

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-

Donald B. Clark

(“Clark”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 97/357

DATE OF DECISION: September 2, 1997

DECISION

OVERVIEW

This is an appeal brought by Donald B. Clark (“Clark”) 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 Clark 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, Clark was first elected as a director of West Coast Plywood on August 1st, 1994. Clark resigned his directorship on July 27th, 1995. Clark also held the office of “Chief Executive Officer” and “Chairman” during the same period, 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*, Clark 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 Clark.

ISSUES TO BE DECIDED

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

1. Clark'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*, Clark is not liable for any vacation pay owing to the former employees of West Coast Plywood.

I propose to deal with each of these two issues in turn.

ANALYSIS

Does the "new" Act govern the employees' complaints?

Although the Determination contains references to both the former (S.B.C. 1980, c. 10), as well as the current *Act*, I am satisfied that the Director correctly proceeded under the provisions of the current *Act*, which is the governing legislation [see s. 128(3)].

Is Clark liable for unpaid vacation pay?

Clark's solicitors submit that because Clark resigned as an officer or director of West Coast Plywood on July 27th, 1995, the same day that the employees' were terminated, he is not liable for any unpaid vacation pay because, by reason of the combined effects of section 58(3) and 18, the unpaid vacation pay liability, if any, did not crystallize until July 29th, 1995. Thus, by reason of section 96(2)(b) of the *Act*, Clark should not be liable for any unpaid vacation pay because it became "payable" after he ceased to hold office as either a director or officer. It should be noted that this argument can only be raised in relation to Clark's liability for unpaid vacation pay; the other unpaid wage claims set out in the Determination are unaffected by the section 96(2)(b) defence.

In my view, the foregoing argument proceeds on a false premise, namely, the actual date of the employees' termination of employment. Clark says that the employees were terminated on July 27th, 1995, that being the date that West Coast Plywood went bankrupt. However, the undisputed fact is that the employees were laid off by West Coast on February 17th, 1995. It is not clear on the material before me whether or not the employees were "permanently" laid off at that time, or whether there was merely a "temporary layoff" of the employees in question.

If the layoffs of February 17th, 1995 were "permanent" layoffs then, clearly, the liability for unpaid vacation pay under section 18(1) arose well prior to Clark's resignation.

If the layoffs were "temporary" in nature, they nonetheless at some point became "permanent", inasmuch as none of the employees was ever recalled within a thirteen-week period. In the latter instance, section 63(5) of the *Act* governs and the employees were thus deemed to have been laid

off as at February 17th, 1995 [“...an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff]. In the case of a “temporary layoff” that became “permanent”, the employees’ termination date, and the crystallization of the employees’ right to be paid accrued vacation pay, both pre-dated Clark’s resignation and, again, section 96(2)(b) is of no assistance to Clark.

There is one further complication, however. I understand that a number of the employees (in fact, a majority) who were laid off on February 17th, 1995 were members of a trade union, I.W.A., Local 217. These employees apparently reserved their rights of recall under their collective bargaining agreement rather than opting for immediate termination without any recall rights (in which case they would have been entitled to severance pay etc. forthwith). For these employees, section 70 of the *Act* governs, and more particularly, section 70(3):

70. (3) If the employee chooses to maintain the right of recall or does not after 13 weeks of layoff make a choice, the employer must pay the amount referred to in subsection (1)(a) to the director, in trust, within 48 hours after

(a) the choice is made under subsection (1), or

(b) the end of the 13 weeks.

The “amount referred to in subsection (1)(a)” includes any severance pay that may be owed pursuant to the provisions of the collective bargaining agreement, and by reason of section 18 of the *Act* [which is deemed to be incorporated into all collective bargaining agreements, *cf.* sections 4 and 61(2) of the *Act*], any other unpaid wages, including vacation pay.

Accordingly, West Coast Plywood’s bargaining unit employees who opted to retain recall rights were entitled to have all their accrued vacation pay paid to them not later than 13 weeks and 2 days after their initial layoff date, February 17th, 1995. Thus, even for this latter group of employees, the accrued vacation pay became payable well prior to the date of Clark’s resignation as a director/officer of West Coast Plywood (N.B. Clark did not resign until nearly 23 weeks after the initial layoff date).

To summarize, I am satisfied that when Clark resigned as an officer/director of West Coast Plywood, the complainant employees’ vacation pay was already due and payable. Therefore, the statutory defence set out in section 96(2)(b) of the *Act* has no application in the instant case.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination issued against Clark, 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.