Employment Standards TRIBUNAL

An appeal

- by -

Byron J. Seaman, a Director or Officer of No. 289 Taurus Ventures - and - Prema Systems Ltd. - and - 544553 B.C. Ltd. - and - 546414 British Columbia Ltd. (associated corporations)

- 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: David B. Stevenson

FILE No.: 2001/452

DATE OF DECISION: August 14, 2001

DECISION

OVERVIEW

This is an appeal filed pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Byron J. Seaman ("Seaman"), a Director or Officer of No. 289 Taurus Ventures Ltd. -and- Prema Systems Ltd. -and- 544553 B.C. Ltd. -and- 546414 British Columbia Ltd. (associated pursuant to Section 95 of the Employment Standards Act) ("the companies") of a Determination which was issued on January 24, 2001 by a delegate of the Director of Employment Standards (the "Director").

An earlier Determination (the "corporate Determination"), dated August 28, 2000, had concluded that the companies had contravened Part 3, Sections 17(1), 18(1) and 27(1), Part 7, Section 58(3) and Part 8, Section 63(2)(b) of the *Act* in respect of the employment of John Babcock ("Babcock") and ordered the companies to cease contravening and to comply with the *Act* and to pay an amount of $253,544.83. The Determination under appeal concluded that Seaman was a Director or Officer of the companies and as such was required to pay an amount of $17,907.20, the extent of his statutory obligation under Section 96 of the *Act*.

In this appeal, Seaman contends, alternatively, the Director was wrong to have concluded that Babcock was an employee of Prema Systems Ltd., at any time or, more specifically, during the period Seaman was a Director/Officer of Prema Systems Ltd., that Babcock was employed by all four of the companies for the entire period from November, 1994 to April 20, 2000, that all of the companies were jointly and separately liable as associated corporations for the full amount found owing in the corporate Determination and that Prema Systems Ltd. was associated with the other companies named in the corporate Determination. As well the appeal alleges other errors of fact, including the conclusion that Prema Pacific Concrete Products Ltd. was a non-existent company.

The appeal was filed with the Tribunal on June 11, 2001.

ISSUE

The issue being considered in this decision is whether the Tribunal should extend the time period in subsection 112(2) of the *Act* for requesting an appeal of the Determination. If the time period is not extended, the appeal will be dismissed. If the appeal is accepted, the substantive issue raised is whether Seaman is liable under Section 96 of the *Act*.

FACTS

It is acknowledged that the Determination was served on Seaman by registered mail at his office address on January 30, 2001. At the time of service of the Determination, Seaman was represented by legal counsel, who had instructions to appeal it. Seaman had also been represented by legal counsel on an earlier appeal of the corporate Determination.

The Director was not informed that legal counsel would be continuing to represent Seaman on matters arising from any Director/Officer Determinations that might be issued against him. No copy of the Determination was sent to legal counsel.

The Determination prominently displayed the appeal deadline as being February 16, 2001. Seaman was served with a demand to pay on June 5, 2001 and communicated with legal counsel at that time. Seaman, according to legal counsel, assumed legal counsel was dealing with an appeal of the Determination.

ARGUMENT AND ANALYSIS

Subsections 122(1) and (2) of the *Act* state:

1. (1) A determination or demand that is required to be served on a person under this Act is deemed to have been served if

   (a) served on the person, or

   (b) sent by registered mail to the person's last known address.

   (2) If service is by registered mail, the determination or demand is deemed to have been served 8 days after the determination or demand is deposited in a Canada Post Office.

The *Act* deems delivery by registered mail to be service on the person to whom the Determination is sent. Accordingly, for the purpose of the issue being considered in this decision, the Determination was served on Seaman on January 30, 2001 The appeal of the Determination is late by almost 4 months.

The Tribunal has consistently held that it will not grant extensions under Section 109(1)(b) of the *Act* as a matter of course and will exercise its discretionary powers only where there were compelling reasons to do so (see, for example, *Re Metty M. Tang*, BC EST #D211/96). In deciding whether "compelling" reasons exist in a particular request for an extension, the Tribunal's decision in *Re Niemisto*, BC EST #D99/96, stated the following:

> Certain common principles have been established by various courts and tribunals governing when, and under what circumstances, appeal periods should be

extended. Taking into account the various decisions from both courts and tribunals with respect to this question, I am of the view that appellants seeking time extensions for requesting an appeal from a Determination issued under the Act should satisfy the Tribunal that:

i. there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;

ii. there has been a genuine and on-going bona fide intention to appeal the Determination;

iii. the respondent party (i.e., the employer or employee), as well the Director, must have been made aware of this intention;

iv. the respondent party will not be unduly prejudiced by the granting of an extension; and

v. there is a strong prima facie case in favour of the appellant[1].

The above criteria are not intended to constitute an exhaustive list. Adjudicators may find that in particular cases, certain other, perhaps unique factors ought to be considered.

Counsel for Seaman has addressed each of the above criteria in her appeal submission. On the first point, counsel seems to suggest that it was improper for the Director not to have served her with the Determination. I don't agree with that suggestion. Simply put, the Director met the service requirements of the *Act*. If counsel wished to be provided a copy, she could have asked or Seaman could have directed service of the Determination to legal counsel. Neither occurred.

On the second point, counsel argues we should infer a genuine, on-going and bone fide intention to appeal the Determination arising from the fact he had appealed the corporate Determination.

Practical reality suggests that if Seaman were truly committed to filing an appeal of the Determination, he would have brought the fact of service of the Determination to the attention of legal counsel when it occurred. If there is some reasonable explanation for avoiding that practical reality, it is incumbent on Seaman to provide it. No explanation, either by way of a letter, statutory declaration or affidavit has been submitted by Seaman. The only information we have comes from legal counsel and none of that information provides a reasonable and credible explanation for not taking some action, however slight, in respect of the Determination for more than 4 months.

[1] See also the comments in *Re Berg*, BC EST #D212/97 in respect of this factor.

I accept that Seaman, at least at one point (exhibited by his appeal of the corporate Determination), had a genuine intention to appeal the Determination, although I do not accept that the Director or the other parties to this appeal were made aware of this intention. These factors are neutral in the circumstances, although I do note that other Directors/Officers filed their appeals in a timely way. The delay in enforcing the Determination is prejudicial to the Complainant, Babcock. Counsel expresses the opinion that no person will be unduly prejudiced. There has already been considerable delay in administering Babcock's claim. This factor weighs against Seaman's request, not heavily, but any further delay should be avoided.

Finally, I am not satisfied Seaman has made out a *prima facie* case in his favour. His appeal raises essentially two grounds: first, that Prema Systems Ltd. should not have been associated with the other companies; and second, that Seaman ceased to be a Director/Officer of Prema Systems Ltd. on May 10, 1999. Questions about whether Babcock was ever an employee of Prema Systems Ltd. go to the relationship of Prema Systems Ltd. with the other companies and whether that company should have been associated with the others. The first issue was considered in *Theodore (Ted) W. Myrah, a Director or Officer of No. 289 Taurus Ventures Ltd. -and- Prema Systems Ltd. -and- 544553 B.C. Ltd. -and- 546414 British Columbia Ltd. (associated pursuant to Section 95 of the Employment Standards Act)*, BC EST #D, where the Tribunal stated, in respect of the decision to associate Prema Systems Ltd. with the other companies:

> The second point is very minor, and even if Myrah is correct that Babcock was never issued a cheque from Prema, the balance of the reasons given for the decision to associate the companies under Section 95 of the *Act* are sufficient to support that decision. I also note the decision to associate the companies has not been appealed.

There is nothing in the appeal on this point that diminishes the validity of the reasons given by the Director for deciding to associate the companies under Section 95 of the *Act*.

On the second issue, the Determination notes the liability to Babcock was for unpaid wages earned between April 21, 1998 and April 20, 2000. The Director submits that Seaman was shown as a Director/Officer of Prema Systems Ltd. in the company records maintained by the Registrar of Companies during that entire period and has not established, to the degree of certainty required, that his resignation was accepted and given effect. However, even accepting Seaman resigned as a Director/Officer of Prema Systems Ltd. on May 11, 1999, he was a Director/Officer of that company for more than one year of the period during which wages were earned and became payable. Apart from the argument about the associated company decision (which does not show a *prima facie* case), he has provided nothing to indicate he should not be statutorily liable under Section 96 for wages earned by Babcock and not paid during the period he was inarguably a Director/Officer of Prema Systems Ltd.

The delay in filing an appeal of the Determination is lengthy. Seaman has not shown there to be sufficiently compelling reasons to justify granting an extension. The appeal has not been

requested within the time limits in the *Act* and, pursuant to Section 114(1)(a) of the *Act*, is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated January 24, 2001 be confirmed in the amount of $17,907.20, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal