

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-

William E. Aziz

(“Aziz”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 97/447

DATE OF DECISION: September 5, 1997

DECISION

OVERVIEW

This is an appeal brought by William E. Aziz (“Aziz”) 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 14th, 1997 under file number 023483 (the “Determination”). The Director determined that Aziz was liable, pursuant to section 96 of the *Act*, as an officer of Agnew Group Inc./Groupe Agnew Inc. (“Agnew”) for unpaid vacation pay (see section 58) owing to former employees of Agnew and interest (see section 88 of the *Act*). Including interest, Aziz’s total liability under the Determination is \$39,873.76.

ISSUES TO BE DECIDED

Aziz’s solicitors, in a letter addressed to the Tribunal dated June 6th, 1997 and appended to Aziz’s appeal form, advance two grounds for appealing the Determination:

1. the legal principle known as *res judicata*; and
2. errors in calculating the various employees’ entitlements to vacation pay.

Aziz also sought, pursuant to section 113 of the *Act*, a suspension of the Determination pending the appeal. However, in light of the Director’s undertaking not to “proceed with collection activities against Mr. Aziz prior to the adjudication of the issues raised on appeal to the Tribunal” (Director’s solicitor’s submission to the Tribunal dated July 14th, 1997), the appellant was advised that the Tribunal did not intend to rule on the suspension request.

FACTS

According to the facts recited in the Determination, Agnew--a federally incorporated company that first registered in B.C. on June 30th, 1987--made an assignment into bankruptcy and was adjudged to be bankrupt, pursuant to the federal *Bankruptcy and Insolvency Act*, on January 12th, 1996. The firm of Price Waterhouse Limited was appointed as Agnew’s Trustee in Bankruptcy; the firm of Coopers & Lybrand Limited was appointed as Agnew’s Receiver-Manager.

Agnew operated various retail outlets across Canada; its head office was in Brantford, Ontario and the head office for the province of B.C. was located in Vancouver. According to payroll records provided by Coopers and Lybrand Limited, a total of \$141,325.27 was owed to approximately 180 former Agnew employees of the firm’s B.C. operations on account of unpaid vacation pay and compensation for length of service (see section 63 of the *Act*). A determination,

in this latter amount, was issued against Agnew on July 25th, 1996 (Determination No. CDET 003434)--I shall refer to this as the "Corporate Determination".

According to records held in the B.C. Corporate Registry, maintained by the Ministry of Finance and Corporate Relations, as of January 11th, 1996 (*i.e.*, the day before Agnew was adjudged bankrupt) Aziz was listed as as a director and officer ("President" and "Chief Executive Officer") of Agnew. Indeed, on January 12th, 1996 Aziz, as President and Chief Executive Officer of Agnew, executed an "Assignment for General Benefit of Creditors" under section 49 of the *Bankruptcy and Insolvency Act* on behalf of Agnew.

On July 25th, 1996 (*i.e.*, the same day as the Corporate Determination was issued) a determination was issued against Aziz as a "Director/Officer of Agnew Group Inc." in the amount of \$36,851.90 (determination number DDET 000356)--I shall refer to this determination as the "First Aziz Determination". The Reason Schedule appended to the First Aziz Determination clearly indicates that the monetary claim against Aziz was identical to the claim that is now before me in the present Determination, namely, a claim for unpaid vacation pay by Agnew's former B.C. employees.

On August 16th, 1996 Aziz appealed the First Aziz Determination, arguing, *inter alia*, that Aziz "ceased to be a director or officer of Agnew on January 12th, 1996" (see Aziz's solicitors' letter to the Tribunal dated August 16th, 1996) and thus, by reason of section 96(2)(b) of the *Act*, was not liable for any vacation pay because such vacation pay did not become "payable" until after Aziz had resigned both his Agnew directorship and offices. On September 18th, 1996 the Director's delegate who had issued the Corporate Determination as well as the First Agnew Determination wrote to the Tribunal Registrar stating, in part:

"Mr. Aziz contends he was not a director of Agnew when these employees' vacation pay became payable, and thus claims he is not liable for these amounts. I have asked Mr. Aziz's lawyers for proof of when he resigned as a director. If this information indicates he resigned before the bankruptcy, and if it can be shown the Mr. Aziz was not involved in the running of the company past the date of his resignation, the [Employment Standards] Branch may consider cancelling the determination."

On September 24th, 1996 Aziz's solicitors wrote to the Director's delegate enclosing, *inter alia*, the following documents:

- Aziz's director's resignation dated November 22nd, 1995; and
- Notice of Change of Directors filed January 5th, 1996 pursuant to the provisions of the *Canada Business Corporations Act*.

By letter dated November 8th, 1996, the Regional Manager, Vancouver Island Region, Employment Standards Branch, advised Aziz's solicitors that "effective immediately, Determination #000356 [*i.e.*, the First Aziz Determination] is hereby cancelled" and that "no further action relating to this Determination will be taken by the Branch". By letter dated

November 13th, 1996 the Tribunal Registrar advised Aziz that in light of the cancellation of the determination “we are not proceeding with your appeal and we are closing the file”.

Of course, on May 14th, 1997 a new determination was issued against Aziz and, subsequently, the appeal now before me was filed.

ANALYSIS

Aziz raises two issues on appeal; I propose to deal with these two issues in turn.

Res Judicata

This legal principle is grounded in the notion that all legal disputes should have a final endpoint. Accordingly, if a final order has been made with respect to a particular dispute, that order stands as a bar to an essentially identical claim that may be subsequently filed. *Black’s Law Dictionary*, 5th ed., defines the principle as follows:

“...a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.”

This Tribunal has repeatedly applied the doctrine in circumstances where a director has sought to “re-open” a final corporate determination in an appeal of a related determination issued against the director in his or her personal capacity pursuant to section 96 of the *Act*, cf. e.g., *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.

The circumstances of the present appeal, however, are somewhat different. Here, there is an earlier determination, an apparently informed decision by the Director to cancel the determination (see section 86 of the *Act*) and then, some six months later, the issuance of a new determination with respect to the very same unpaid wage claims. Aziz submits that in these circumstances all three necessary elements of the doctrine of *res judicata* exist--a *previous final decision* involving the *same issues* and the *same parties*.

In reply to this submission, legal counsel for the Director advances two principal points:

- the First Aziz Determination was not a “final order” against Aziz in his capacity as an *officer* of Agnew; rather, it was only a final order insofar as his status as a *director* was concerned.
- the Director’s decision to cancel the First Aziz Determination, predicated as it was on misleading information and material nondisclosures by Aziz, is not a proper foundation for the application of the principle of *res judicata*.

In my view, the First Aziz Determination was clearly issued against Aziz in his dual capacity as an officer and director of Agnew. I note that this latter determination refers to Aziz as a “Director/Officer of Agnew Group Inc.”. In the Reason Schedule appended to the First Aziz Determination Aziz is referred to on at least two occasions as an “officer or director” of Agnew.

With respect to the Director’s counsel’s second point, I note that Aziz’s solicitors’ letter of August 16th, 1996 set out two grounds for appealing the First Aziz Determination:

- i) Aziz was neither an officer or director of Agnew when the monies due under that Determination became payable; and
- ii) the calculation of the former Agnew employees’ vacation pay entitlement was erroneous.

At page two of the August 16th letter, Aziz’s solicitors state:

“The Respondent [*i.e.* Aziz; N.B. that Aziz was in fact the *appellant* not the respondent] submits that his liability for vacation pay should be eliminated as a result of his ceasing to be a *director or officer of Agnew* prior to the date upon which the employment of Agnew’s employees was terminated. The Respondent ceased to be a *director or officer of Agnew* on or about November 18, 1995...

Section 96(2)(b) of the Act provides that a person who was a *director or officer* of a corporation is not personally liable for vacation pay that becomes payable after the *director or officer* ceases to hold office...

In our submission, the Respondent was no longer a *director or officer* of Agnew at the time that triggering event occurred. He no longer held office at the time that the vacation pay became payable for the purposes of section 58(3).”

(*my italics; underlining* in original)

Based on the foregoing excerpt, I am satisfied that Aziz’s appeal of the First Determination was predicated, in part, on a submission that Aziz was not an officer or a director when the employees’ vacation pay claims crystallized. As subsequent events clearly show, Aziz continued to act as an officer of Agnew well after he apparently resigned as a director (I note that this resignation does not appear to have been filed with the B.C. Registrar of Companies); indeed, Aziz continued to act as an officer at least until the filing for bankruptcy on January 12th, 1996 (recall that it was Aziz, as President and C.E.O. of Agnew, who executed the “Assignment” under section 49 of the *Bankruptcy and Insolvency Act*).

Although the body of Aziz’s solicitors’ letter to the Director dated September 24th, 1996 only refers to Aziz’s resignation as a “director” of Agnew, I am of the view that this representation ought to be read in light of the earlier August 16th appeal submission to the Tribunal in which it

was asserted, as noted above, that Aziz had resigned both his directorship and his office prior to January 12th, 1996. I might also note that the “reference” portion of the September 24th letter refers to Aziz as a “Director/Officer of Agnew Group Inc.”.

I am of the opinion that the Director’s decision to cancel the First Aziz Determination was induced, in large measure, by a false representation by Aziz’s solicitors to the effect that he had ceased to be both an officer and a director of Agnew prior to January 12th, 1996 (when the former employees’ vacation pay claims crystallized).

It has been a long-standing rule that *res judicata* ought not to be applied when there has been fraud or material misrepresentation with respect to the original decision that is alleged to constitute the bar to further action [*cf. e.g., Johnston v. Barkley* (1905) 10 O.L.R. 724 (O.C.A.)].

In light of the foregoing, I cannot accede to Aziz’s submission that the Determination should be cancelled because any claim for unpaid vacation pay that might otherwise be advanced against him under section 96 of the *Act* is now *res judicata*.

Calculation of the Former Agnew Employees’ Vacation Pay Entitlements

Aziz seeks to challenge the Director’s calculation of the former Agnew employees’ vacation pay entitlements. However, on the basis of 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, he is estopped from doing so.

In any event, Aziz’s argument that the Director erred by awarding additional vacation pay based on the employees’ respective entitlements to compensation for length of service is without merit in light of the definition of “wages” contained in section 1 of the *Act*. Vacation pay is payable, at a rate of 4% or 6%, on an employee’s “total wages”, including any monies required to be paid as compensation for length of service under section 63 of the *Act*.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated May 14th, 1997 and filed under number 023483, be confirmed in the amount of \$39,873.76 together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft, Adjudicator
Employment Standards Tribunal