Employment Standards TRIBUNAL

An appeal

- by -

Stanley D. Ginsburg, a Director or Officer of Express Punching Service Inc. operating as Gold Label Garments

("Ginsburg" or "Employer")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Paul E. Love

FILE No.: 2002/341

DATE OF DECISION: September 9, 2002

DECISION

OVERVIEW

This is an appeal by Stanley D. Ginsburg, a Director or officer of Express Punching Service Inc. operating as Gold Label Garments ("Mr. Ginsburg"), from a Determination dated May 27, 2002 (the "Determination") issued by a Delegate of the Director of Employment Standards ("*Delegate*") pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the "*Act"*). This Determination imposed liability upon Mr. Ginsburg, as a Director or Officer of Express Punching Services Inc. operating as Gold Label Embroidery for vacation pay, statutory holiday pay and interest in the amount of $3,757.16 for five employees. Mr. Ginsburg, in effect, argues that it would be inequitable for the Determination to be enforced against him, given the history of a shareholders dispute. At the time of the issuance of the Determination against the Company, the Company did not dispute that it had not paid the employees vacation pay or statutory holiday pay. Mr. Ginsburg has not satisfied me that the amounts are incorrect or that he was not a director or officer at the time the wages were earned.

Counsel for Mr. Ginsburg has provided a written submissions, arguing that because Mr. Ginsburg filed an appeal and the appeal was not finally determined, Mr. Ginsburg is entitled to the benefit of the amendments to section 96(2) of the *Act*, which now provide that an officer or director is not liable for vacation pay, and statutory holiday pay in the event of the bankruptcy of a company. It is my view, that the Determination was properly issued, on the basis of the law as it existed at the time the Determination was issued. There is nothing in the language of section 96(2) of the *Act*, or in the transitional provisions of the *Act*, that shows an intention by the legislature to permit an already "determined" complaint to be decided on the basis of law which was not in force as of the date that the Determination was issued. At the time that the Determination was issued, there was no error made by the Delegate, which would warrant this Tribunal exercising any jurisdiction to vary or cancel the Determination. In order to interfere with the Determination, one would have to apply the amendments on a retroactive basis. While Legislatures can draft laws to be applied in a retroactive manner, the amendments are not drafted with any apparent intention that the amendments be given a retroactive effect. I therefore dismissed the appeal, and confirmed the Determination.

ISSUES:

1. Did the Delegate err in finding that Mr. Ginsburg was liable to pay vacation pay, holiday pay and interest for six employees?

2. Should the Determination of May 27, 2002, be cancelled because of the coming into force of section 96(2) of the Act on May 30, 2002?

FACTS

I decided this case after considering the submissions of Mr. Ginsburg and the Delegate. The Employer, Express Punching Services Inc. operating as Gold Label Embroidery ("EPS" or "the Employer") operated a garment factory. The Employer was assigned into bankruptcy on August 22, 2001. On April 12, 2002, the Director issued a Determination finding that the amount owing to employees was $16,852.37 inclusive of interest to that date. This amount includes wages. A copy of the Determination was sent to

the company, and copies to Stanley D. Ginsburg, La Wah Lin and Kam Fat Yau, who were the directors of the Company. Mr. Ginsburg, at all material times, was a director and officer of the Employer. No appeal was filed of the Determination before the expiration of the appeal period. During that process, the position taken by the Employer was that it did not dispute that annual vacation pay, statutory holiday pay and compensation for length of service were not paid in accordance with the *Act*.

On May 27, 2002, the Delegate issued a Determination that Mr. Ginsburg was liable pursuant to section 96 of the *Act*, for vacation pay, statutory holiday pay, and interest to the following employees in the following amounts:

Wendy Fontaine	Vacation Pay:	$15.90
	Statutory holiday:	$120.00
	Interest:	$5.34
	Total:	$141.24
Pavittar Ranuata	Vacation pay:	$780.00
	Statutory holiday:	$90.00
	Interest:	$34.19
	Total:	$904.19
Rohin Nand	Vacation pay:	$1250.00
	Statutory holiday:	$125.04
	Interest:	$54.03
	Total:	$1429.07
Nittaya Sae-Lim	Vacation pay:	$361.58
	Statutory holiday:	$66.00
	Interest:	$16.80
	Total:	$444.38
Parminder Sidhu	Vacation pay:	$702.59
	Statutory holiday:	$104.00
	Interest:	$31.69
	Total:	$838.28
	Total Amount owed:	$3757.16

I note that the interest calculation covers the period August 1, 2001 to May 27, 2002.

Employer's Argument:

The Employer says that he had sold control of the business (70% of the shares) to Mr. Lap Wah Lin and Kam Fat Yau in about October of 1997, and the business was moved to Mr. Lin's business premises. The sale took place after Mr. Ginsburg's wife was injured in a motor vehicle collision, and was unable to continue working in the business. As a result of the share purchase Lin and Yau became directors/officers of EPS. Mr. Ginsburg remained an employee, a minority shareholder and an officer of the company. As Mr. Lin did not pay the full price of the shares, Mr. Ginsburg informed him, on Friday November 20, 1998 of his intention to take legal action for non-payment of the balance of the purchase price. Mr.

Ginsburg says that he was fired on Monday November 23, 1998, and the locks were changed. Mr. Ginsburg says that since that time he was only allowed to be on the premises twice. As he was a director of the company with cheque signing authority, documents were brought to his home by the bookkeeper, Wendy Fontaine, from time to time. Mr. Ginsburg says that he does not have any day-to-day control of the company and it would be unfair for him to personally pay amounts owing by the Employer to the Employees because:

- As mentioned, I had never refused payment to any employees ever, and I would have signed the severance pay cheques. I had no knowledge of this being a requirement, at that time.
- No request was made to me to pay severance pay, until now. At this time the Liquidator has control of EPS's funds.
- I was locked out of EPS's premises, & didn't know what was going on there
- My wife & I have taken severe losses from our retirement nest-egg. We've lost $153,000 ($288,000 less $135,000 paid) on our business. Also it's cost us more than $80,000 in legal expenses to date, and we've still not received any payment against this. At age 58 I've not been able to find suitable part-time employment.
- Now I'm being asked to pay $3,757.16 personally, for a Company expense, whereas I believe EPS has the money to pay for this.
- EPS is bankrupt and the Employment Standards Act specifically deals with directors' liability for these amounts when a company is bankrupt

Mr. Ginsburg says that the Director has not properly interpreted the director's liability where a company is bankrupt. He says that the company should pay the amount, or alternatively that the amount should be split between EPS and all the directors.

Mr. Ginsburg's counsel, in a submission dated July 26, 2002, says that because of the new amendments to s. 96 of the *Act*, Mr. Ginsburg is not liable for any amounts owing.

Delegate's Argument

The Delegate submits that the only issues properly before me, when considering this appeal by the Director are whether Mr. Ginsburg was a director of the company at the time the wages were earned, and whether the calculation of the liability is correct. The Director says that Mr. Ginsburg was an officer of the company, as well as in an ownership position. The Director says that Mr. Ginsburg has not elaborated on why he feels that the Delegate incorrectly interpreted the *Act*. The Delegate indicates that while Mr. Ginsburg has indicated that payment of the amount of the Determination poses a hardship, Mr. Ginsburg has not shown any error in the Determination.

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case, the Employer to show that there is an error in the Determination, such that the Determination should be cancelled or varied.

Issue #1: Any Error in the Determination:

It is unfortunate in this case, that Mr. Ginsburg had a dispute with the other owners of the Employer, and that this dispute has caused him financial loss or hardship. This dispute, however, is not a circumstance that should bear on the issue of the Employees' rights under the *Act*. The applicable analysis, as pointed out by the Delegate, is whether Mr. Ginsburg was an officer at the time that the wages were earned, and secondly, whether there is any error in the calculation.

From the evidence before me, it is apparent that Mr. Ginsburg was recorded as a Director and Officer of the company, in the company records, and with the Registrar of Companies. He never resigned this position. In my view there is some evidence that he signed company documents and cheques from time to time, although he did not maintain day-to-day control over the company, and was prevented from exercising day-to-day control by the majority shareholders.

There is no dispute that the amounts found to be due and owing, were due and owing while Mr. Ginsburg was a director of the Employer. The amounts found to due and owing were for vacation pay, statutory holiday and interest. These are all amounts properly found by the Delegate to be due, on the basis of the *Act* as it existed on the date of the Determination, May 27, 2002.

Issue #2, Cancellation of Determination as a Result of Amendments to s 96

In a submission of July 26, 2002, counsel for Mr. Ginsburg suggests that the new amendments to the Act should be applied to Mr. Ginsburg, and that Mr. Ginsburg should not be liable for any amount:

> In our submission, Mr. Ginsburg is not liable for any of the amounts claimed pursuant to section 96(2)(b) of the *Employment Standards Act*, as recently amended by Bill 48. We attach a copy of the amended section 96(2) in that regard. Pursuant to section 96(2), Mr. Ginsburg is not liable for "wages", which includes all of the amounts claimed, as Express Punching Service Inc. is in bankruptcy.
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> In our submission, this position holds true regardless of the Date of the Determination issued by the Director of Employment Standards or the date that the amended section 96(2) came into force. **Mr. Ginsburg is entitled to the benefit of the amendment in light of the fact that the appeal process is still pending and that he liability of Mr. Ginsburg is not yet finally determined.** (my emphasis)

Prior to the passing of Bill 48, section 96 (1) and (2) of the *Act* read as follows:

> 96 (1) A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months' unpaid wages for each employee.
>
> (2)Despite subsection (1), a person who was a director or officer of a corporation is not personally liable for
>
> (a) any liability to an employee under section 63, termination pay or money payable under a collective agreement in respect of individual or group terminations, if the corporation is in receivership or is subject to action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act,
>
> (b) vacation pay that becomes payable, after the director or officer ceases to hold office, or
>
> (c) money that remains in an employee's time bank after the director or officer ceases to hold office.

The new provision of the *Act* is as follows:

> 54. Section 96(2) is repealed and the following substituted:
>
> (2) Despite subsection (1), a person who was a director or an officer of a corporation is not personally liable for
>
> (a) any liability to an employee under section 63, termination pay or money payable in respect of individual or group terminations, if the corporation is in receivership,
>
> (b) any liability to an employee for wages, if the corporation is subject to action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act,
>
> (c) vacation pay that becomes payable after the director or officer ceases to hold office, or
>
> (d) money that remains in an employee's time bank after the director or officer ceases to hold office

The new provision, if it applies to Mr. Ginsburg, would eliminate his liability with respect to the payment of vacation pay, and statutory holiday pay, as well as interest. The amendments to the *Act* contained in Bill 48, and now in force do not contain much in the way of transitional effect language, with the exception of s. 65 and 66, neither of which assist in the disposition of the appellant's argument:

> **Transitional -- repeal of flexible work schedules**
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> **65** On the date that section 17 *[averaging agreements]* comes into force, a flexible work schedule under section 37 of the *Employment Standards Act*, as it read before that date, is cancelled.
>
> **Commencement**
> **66** Sections 1 (b) to (d) and (h), 4, 5, 15, 17, 19 to 21, 23, 36 (b), 55, 59 to 61 and 64 (b), (c) and (f) come into force by regulation of the Lieutenant Governor in Council.

I note that when the Legislature amended the Employment Standards Act in 1995, it provided for "transitional events" in section 128 and 129. The transitional language was far more detailed and specific than the language contained in the amendments at issue in this appeal.

I do not accept the argument presented by counsel to Mr. Ginsburg, that Mr. Ginsburg " is entitled to the benefit of the amendment in light of the fact that the appeal process is still pending and that the liability of Mr. Ginsburg is not yet finally determined." On May 30, 2002 Bill 48, the *Employment Standards Amendment Act,* 2002 was given Royal Assent. The Determination in this matter was issued on May 27, 2002. Once a Determination is issued, it is a valid order, which can be registered with a court. In my view the language of s. 91 and s. 113(1) of the *Act* makes it apparent that amounts determined to be owing are a "vested right":

> 91 (1) The director may at any time file a determination or an order to the tribunal in a Supreme Court registry.
>
> (2) Unless varied, cancelled or suspended under section 86, 113, 115, 116, or 119 a filed Determination is enforceable in the same manner as a judgement of the Supreme Court in favour of the director for the recovery of a debt in the amount stated in the determination;
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> (3) Unless varied or cancelled by the tribunal under section 116, a filed order of the tribunal is enforceable in the same manner as a judgement of the Supreme court in favour of the director for the recovery of a debt in the amount stated in the order.
>
> (4) If a determination or order filed under this section is varied, cancelled or suspended, the director must promptly withdraw the determination or order from filing in the Supreme Court registry.

The filing of an appeal does not operate to automatically suspend the effect of the Determination: s. 113(1). It is clear that the Tribunal has jurisdiction to vary, suspend or cancel the Determination, but as at the date of the coming into force of the new amendments, the Tribunal had done none of those things, and the appeal of this matter was not filed until June 19, 2002. The filing of the appeal was "in time", and in the meantime the amendments to the *Act* came into force.

In my view, one should give some consideration to the nature of the Tribunal's process, and the function of the Tribunal, in answering the point raised by the appellant. It is clear that as of the date the Determination was issued, the Delegate correctly applied the applicable law, and Mr. Ginsburg is liable, under that law, to pay vacation pay, statutory holiday pay, and interest on those amounts, as a director of a corporation that is in bankruptcy. As of the date of the issuance of the Determination, it is clear that the Delegate did not err in the application of the law to the facts of the case.

One of the purposes of the *Act* is to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. The Tribunal exists to correct errors that a Delegate made during the process leading up to a Determination, and errors that the Delegate made in the Determination. The process before the Tribunal is an appeal process. The provisions of the *Act* outlined above indicate that the Determination is in the nature of an order, which can be registered with a court. At the time that the Delegate issued the Determination, the Determination was properly based on the *Act* that was in effect at that time. At the time of the issuance of the Determination there was "no error" made by the Delegate with regard to the interpretation of section 96 of the *Act*. In order for me to give effect to counsel's argument, I would have to find that the legislative amendments, were intended to change Determinations already issued, and have them "issued again", or alternatively "corrected" on the basis of the amended

law, simply because an appellant has invoked the appeal process. In my view, this is an absurdity, and could not have been intended by the Legislature.

The amended *Act* does not contain any transitional provisions that would warrant this by the Tribunal. The meaning of section 96(2) as suggested by the Appellant, would interfere with a right that was already vested as of the date that the amendments came into force. The right was vested in the Employee because a Determination was issued.

I note that the issue of the affect of new legislative amendments was dealt with recently by the Tribunal in *Oakcreek Golf and Turf Inc., BCEST #RD366/02*. This case involved an application for reconsideration on the basis of the new amendments, and the change in the Employer's liability for wages from two years in the former act, to six months in the recent amendments.

> I cannot agree that this raises a significant issue for tribunal jurisprudence warranting reconsideration. First, with respect to any retroactive application of the *Amendment Act*, I note that the complaint, the Determination, and the Decision were all completed within the timeframe of the *Act* prior to Royal Assent to the *Amendment Act*. In deciding that the *Amendment Act* has no application in this matter, I am guided by Driedger on the Construction of Statutes (3rd ed., Butterworths, 1994):
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> > "When a court is called on to interpret legislation, it is not engaged in an academic exercise. Interpretation involves the application of legislation to facts in a way that affects the well-being of persons for better or worse. Not surprisingly, the courts are interested in knowing what the consequences will be and judging whether they are acceptable. Consequences judged to be good generally are presumed to be intended and are regarded as part of the legislative purpose. Consequences judged to be unjust or unreasonable are regarded as absurd and are presumed to have been unintended. Where it appears that the consequences of adopting an interpretation would be absurd, the courts are entitled to reject it in favour of a plausible alternative that avoids the absurdity." (p. 79).
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> In my view it would be absurd for the legislature to have intended to invite applications for reconsideration of all decisions made between proclamation of the *Act* establishing the 2-year time limit in 1995 and Royal Assent of the *Amendment Act* in 2002. This remains an act, a purpose of which, as articulated in Section 2 is "To provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act." I find that it would produce an absurd result were I to agree with Oakcreek that the time limit for collecting on wages owed in the new *Amendment Act* should be a factor in deciding whether to reconsider a claim made under the former time limit.

I note that legislation often alters the rights that existed up until the date of the amendment. Here we are talking about rights that existed, and were crystallized in a Determination or an enforceable order before the legislative amendment came into effect. In my view, this legislative amendment is not clear enough to take away these rights of the Employees that existed and were determined on May 27, 2002.

I note that Driedger gives a good definition of a "retroactive statute" in Construction of Statutes (2nd edition) at p 186:

> A retroactive statute is one that operates backwards, that is to say, it is operative as of a time prior to its enactment. It makes the law different from what it was during a period prior to its enactment. A statute is made retroactive in one of two ways: either it is stated that it shall be

> deemed to have come into force at a time prior to its enactment, or it is expressed to be operative with respect to past transactions as of a past time, as, for example, the Act of Indemnity considered in Phillips v. Eyre. A retroactive statute is easy to recognize, because there must be in it a provision that changes the law as of a time prior to its enactment.

There is a strong presumption in the interpretation of statutes against giving an enactment a retroactive effect. A legislature can bring into force retroactive legislation, but the intention to give a statute a retroactive effect must be clearly ascertainable from the statutory language. In my view, section 96(2) of the *Act* cannot be given a retroactive effect, because this would require clearer language such as set out above in Driedger.

In making this decision, I wish to make it clear that I have made no decision with regard to a case where the section came into effect before a complaint was made, or after a complaint was made, but before the Delegate issued a determination. These are particular fact patterns, which may require a ruling from the Tribunal during the course of another appeal.

For all the above reasons, I dismiss this appeal.

ORDER

Pursuant to s. 115 of the *Act* I order that the Determination dated May 27, 2002 is confirmed with interest in accordance with s. 88 of the *Act*.

Paul E. Love
Adjudicator
Employment Standards Tribunal