Employment Standards TRIBUNAL

An appeal

- by -

Serge Biln, a Director or Officer of Delphi International Academy, Delphi Student Development Inc. and Double D Holdings Ltd. associated companies pursuant to section 95 of the Employment Standards Act

("Biln")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2002/428

DATE OF DECISION: October 30, 2002

DECISION

INTRODUCTION

This appeal was filed by Serge Biln ("Biln") pursuant to section 112 of the *Employment Standards Act* (the "*Act*"). Mr. Biln appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on October 10th, 2001 (the "Determination") pursuant to section 96(1) of the *Act* which provides as follows:

> **Corporate officer's liability for 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.

The present proceedings come before me as a result of my order referring certain matters back to the Director for further investigation (see *Biln,* B.C.E.S.T. Decision No. D302/02 issued on July 10th, 2002). The Director's delegate's further investigation has now been completed, a report summarizing the delegate's further findings has been prepared, all of the parties have been provided with copy of the report, and they have been given an opportunity to make submissions with respect to the contents of that report.

PREVIOUS PROCEEDINGS

The Director's delegate originally determined that Mr. Biln was a director and officer of a company known as Double D Holdings Ltd. ("Double D") and, accordingly, was personally liable for $37,510.56 in unpaid wages and section 88 interest owed to nine former employees of Delphi International Academy ("Delphi Academy"). Delphi Academy was originally incorporated under the B.C. *Society Act* on July 21st, 1992 as Choiceland Foundation Society; the society's name was subsequently changed to Iceland Foundation on August 3rd, 1994 and to its present name on June 6th, 1996. The employees' unpaid wage claims span the period from September 2000 to June 30th, 2001 and include unpaid regular wages and, for seven of the nine employees, compensation for length of service.

By way of a separate determination, also issued on October 10th, 2001, a Director's delegate issued an order declaring that Delphi Academy, Double D and a third firm, Delphi Student Development Inc. ("Delphi Development"), were "associated corporations" under section 95 of the *Act* and were thus jointly and severally liable for $37,510.56 in unpaid wages and section 88 interest.

It would appear that all three firms were closely interrelated, subject to common direction and control. The firms jointly operated a common business enterprise, namely, an independent school targeted to high school athletes, particularly hockey and baseball players. Delphi Academy was the entity that formally operated the academic component of the school, the school's athletic programs were operated through Delphi Development and Double D was the "holding company" and "landlord" that owned, *inter alia,* the shares of the other two firms. Delphi Academy is no longer operating; all of the respondent employees were former members of the teaching staff. The section 95 declaration was not appealed and, in any event, was formally confirmed by way of a decision issued in a related appeal (see *Delphi International Academy et al.* B.C.E.S.T. Decision No. D166/02).

My July 10th, 2002 reasons for decision in the present appeal addressed a number of issues that were raised by Mr. Biln most of which were dismissed in rather summary fashion since these issues had already been adjudicated in other appeals. My July 10th reasons addressed two issues in much greater depth, namely:

> i) whether Mr. Biln was exempted from personal liability under section 96 by reason of section 45 of the *Employment Standards Regulation:*
>
> > **Exclusion from liability provisions**
> > 45. Section 96 of the Act does not apply to a director or officer of a charity who receives reasonable out-of-pocket expenses but no other remuneration for services performed for the charity.
>
> and
>
> ii) whether Mr. Biln, as a director of an "associated firm", could be held liable for the employees' unpaid wages.

In my July 10th decision, I held that section 45 of the *Regulatio*n did not apply. However, with respect to the second issue I determined, based on my decision in *ICON Laser Eye Centres, Inc.* (B.C.E.S.T. Decision No. D649/01; confirmed on reconsideration RD201/02) that Biln could not be held liable under section 96(1) simply because he was a director of a firm that was "associated" with the employer. However, I also ruled that if Double D was an "employer" of the teachers in question, then Biln could be properly held liable under section 96(1).

Since I was unable to adjudicate this latter question based on the material before me, I referred that matter back to the Director for further investigation. The relevant portions of my July 10th decision on this point are reproduced below:

> Counsel for Mr. Biln quite correctly notes that the *ICON* decision [see B.C.E.S.T. Decision No. RD201/02 confirming B.C.E.S.T. Decision No. D649/01] holds that directors of "associated corporations" (where the associated firm cannot be lawfully characterized as an "employer" of the employees in question) are not personally liable under section 96 for unpaid wages owed by the "employer" firm.
>
> Although Delphi Academy was, at least nominally, the "school" for whom the teachers provided service, some, if not all of the teachers had written contracts of employment with both Delphi Academy and Double D pursuant to which, for example, both firms could direct and control the teacher's duties. The agreements state, in some provisions, that the employer is Delphi Academy; in other provisions, both Delphi Academy and Double D are said to constitute the employer. The agreements state that the paymaster is Double D. By way of the agreement, the employee agrees to faithfully serve both entities; a confidentiality agreement protects both entities.
>
> It is, of course, quite possible under both the common law and the *Act* for an individual to be "employed" by more than one "employer" (see *e.g.*, *McPhee*, B.C.E.S.T. Decision No. D183/97). It may well be the case that Double D meets the statutory definition of "employer" set out in section 1 of the *Act.* This latter question was not specifically addressed in the original section 95 determination nor is it addressed in the section 96 Determination now under appeal before me.

In light of the fact that the delegate did not specifically determine that Double D was an "employer" as defined in section 1 and given the uncertainty surrounding this issue (I am unable to unequivocally

determine the matter based on the material before me), I am of the view that the most appropriate disposition of this particular issue is to refer the matter back to the Director for further investigation.

In light of the above findings, I issued the following Order:

> **ORDER**
>
> Pursuant to section 115(1)(b) of the *Act*, I order that the issue of whether or not Double D Holdings Ltd. was an "employer" of some or all of the respondent teachers be referred back to the Director for further investigation.

THE DIRECTOR'S FURTHER INVESTIGATION

As directed, the Director's delegate conducted an investigation which resulted in a 2-page report (plus various attachments) dated August 9th, 2002. As previously noted, this report was provided to the parties so that they might file submissions responding to the delegate's findings. Counsel for Mr. Biln filed a submission; none of the employees did so.

It is perhaps useful, at the outset, to set out the relevant statutory definitions:

> "**employee**" includes
>
> (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
> (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
> (c) a person being trained by an employer for the employer's business,
> (d) a person on leave from an employer, and
> (e) a person who has a right of recall;
>
> "**employer**" includes a person
>
> (a) who has or had control or direction of an employee, or
> (b) who is or was responsible, directly or indirectly, for the employment of an employee;
>
> "**wages**" includes
>
> (a) salaries, commissions or money, paid or payable by an employer to an employee for work,
> (b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,
> (c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,
> (d) money required to be paid in accordance with a determination or an order of the tribunal, and
> (e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefit, to a fund, insurer or other person,
>
> but does not include
>
> (f) gratuities,
> (g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,
> (h) allowances or expenses, and
> (i) penalties;

> **"work"** means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

The central findings of the delegate's August 9th report are set out below:

> The following evidence shows that Double D was one of the controlling entities "who has or had control or direction of" the employees or who was responsible if not directly, then indirectly, for the employment of the employees.
>
> - It was decided the day to day business would be operated under the name Delphi to that end, teachers (instructors) were provided [sic]
> - The teachers were hired by Delphi and Double D as is evidenced from the attached employment contracts
> - The employment contracts indicate that both Delphi and Double D could control and direct the teachers' duties
> - Double D was the paymaster (e.g. most pay cheques were issued in the name of Double D)
> - The employment contracts state that the employees agree to faithfully serve both entities and that their confidentiality agreement protects both Double D and Delphi
> - Double D attended meeting [sic] where the day to day business of the Academy was discussed
>
> When Delphi ran into financial difficulties, Double D became a more active participant in the day to day operations of the business and decisions that affected the employees such as:
>
> - Biln and Kor attended and chaired staff meetings
> - E-mails were forwarded to the teachers from the directors of Double D
> - Kor and Biln chair meetings of the Parent's Advisor Committee once they became Directors of Double D [sic]
> - The directors of the Double D interviewed for the new principal for Delphi Academy [sic]
>
> According to Sean Newman, when Biln was deciding if he was going to invest in the school Biln asked him if he should. Newman stated that he suggested to Biln that if he did invest that he should be involved in the running of the school. Newman stated that Biln told him that he would be in charge. This appears to be substantiated by the participation of Biln in the business activities of the school.
>
> As stated previously Double D meets the definition of employer in this case and thus Serge Biln and Norma Kor as the directors/officers of Double D are responsible for the wages owing to the employees.

On August 12th, 2002, the Tribunal's Administrator forwarded the delegate's August 9th report to the parties and invited them to reply to the report by no later than September 3rd, 2002. Legal counsel for both Mr. Biln and Ms. Kor (the appellant in an essentially identical appeal--see E.S.T. File No. 2002/429) filed a joint submission, dated September 3rd, 2002, on their behalf. As previously noted, none of the employees filed a submission with respect to the delegate's August 9th report.

Counsel for Mr. Biln submits the following in response to the delegate's assertion that Double D was a co-employer as evidenced by the various employment agreements signed by the teachers in question:

> While the employment contracts appear to be submitted on behalf of Double D Holdings Inc. and Delphi International Academy as evidenced only by the signature line on the last page of the Agreement, a review of the entire agreement shows that the intention was that the teachers would be employed solely by Delphi International Academy. The Employment Agreement was written on Delphi International Academy letterhead and the first paragraph states that the employer is Delphi International Academy. It is clear from the employees' submissions and from a reading of the Employment Agreement as a whole, that Delphi International Academy was the sole employer of the teachers.

Counsel also says that Double D was not, in fact, the employees "paymaster":

> Further, please find enclosed T-4 Statements for the years 1998 through 2000, evidencing that Delphi International Academy, and not Double D, was responsible for renumerating the employees. Double D was not the the "pay master" as is submitted by the Director. This is further supported by the Double D bank statements, which were previously submitted, which support the position that wages were not paid to any of the employees from Double D accounts.

Regarding the extent of "direction and control" exercised by Double D over the teaching staff, counsel says that:

> ...neither Double D, nor Mr. Biln, nor Ms. Kor, were in a position to exercise any control over the employees as it has been admitted that Mr. Decker was the one who had exercised all care and control over the running of the schools and that it was he who was in charge of directing the employees and it was he who was responsible for the employment of the employees.

FINDINGS AND ANALYSIS

When considering if a particular firm is an "employer" as defined in section 1 of the *Act* I think it important to recognize that facts or circumstances that might be relevant in terms of a section 95 declaration, or in determining if a person is performing director or officer "functions", are not necessarily relevant when deciding if a firm is an "employer". Whether or not Mr. Biln was actively involved in the affairs of the school, or evidence that one individual person exercised the "controlling hand" over the business affairs of the organization does not of itself, in my view, determine whether Double D was an employer.

In order to address this latter question one must, of course, consider the language of the statute. The hallmarks of an "employer", under the *Act*, are control and direction of employees and/or responsibility for engaging employees although other factors may be relevant (note the use of the non-exclusive term "includes", rather than the exhaustive "means", in the language of the definition).

Although it was argued in some of the related appeals that the teachers in question were "independent contractors" rather than employees, that argument, to date, has been consistently rejected by the Tribunal. Indeed, in the appeal of the section 95 determination, the point was conceded (see *Delphi International Academy et al.*, B.C.E.S.T. Decision No. D166/02; see also *Delphi International Academy et al.*, B.C.E.S.T. Decision No. D426/02).

Thus, the teachers were "employees" for purposes of the *Act*. The key question, of course, is whether Double D was their "employer".

The written employment contracts

The delegate relies, in large measure, on the essentially identical individual written employment contracts that were signed by the teachers. Counsel for Mr. Biln notes that the contracts were "written on Delphi International Academy letterhead", however, that is not quite accurate. The masthead reads "Delphi Academy" which, so far as I can gather, was the moniker that was used in a generic sense to describe the integrated business enterprise consisting of all three corporate entities. The agreements themselves are in the form of a letter signed on behalf of both Double D Holdings Inc. and Delphi International Academy. The offer of employment embodied in the letter was, in turn, accepted by the teacher affixing their signature to a form of "acceptance" provision contained on the last page of the document.

Counsel for Mr. Biln correctly notes that the first paragraph of the letter states that the offer of employment is made by "Delphi International Academy". However, throughout the document reference is repeatedly made to the "Company/School"; as previously observed, Delphi Academy was the "school" and Double D, the asset-holding company. In my view, the many references contained in the document to "Company/School" refer to Double D, on the one hand, and Delphi Academy, on the other.

The express provisions of the agreement set out the usual rights and obligations of an employer--for example, to assign work, change job descriptions or duties, to pay benefits and reimburse employee expenses, and to terminate with notice--and these rights and obligations bind both Delphi Academy and Double D. Regardless of which entity might have actually paid the teachers, the teachers' salaries were to be paid only by "the Company". Under the agreements, the teachers' duty of faithful service, as well as their obligation to respect employer confidences, are duties imposed for the benefit of both Delphi Academy and Double D. The document states that "if you are prepared to accept employment with the Company/School" such acceptance is to be evidenced by signing the letter where indicated.

The terms of the agreement clearly evidence an intention and a right on the part of Double D to effect control and direction over the teachers' activities during the school day. The offer of employment emanates, *inter alia*, from Double D. The terms of the agreements, coupled with the statutory language, lead me to conclude that Double D was, indeed, an "employer" for purposes of the *Act*.

In my view, the only reasonable interpretation to be placed on the agreement is that an offer of employment was being made to the teacher on behalf of *both* Delphi Academy and Double D. It cannot be ignored that the document was prepared by Delphi Academy and Double D--*it is their document*--and thus to the extent that the agreement is ambiguous as to identity of the employer (and I do not think that it is), the *contra proferentum* rule would suggest that any such ambiguity be resolved in favour of the teacher not Delphi Academy and/or Double D.

Ownership of assets and other factors

It might also be noted that under the common law, ownership of tools and equipment is a relevant factor when determining if someone is an employee. An "employer" provides the requisite tools whereas, typically, an independent contractor provides their own tools. To the extent that Double D owned or controlled the school assets, it might be considered to be an "employer" as a matter of common law. In his original appeal submission (filed November 2nd, 2001), Mr. Biln acknowledged that Double D was

incorporated "as a holding company for minimal sundry equipment (i.e., computers, desks, tables, chairs etc.) which also leased and sub-let the Delphi premises" and that its purpose was to "financ[e] certain assets required in the school operations of Delphi". Clearly, Double D owned or controlled most, if not all, of the school's tools and equipment.

Although counsel for Mr. Biln disputes the delegate's assertion that Double D was a "paymaster", the evidence before me shows that at least one of the teachers, Ryan Douglas, received regular paycheques drawn on a Double D account. Obviously, such monies were paid to Mr. Douglas as "wages" and, under the *Act*, the obligation to pay wages rests with an "employer" (see Part 3 of the *Act*). While I would not suggest that the mere fact of paying "wages" to an "employee" constitutes the payor as an "employer", I would go so far as to suggest that, in the ordinary course of events, it is "employers", and not independent third parties, who pay wages to their own employees.

The *Act* is a "benefits-conferring" statute that ought to be liberally construed in favour of employees so that "its protections [extend] to as many employees as possible" (see *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 at p. 1002; see also *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27). It must be remembered that the issue now before me is whether or not Double D was an "employer", not whether Mr. Biln was actively involved in the business affairs of the school. Mr. Biln's liability does not depend on the nature or scope of his involvement; his liability flows from his status as a Double D director but only if Double D was, under the *Act*, an "employer". In my view, as I have previously stated, Double D *was* an employer and thus, since I have also previously determined that Mr. Biln was a Double D director during the relevant time period, he is personally liable for the employees' unpaid wages in accordance with the provisions of section 96(1) of the *Act.*

Summary

As the Tribunal noted in *ICON, supra*, the personal liability imposed on directors and officers under section 96(1) is predicated on an *employment* relationship between the employee and the corporation of which the individual is a director or officer. A section 95 "associated corporations" declaration does not constitute the associated firms as a single "employer" of all of the employees of any one of the constituent firms. Section 95 must be distinguished from section 38 of the *Labour Relations Code* which specifically states that several entities may be treated as one "employer" for purposes of the *Code.* The personal liability imposed on directors and officers under section 96(1) flows from their status as a director or officer of the corporate *employer* when the employees' unpaid wage claims crystallized.

It is conceded that the teachers in question were employees. However, this is one of those, perhaps rare, cases where the employees were employed by more than one firm, namely, by both Delphi Academy and Double D. It thus follows that directors and officers of both firms are personally liable under section 96(1) for the employees' unpaid wage claims (to a maximum of 2 months' wages per employee). Since Mr. Biln was a Double D director when the employees' unpaid wage claims crystallized, he is personally liable for those unpaid wages.

The appeal is dismissed.

ORDER

Pursuant to section 115(1)(a) of the *Act*, I order that the Determination be varied to indicate that Serge Biln is liable for unpaid wages and section 88 interest in the sum of $37,510.56 by reason of his status as a director of Double D Holdings Ltd., the latter being an "employer" of the respondent employees. In addition, Mr. Biln is also liable for whatever further section 88 interest that has accrued as and from the date of issuance of the Determination.

In all other respects, the Determination is confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal