Decision No. D342/98), in which I specifically rejected the very position espoused by the Director’s delegate in this case. The relevant portions of that decision are reproduced below:

“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 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.

I do not wish to be taken as making any finding as to whether or not Austin was an "employee" as defined in section 1 of the *Act*--I am merely holding that the delegate erred in finding that Austin was *not* an employee solely because he was also an officer or director of Protective Strategems Incorporated. It may well be the case that Austin does not meet the statutory definition of "employee" (say, because he was, in law, a partner--see *e.g. Caba Mexican Restaurants Ltd.*, B.C.E.S.T. Decision No. 370/96), or that his claim ought to be dismissed because it is not one for "wages"; these are questions that I am referring back to the delegate for further investigation, and, if appropriate, determination.

ORDER

Pursuant to section 115 of the *Act*, I order that Austin's complaint be referred back to the Director for further investigation in accordance with the reasons set out herein.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal