

**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-

Richard W. Warke

(“Warke”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 97/358

**DATE OF DECISION:** September 2, 1997

## DECISION

### OVERVIEW

This is an appeal brought by Richard W. Warke (“Warke”) 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 14th, 1997 under file number 031252 (the “Determination”).

The Director determined that Warke was liable, pursuant to section 96 of the *Act*, as an officer and director of West Coast Plywood Company Ltd. (“West Coast Plywood”), for the sum of \$94,746.46 being the amount of unpaid wages owed to approximately 340 former employees of West Coast Plywood.

### FACTS

A Determination with respect to the same wage claims now before me was issued against West Coast Plywood on July 15th, 1996. West Coast Plywood did not appeal that Determination. In fact, I understand that West Coast Plywood made an assignment, or was petitioned (the material before me is unclear on this point), into bankruptcy on or about July 27th, 1995.

According to West Coast Plywood’s corporate records, Warke was first elected as a director of West Coast Plywood on June 4th, 1993; Warke resigned his directorship on July 27th, 1995. Warke also held the offices of “President” from October 30th, 1993 to August 1st, 1994 and “Secretary” from August 1st, 1994 to July 27th, 1995.

In response to various complaints received in early to mid-September 1995, the Director issued a Determination against, *inter alia*, Warke based on West Coast Plywoods’ failure to pay the complainant employees’ accrued vacation pay and other wages. I should note that the total claim set out in the Determination also includes amounts reflecting medical insurance premiums, health and welfare benefits and union dues that were deducted from the employees’ wages but not, in turn, remitted to their union or to the insurer contrary to what are now sections 22, 23 and 26 of the *Act*.

There does not appear to be any issue with respect to the two-month “liability ceiling” set out in section 96(1) of the *Act* in that each individual employee’s wage claim is for less than two month’s wages. The Director calculated the employees’ total wage claim based on West Coast Plywood’s own payroll records. Thus, in accordance with the principles set out in previous Tribunal decisions such as *Steinemann* [1996] B.C.E.S.T.D. 320.75.30-03 and *Perfekto Mondo Bistro* [1996] B.C.E.S.T.D. 320.03.20-09 it would appear that the Determination was properly issued as against Warke.

**ISSUES TO BE DECIDED**

However, Warke's solicitors, in a submission to the Tribunal dated June 23rd, 1997, raise two points:

1. Warke's liability should be determined under the current, rather than the former (S.B.C. 1980, c. 10), *Employment Standards Act*; and
2. By reason of the combined effects of sections 96(2)(b), 58(3) and 18 of the *Act*, Warke is not liable for any vacation pay owing to the former employees of West Coast Plywood.

The present appeal is based on essentially the same facts, and raises the identical legal issues, as were discussed in my decision in *Clark* (EST #D360/97) issued contemporaneously with the decision in the instant case.

**ANALYSIS**

For the reasons set out in the *Clark* appeal, I am of the view that the Determination ought to be confirmed as against Warke. Briefly, I am satisfied that when Warke resigned as an officer/director of West Coast Plywood, the complainant employees' unpaid vacation pay was then due and payable. Thus, the statutory defence set out in section 96(2)(b) of the *Act* does not apply.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination issued against Warke, dated April 14th, 1997 and filed under File No. 031252, be confirmed in the amount of \$94,746.46 together with whatever further interest that may have accrued, in accordance with section 88 of the *Act*, since the date of issuance.

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**Kenneth Wm. Thornicroft, *Adjudicator***  
**Employment Standards Tribunal**