

An appeal

- by -

David Boyd, a Director or Officer of Hewitt Rand Corporation,  
A Division of Hewitt Rand Inc.  
Richard Winslow, a Director or Officer of Hewitt Rand Corporation,  
A Division of Hewitt Rand Inc.  
(“Boyd” and “Winslow”)

- 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.:** 2002/396 and 2002/397

**DATE OF DECISION:** October 17, 2002

## DECISION

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by David Boyd (“Boyd”) and Richard Winslow (“Winslow”), Directors or Officers of Hewitt Rand Corporation, a Division of Hewitt Rand Inc. (“Hewitt Rand”), of two Determinations that were both issued on June 27, 2002 by a delegate of the Director of Employment Standards (the “Director”). The Determinations concluded that Boyd and Winslow were Directors or Officers of Hewitt Rand, an employer found to have contravened provisions of the *Act*, and under Section 96 of the *Act* were each ordered to pay an amount of \$11,795.75.

The grounds of appeal for both Boyd and Winslow are identical and have been filed on their behalf by Bob Akin, who is identified in the material as Collections Manager of National Association of Credit Management - Oregon, Inc. (NACM). Mr. Akin submits neither Boyd nor Winslow should be held personally liable under Section 96 of the *Act* because Hewitt Rand was, from approximately August 29, 2001, in a form of receivership or bankruptcy reorganization.

### ISSUE

The sole issue in this case is whether Boyd and Winslow can be held liable under Section 96 of the *Act* for length of service compensation, or any wages owed, to the former employees of Hewitt Rand.

### FACTS

The appeals do not challenge the findings of fact in the Determination. Rather the appeals contend, in effect, there were relevant facts not considered by the Director.

Hewitt Rand was a high tech company with an office in Richmond. In September 2001, Hewitt Rand closed its office and terminated the employment of several employees working at that office. Complaints were filed by the affected employees and a Determination was issued against Hewitt Rand. That Determination has not been appealed.

Boyd and Winslow were found to be Directors or Officers at the time the wages covered by the Determination were earned and should have been paid. That conclusion has not been appealed.

In the appeals, Mr. Akin submits Boyd and Winslow should not be held liable for wages as Hewitt Rand was in a form of receivership or bankruptcy. In support of this assertion, he submits several documents:

1. A letter, dated August 9, 2001 from NACM, over the signature of Mr. Akin and addressed to the creditors of Hewitt Rand, notifying the creditors of a general meeting of creditors to take place on August 24, 2001 in the Embassy Suites Tukwila, Tukwila, Washington. The letter states the purpose of the meeting:

The purpose of this meeting is to review the operating status of the company and to form a Creditor's Committee to work with Hewitt Rand on design and implementation of a repayment plan

2. Minutes of the meeting.
3. A copy of a Payment Adjustment Agreement dated August 28, 2001 between Hewitt Rand and NACM.
4. Minutes of a Creditor's Committee meeting, dated as having taken place on August 29, 2001.
5. A letter dated September 10, 2001 from NACM, over the signature of Mr. Akin and addressed to the creditors of Hewitt Rand, providing a follow-up to the creditors meeting and enclosing a copy of the minutes.

The appeals also identified the dates of other meetings of the Creditor's Committee and, finally, noted that notwithstanding the above efforts, Hewitt Rand could not continue to operate and closed the business. There is no indication in all of that material that Hewitt Rand formally filed bankruptcy, was subject to a proceeding under an insolvency Act or went into receivership.

## ARGUMENT AND ANALYSIS

The relevant parts of Section 96 of the *Act* state:

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,*
  - (b) *any liability to an employee for wages, if the corporation is subject to an action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act,*

Mr. Akin argues that Hewitt Rand was "in a form of receivership or bankruptcy reorganization".

The general rule under the *Act* is that a director or officer can be held personally liable for up to 2 months' unpaid wages. Paragraphs 96(2)(a) and (b) of the *Act* create exceptions to the general rule and identify three circumstances where a director or officer may be relieved from all or part of their liability: if the corporation is in receivership, if the corporation is subject to an action under Section 427 of the *Bank Act (Canada)* or if the corporation is subject to a proceeding under an insolvency Act.

The Tribunal has noted on many occasions that Act should be interpreted in a manner that accords with its remedial nature and should be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects: see *Machtiger v. HOJ Industries Ltd.*, (1992) 91 D.L.R. (4th) 491 (S.C.C.) and *Helping Hands v. Director of Employment Standards*, (1995) 131 D.L.R.(4th) (B.C.C.A.). Section 96

of the *Act* is a minimum statutory benefit and is part of the legislative scheme that has, as one of its purposes, “to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment”. The Tribunal has consistently taken the position that provisions which derogate from the minimum statutory benefits provided by the *Act* are to be strictly construed. As noted above, there is nothing in the material that establishes any of the circumstances which would relieve Boyd and Winslow from the liability created under subsection 96(1). More specifically, there is nothing in the appeals that would support a conclusion that Hewitt Rand was in receivership, that it was subject to an action under Section 427 of the *Bank Act (Canada)* or that it was subject to a proceeding under an insolvency Act.

The appeals are dismissed.

### **ORDER**

Pursuant to Section 115 of the *Act*, I order the Determinations dated June 27, 2002 both be confirmed in the amount of \$11,795.75, together with any interest that has accrued pursuant to Section 88 of the *Act*.

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**David B. Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**