

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 -

Herbert L. Tobias
("Tobias")
and

Phil M. Bain
("Bain")
and

Allan Sollows
("Sollows")

Directors or Officers of Hamerlock Couplings Inc.
and Hamerlock Coupler U.S.A.

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NOS.: 1999/509, 1999/513, 1999/514

DATE OF DECISION: November 8, 1999

DECISION

OVERVIEW

These are appeals by Herbert L. Tobias (“Tobias”), Phil M. Bain (“Bain”) and Allan Sollows (“Sollows”), Directors or Officers of Hamerlock Couplings Inc. and Hamerlock Coupler U.S.A. under Section 112 of the *Employment Standards Act* (the “Act”), against three separate determinations dated July 30, 1999 issued by a delegate of the Director of Employment Standards (the “Director”). Tobias, Bain and Sollows allege that the delegate of the Director erred in the Determination by concluding that they were personally liable as Directors or Officers of Hamerlock Couplings Inc. and Hamerlock Coupler U.S.A. for the amount of \$5,000.00 in wages each to Raymond Prevost (“Prevost”).

ISSUE

The issue to be decided in this appeal is whether Tobias, Bain and Sollows were Directors or Officers of Hamerlock Couplings Inc. and Hamerlock Coupler U.S.A. when wages were earned or should have been paid to Prevost.

FACTS

A Corporate Determination (“CDET”) was issued January 20, 1999 which concluded that Hamerlock Couplings Inc. and Hamerlock Coupler U.S.A. (Associated Pursuant to Section 95 of the *Employment Standards Act*) owed wages in the amount of \$33,788.53 to a former employee, Prevost.

That Determination was appealed and a hearing took place April 12, 1999. The Adjudicator found that Prevost was an employee of Hamerlock Couplings Inc. and Hamerlock Coupler U.S.A. (Associated Pursuant to Section 95 of the *Employment Standards Act*) but varied the amount of wages owing to \$24,575.10. Both Tobias and Bain appeared at that hearing.

Herbert L. Tobias

In his appeal, Tobias argues that he should have no personal liability for wages owing to Prevost as those wages were supposed to have been paid by Glen Lau (“Lau”). Tobias further argues that the amount of wages owing to Prevost should be pro-rated on an equitable basis amongst all of the Directors/Officers of the Companies.

In a subsequent unsolicited submission Tobias argues that sufficient monies were received by the Companies during the period of time immediately following the June 17, 1997 meeting to meet all claims against the Companies. Further, Tobias argues that Prevost did not submit any claims at that time. Finally, Tobias argues that the interim CEO should be able to provide evidence with respect to Prevost’s claim.

Phil M. Bain

In his appeal Bain argues that he should have no personal liability for wages owing to Prevost as those wages were supposed to have been paid by Glen Lau (“Lau”). Bain further argues that the amount of wages owing to Prevost should be pro-rated on an equitable basis amongst all of the Directors/Officers of the Companies.

In a subsequent unsolicited submission Bain argues that he should have no personal liability for wages owing to Prevost as those wages should have been paid by those Directors or Officers remaining after the June 17, 1997 meeting at which he claims to have resigned as a Director / Officer.

Both Tobias and Bain argue that the Corporate Lawyer for Hamerlock Couplings Inc. was instructed and paid to immediately amend the corporate records after the June 17, 1997 Extraordinary General Meeting.

Allan Sollows

In his appeal, Sollows argues that he was not a Director at the time Prevost’s wages were earned and therefore is not liable for any part of those wages. Sollows further argues that he resigned as a Director on September 16, 1997. Sollows finally argues that he was never introduced to Prevost nor did he have any opportunity to discuss business with Prevost.

The delegate of the Director

The delegate of the Director conducted a search of the records of the Registrar of Companies and issued a Directors Determination (“DDET”) to each Director / Officer listed. The delegate of the Director submitted a copy of a “Corporation Search” from the Registrar of Companies dated September 23, 1999 which indicated that as of September 15, 1999, the Directors / Officers of Hamerlock Couplings Inc. were Phil M. Bain, Larry Clark, Jack L. Moore, Murray Proudfoot, Allan Sollows, Herbert L. Tobias, and Joseph D. Willmott.

ANALYSIS

The onus of establishing that the delegate of the Director erred in the Determinations rest with the appellants, in this case, Tobias, Bain and Sollows.

At the outset I should point out that the issue of whether Prevost was an employee and owed wages was the subject of an earlier appeal and dealt with in **BC EST No. D198/99 *Hamerlock Couplings et al (Thornicroft)*** issued May 19, 1999.

This panel is dealing with the matters raised in the DDET's issued July 30, 1999. This panel will not be considering arguments on the merits of the CDET which was issued January 20, 1999 and already dealt with by the Tribunal in **BCEST No. D198/99** *supra*.

The CDET set forth the liability of the corporate entities named in the Determination. That liability was confirmed albeit in a varied amount by the previous Tribunal decision. The only issue to be considered by this panel is whether the persons named as Directors / Officers in the DDET's were personally liable pursuant to the provisions of Section 96 of the *Act* which provides:

Section 96, Corporate officer's liability for unpaid wages

(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).

The critical period for determining personal liability is therefore "the time wages of an employee of the corporation were earned or should have been paid". The evidence provided was that Prevost was employed by the Companies (Associated pursuant to Section 95 of the *Act*) and **earned wages from September 2, 1996 until September 17, 1997.**

The *Act* contains requirements with respect to when wages are to be paid to an employee. Those requirements are set forth in Sections 17 and 18 which provide:

Section 17, Paydays

(1) At least semimonthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by the employee in a pay period.

(2) Subsection (1) does not apply to

(a) overtime wages credited to an employee's time bank,

(b) statutory holiday pay credited to an employee's time bank, or

(c) vacation pay.

Section 18, If employment is terminated

(1) An employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment.

(2) An employer must pay all wages owing to an employee within 6 days after the employee terminates the employment.

The evidence of the corporation search of the Registrar of Companies clearly indicates that as late as September 15, 1999, Tobias, Bain and Sollows were listed as Directors / Officers.

Tobias and Bain state that the corporate lawyer was supposed to amend the list of Directors / Officers with the Registrar of Companies, however, the evidence is, that was not done.

Even if I were to accept the arguments put forward by Tobias, Bain and Sollows with respect to their term of service as a Director / Officer, the evidence is that they were all Directors / Officers at the time wages were earned by Prevost.

With respect to the arguments put forward that the liability should be pro-rated amongst all of the Directors / Officers, the provisions of Section 96 (1) *supra* clearly state that the liability of a Director / Officer is for “*up to 2 months' unpaid wages for each employee.*”

The evidence was that the monthly wages being earned by Prevost were \$2,500.00 U.S. The amounts set forth in the Determinations, \$5,000.00 CDN is therefore in accordance with the requirements set out in Section 96(1) *supra*.

For all of the above reasons, based on the evidence provided and on the balance of probabilities, I conclude that Tobias, Bain and Sollows were Directors / Officers at the time wages were earned or should have been paid to Prevost. I further conclude that as Directors / Officers, Tobias, Bain and Sollows are personally liable for the amounts set forth in the Determinations.

The appeals by Tobias, Bain and Sollows are therefore dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determinations dated July 30, 1999 issued to Tobias, Bain and Sollows be confirmed in the amount of **\$5,000.00** each together with whatever interest has accrued pursuant to the provisions of Section 88 of the *Act*.

Hans Suhr
Adjudicator
Employment Standards Tribunal