

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 -

Tamara Zilcosky, a Director or Officer of Absolute Best Home Care Inc.

("Zilcosky")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 2000/562

DATE OF DECISION: December 13, 2000

DECISION

OVERVIEW

The Director of Employment Standards (who I will henceforth refer to as “the Director”) issued a Determination against Absolute Best Home Care Inc. (“Absolute” or “the employer”) on June 27, 2000. In that determination (“the Corporate Determination”), Absolute is found to have contravened the *Employment Standards Act* (the “Act”) and is ordered to pay Patty A. Wallace a total of \$1,339.74 in wages and interest.

A delegate of the Director issued a determination against Tamara Zilcosky, a director and/or officer of Absolute Best Home Care Inc. on July 24, 2000. That decision (“the Zilcosky Determination”) orders Zilcosky to pay the amount of the Corporate Determination. Zilcosky appeals the determination which is against her personally. The appeal is pursuant to section 112 of the *Act*.

ISSUES TO BE DECIDED

Zilcosky’s appeal goes to the matter of whether the Corporate Determination is or is not correct. She claims that Wallace’s hours of work are not as set out in the Determination, but less, and that the employee is entitled to only \$296.21.

FACTS

The Corporate Determination advised Absolute of the right to appeal. It is clearly stated in the Corporate Determination that the deadline for appealing the Corporate Determination was July 20, 2000. The determination was not appealed by that date.

On July 21, 2000, the Director issued a second determination against Absolute. That Determination (“the Penalty Determination”) imposes a penalty of \$500 on Absolute for a failure to produce employment records. Absolute did appeal that determination. It fell to me to consider the merits of the appeal. I did not find evidence that showed that the employer produced the records that it was ordered to produce and I therefore confirmed the Penalty Determination [*Absolute Best Home Care Inc.*, BCEST No. D522/00].

It was Zilcosky that prepared the employer’s appeal of the Penalty Determination and, in setting out the appeal, Zilcosky indicated that she was going appeal the Corporate Determination as well. Noticing that, the Tribunal sent Zilcosky a letter and, by that letter, advised her to file a copy Corporate Determination and explain why the appeal was late and why the Tribunal should accept the appeal given that it was late.

The Tribunal received an appeal of the Corporate Determination on September 22, 2000. It fell to me to decide whether it was or was not a case in which the Tribunal should extend the time limit for an appeal. I found that the employer had not advanced a compelling reason to allow the

appeal and, accordingly, I dismissed the appeal [*Absolute Best Home Care Inc.*, BCEST No. D536/00].

In appealing the determination which is against her personally, Zilcosky seeks to reopen matters which are decided in the Corporate Determination, namely, the extent of Wallace's work and the related matter of the amount which Absolute owes Wallace. Zilcosky does not argue that she was not a director/officer of Absolute when Wallace was employed by Absolute, nor does she claim that she has been ordered to pay an amount which is greater than the amount allowed by the *Act*.

ANALYSIS

I am satisfied that this appeal can be decided on the basis of written submissions as section 107 of the *Act* allows.

- 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.

The Zilcosky Determination is against Tamara Zilcosky as a director or officer of Absolute. 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).

Zilcosky does not claim that she was not a director or officer of Absolute in the relevant period, nor is she claiming that she has been ordered to pay moneys other than those permitted by the *Act*. What Zilcosky is seeking to do, on appeal, is reopen the matter of how many hours were

worked by Wallace and the related matter of what Wallace is owed in the way of wages, two issues which are decided in the Corporate Determination.

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. Through decisions which include *Kerry Steinemann, Director/Officer of Pacific Western Vinyl Windows* (BCEST No. D180/96), *Seacorp Properties Inc. et al* (BCEST No. D440/97) and *Peter Todoruk et al*, (BCEST No. D201/99), 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 are not entitled to use the appeal process to, in effect, reopen the determination against the corporate body. As noted in *Seacorp Properties*,

In *Steineman*, supra, the Tribunal decided that once a final determination is issued against a Corporation, the principle of issue estoppel prevents the Corporation's directors or officers from challenging subsequent determinations which are issued against them personally under Section 96 of the Act, provided that three criteria are met:

- the identical issue has been decided previously,
- the previous decision was final; and
- the previous decision involved the same parties, or their privies.

There are two exceptions to that principle – there was a fraud in issuing the Corporate Determination or the directors/officers have new and cogent evidence that was not available previously.

The appeal in this case is concerned with two issues, the number of hours worked and the related matter of what Wallace is owed in the way of wages. The identical issues are subjects of Corporate Determination. In the absence of a decision which extends the time limit for an appeal of the Corporate Determination, it is a final decision. And the parties are the same. Zilcosky is not suggesting that she is not a director or officer of Absolute and directors/officers have been found (in *Seacorp Properties*) to be privies to the corporation.

Is Zilcosky entitled to challenge the Determination which is against her personally for reason of the exceptions? She may not. The appellant has not submitted important new evidence which was not previously available, nor is fraud alleged. There is in fact no evidence of fraud in any of the circumstances surrounding the issuance of the Corporate Determination.

For reason of the foregoing, I find that Zilcosky is not entitled to challenge the validity of the Corporate Determination through the appeal of the Determination which is against her personally. She is limited to addressing the issues which arise specifically under section 96, that is, whether she is or is not a director or officer of Absolute and whether she has or has not been ordered to pay an amount which exceeds, or is in some way contrary to, what is permitted by the *Act*. Neither of those issues are addressed in her appeal and the appeal is, accordingly, dismissed.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated July 24, 2000, be confirmed in the amount of \$1,339.74 plus what further interest has accrued pursuant to section 88 of the *Act*.

Lorne D. Collingwood

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal