

An appeal

- by -

John Thomas Baird, a Director or Officer of Universal Cleaning Equipment Inc.
op. as Kirby Home Care Products
("Baird")

- 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: Lorne D. Collingwood

FILE No.: 2002/240

DATE OF DECISION: September 19, 2002

DECISION

OVERVIEW

The Director of Employment Standards (who I will henceforth refer to as “the Director”) issued a Determination against Universal Cleaning Equipment Inc. operating as Kirby Home Care Products (“Universal” and “the employer”) on October 15, 2001. In that determination (“the Corporate Determination”), Universal is found to have contravened the *Employment Standards Act* (the “*Act*”) and it is ordered to pay Joshua McLafferty \$2,717.57 in wages and interest and Tracey Williamson another \$1,220.45 in wages and interest.

The Corporate Determination was appealed by Universal. That appeal was dismissed. Universal did not send anyone to the appeal hearing, nor did it show the Tribunal that the Determination is wrong and that the Tribunal should intervene. [See *Universal Cleaning Equipment Inc. op. as Kirby Home Care Products*, BCEST No. D108/02.]

On April 12, 2002, a determination was issued against John Thomas Baird as a director/officer of Universal. That decision (the “Baird Determination”) orders Baird to pay all of the moneys that have been awarded to Williamson and McLafferty (a total of \$3,938.02). Baird appeals the determination which is against him personally. It falls to me to decide that particular appeal.

Mr. Baird, in appealing the decision which is against him personally, does not argue that he was not a director/officer of Universal when McLafferty and Williamson were employed by Universal, nor is he claiming that he is being ordered to pay more than the amount that he is, as a director/officer, liable for under the *Act*. The appeal, in part, is that he was not very active as a director and, as I understand it, that I should cancel or vary the Baird Determination for that reason. I have found that the degree to which a director is active as a director is of no importance, that it is enough that he was one of Universal’s directors in the period that McLafferty and Williamson worked for Universal.

I have, in addition to the above, found that Mr. Baird has raised matters that are irrelevant to the appeal and that he is also seeking to challenge the Corporate Determination. I have decided that he may not challenge the Corporate Determination through appealing the decision which is against him personally.

Universal filed for reconsideration of the decision BCEST No. D108/02. And by way of that application, Universal asked that the Tribunal schedule another hearing. In *Universal Cleaning Equipment Inc. op. as Kirby Home Care Products*, BCEST No. RD393/02, it was decided that the Tribunal will not schedule another hearing and that it will not reconsider its decision. As such the Corporate Determination is now final and not a decision which I may revisit.

PRELIMINARY ISSUES

Although neither person has made it entirely clear, it does appear to me that Mr. Baird has invited a Ms. Loraine Shevchuk to intervene on his behalf. She has asked for an oral hearing on the basis that neither she nor Baird were able to attend “the hearing that was arranged”. Is a hearing required in this case?

ANALYSIS

Shevchuk appears to harbour a misconception about the appeal. No hearing has been ever been arranged in regard to the particular appeal which is before me. It must be that she is referring to the hearing that was set in the matter of the appeal of the Corporate Determination and that she is asking that I order another hearing on that particular determination. I will not. The Tribunal has already decided that it will not schedule another hearing on the matter of the Corporate Determination (BCEST # RD393/02).

In regard to the appeal which is before me, namely, the appeal by Mr. Baird of the Determination which is against him personally, I will not order a hearing. The Tribunal is not required to hold a hearing in each and every case.

- 107** Subject to any rules made under section 109 (1) (c), the tribunal may conduct an appeal or other proceeding in the manner it considers necessary and is not required to hold an oral hearing.

There are cases that require a hearing because of credibility issues or because there are matters of great complexity. This is not one of those cases.

OTHER ISSUES TO DECIDE

Baird is not arguing that he was not a director/officer of Universal when McLafferty and Williamson were employed by Universal, nor is he claiming that he is being ordered to pay more than the amount that he is, as a director/officer, liable for under the *Act*.

As I understand the appeal, it is that the Baird Determination should be varied or dismissed on the basis that Mr. Baird was not very active as a director. In that regard, he claims that he did not direct how, when and where the employees worked but did little more than say “hi” and “be nice to them”.

Mr. Baird, on appeal, is also seeking to reopen matters which are decided in the Corporate Determination, namely, the matter of whether McLafferty and Williamson are employees or independent contractors and also the matter of hours worked. And, through Shevchuk, it appears that he is arguing that the amount of the Corporate Determination should be reduced because Williamson quit and McLafferty, in Shevchuk’s view at least, left a trail of problems with a previous employer and was terminated for theft.

What I must ultimately decide is whether it is or is not shown by the Appellant that the Determination ought to be varied or cancelled, or a matter(s) referred back to the Director, for reason of an error or errors in fact or law.

FACTS AND ANALYSIS

The Corporate Determination was appealed. The appeal was dismissed through a decision of the Tribunal dated April 4, 2002 [*Universal Cleaning Equipment Inc. op. as Kirby Home Care Products*, BCEST #. D108/02]. The appellant, Universal, failed to attend a hearing set in the appeal and the Adjudicator decided that it had not been shown that the Determination is wrong and that the Tribunal should intervene.

Universal has asked the Tribunal to reconsider its decision. In BCEST No. RD393/02, the Tribunal decided that it would not schedule another hearing and that reconsideration of its decision was not warranted in that Universal was provided with a full opportunity to make its case: It just did not take advantage of that opportunity.

The Baird Determination is against John Thomas Baird as a director or officer of Universal. The decision is that Baird was a director/officer of Universal at the time wages were earned by both Williamson and McLafferty and that, pursuant to section 96 of the *Act*, he must pay Williamson \$1,220.45 and McLafferty \$2,717.57 as that is in each case less than two months' wages.

Section 96(1) of the *Act* provides that a person who is 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.

- 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.
- (3) This Act applies to the recovery of the unpaid wages from a person liable for them under subsection (1).

As noted above, Mr. Baird is not claiming on appeal that he was not a director or officer of Universal in the relevant period, nor is he claiming that he is being ordered to pay more than the amount for which he is personally liable as a director/officer. His claim is, in part, that he was not a particularly active director, and reading between the lines, that some sort of consideration should be given to that.

I am satisfied that the extent to which Mr. Baird directed Universal's operations is of no importance to the appeal. Section 96 applies to any person that was a director or officer of the corporation at the time wages were earned and should have been paid, even passive directors and officers.

As noted above, the appeal is, to some extent, irrelevant. It is irrelevant whether Williamson did or did not quit. It is irrelevant whether McLafferty did or did not leave a trail of problems with a previous employer. It is also irrelevant whether McLafferty was or was not terminated for theft. Nothing turns on that. That has no bearing on whether Mr. Baird is or is not personally liable to pay Williamson \$1,220.45 and McLafferty \$2,717.57.

What remains of the appeal is a request by Mr. Baird that he be allowed to challenge the validity of the Corporate Determination which is against Universal.

Persons have in the past sought to challenge corporate determinations by appealing determinations which are against them personally as directors/officers of the corporate bodies. The Tribunal has said that a director or officer of an incorporation may argue whether they are or are not a director or officer, and/or the amount of their personal liability under the *Act* but they may not, unless there is fraud or new and cogent evidence not previously available, use the appeal process to, in effect, reopen a determination which is against the corporate body and final.

There is no evidence of fraud in this case, nor is it that new and cogent evidence has just come to light, evidence that was not previously available. And the Corporate Decision is, in this case, final and not a decision which I may revisit now the Tribunal has said that it will not reconsider BCEST # D108/02.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated April 12, 2002 be confirmed. Mr. Baird may be required to pay Tracey Williamson as much as \$1,220.45 and Joshua McLafferty as much as \$2,717.57.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal