

An appeal

- by -

Scott Dow operating as Growthexperts Group Inc.
("Dow")

- 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.: 2002/407

DATE OF DECISION: December 10, 2002

DECISION

OVERVIEW

This is an appeal by Scott Dow operating as Growthexperts Group Inc. (“Dow”) of a Determination by the Director of Employment Standards (the “Director”) dated July 9, 2002 (the “Determination”). The Determination concluded Dow had contravened Part 3, Sections 18 and 21, Part 7, Section 58 and Part 8, Section 64(3)(b) of the *Act* in respect of the employment of in excess of 400 employees and ordered Dow to cease contravening and to comply with the *Act* and to pay an amount of \$1,605,171.92.

Dow says the Determination does not express what is realistically owed to the employees and does not include all of those who should be held responsible for the wages owed. Dow says the Determination needs to be varied to reflect a correct and reasonable wage liability and to correctly identify who is responsible for the wage liability, including associating another corporation, ASPI Europe Inc. (“ASPI Europe”), with Growthexperts Group Inc. (“Growthexperts”) under Section 95 of the *Act* and/or imposing liability on the directors/officers of ASPI Europe.

ISSUE

The issue in this appeal is whether Dow has demonstrated the Determination was sufficiently wrong in its conclusions of fact, in its interpretation of the facts or in its conclusions and decisions in respect of amounts owed, or who owes those amounts, to justify the Tribunal exercising its authority under Section 115 of the *Act* to vary it, cancel it and/or refer it back to the Director.

FACTS

Growthexperts operated a telemarketing/sales business. The company made a voluntary assignment into bankruptcy, and ceased operating, on December 5, 2001. The Director received in excess of 400 complaints from former employees of Growthexperts following that date, relating to unpaid wages and vacation pay and length of service compensation. The Director received information from many of the complainants and from the Trustee in Bankruptcy. Based on the information received, the Director concluded the *Act* had been contravened, that the complainants were owed wages, including vacation pay and length of service compensation, and calculated the amount owing.

The Director also found, through inquiries with the Registrar of Companies for the Province of British Columbia, that Growthexperts was neither incorporated nor extra-provincially registered in this province. Growthexperts was an Alberta registered company. Dow and Mr. Thomas Winters were listed as directors or officers of Growthexperts in the Alberta corporate registry. Because of the failure by Growthexperts to incorporate as a company or register as an extra-provincial company in this province, the Director treated Growthexperts as a proprietorship and found Dow and Mr. Winters to be persons in control of the ‘proprietorship’ as of the date of the bankruptcy of Growthexperts. Both had signed the resolution voluntarily assigning Growthexperts into bankruptcy. Both were found personally responsible for all wages owing under the *Act*.

During the investigation, it was revealed that Growthexperts was a wholly owned subsidiary of ASPI Europe, having merged with that company in or around July 2001. Apparently, this entity effectively

controlled Growthexperts. It is suggested that Dow and Mr. Winters, along with three other individuals, were directors of ASPI Europe, but there is not much other information on file relating to that corporation.

ARGUMENT AND ANALYSIS

Dow makes several arguments:

1. The amount of the Determination should be varied because if it is left to stand, he will be compelled to declare personal bankruptcy and the complainants will not receive any wages;
2. The amount of wage liability should have based on the director/officer liability provisions of the *Act* and, if so, the liability would more manageable and arrangements could be made to pay off that amount over time; and
3. ASPI Europe, and its director and officers, should also be made liable in the same manner as Dow, through Section 95 of the *Act*.

Notwithstanding the appeal suggests there was some error in calculating the wage liability of Growthexperts, it does not indicate or identify any specific errors in the wage liability calculation made by the Director. In fact, the only reference in the appeal to the calculation is in the following paragraph:

It is my intention here to appeal this determination in order that the employees will get paid what is realistically owed to them. There were some very large vacation and severance payments that were included in the initial determination. What would be a reasonable figure would be the amount of actual wages not paid plus any NSF cheques that were issued.

The burden is on Dow to persuade the Tribunal the Director made some error in calculating the wage liability. They have failed to meet that burden and any aspect of the appeal asserting the wage liability calculation done by the Director is dismissed.

The second argument made by Dow is that he should not have made liable as though Growthexperts was a proprietorship, and if that was appropriate then the persons who were directors and officers of ASPI Europe should have treated in the same fashion.

This argument challenging the decision of the Director to treat Dow as though Growthexperts was a proprietorship requires a consideration of the application and interpretation of Section 96 of the *Act* to the present circumstances. The relevant, and applicable, parts of Section 96 of the *Act* read:

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 an 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.*

The object of those provisions is a director and/or officer of a corporation. The *Act* does not define corporation. For the purposes of the *Act*, the *Interpretation Act*, RSBC, 1996, ch. 238, provides the following definition:

1. In this Act, or in any enactment:

“corporation” means an incorporated association, company, society, municipality or other incorporated body, where and however incorporated, and includes a corporation sole other than Her Majesty or the Lieutenant Governor; . . .

The Director found Dow, and Mr. Winters to be liable as proprietors of Growthexperts on the reasoning that Growthexperts was not registered as a ‘company’ or an ‘extra-provincial company’ in the province:

This is an Alberta registered company with its operations in B.C. Because of the [sic] company is not registered in this Province, our office is dealing with the Directors and/or Officers of the company as Proprietors of Growthexperts Group Inc.

I start by noting my agreement with the conclusion that on the available evidence and material on file that Growthexperts was neither a company nor an extra-provincial company in this province as it had failed to incorporate or register in this province, as required by the *Company Act*, RSBC 1996, ch. 62. There are consequences and penalties for that omission in the *Company Act*.

However, I also note that except for an oblique reference in Section 22 of the *Act* to the obligation of an employer to honour an employee’s written assignment of wages to an insurance ‘company’, the term “company” is not used in the *Act*. More specifically, is not used in Section 96 of the *Act*. In the context of the argument being considered here, the term “corporation” is used and applying the governing definition, Growthexperts was a corporation. Dow does not dispute he was a director of Growthexperts. The Director says Growthexperts should be treated as a proprietorship operated by Dow and Mr. Winters, “because the failure to incorporate the business in B.C. meant there are no Officers or Directors”.

I do not agree with the Director’s view that there are no officers or directors of Growthexperts because of its failure to incorporate as a company or register as an extra-provincial company in this province. The *Act* does not relate liability under Section 96 to directors or officers of “companies” or “extra-provincial companies”, but to directors or officers of “corporations”. Based on the governing definition, a corporation includes an incorporated company, “*where and however incorporated*”. Growthexperts falls within that definition, having been incorporated in Alberta under that province’s corporate legislation, and must be viewed as a corporation under the *Act*. Consequently, the finding that Dow was a director or officer of Growthexperts in the Alberta corporate registry effectively means he was “*a person who was a director or officer of a corporation*” under Section 96. A more fundamental question is whether, because of the failure by Growthexperts to incorporate or register in this province, the Director was justified in treating Growthexperts as a ‘proprietorship’, and Dow as a person in control of the ‘proprietorship’. In my view, the Director was not justified or correct in that decision.

As the Tribunal has indicated in *Albert Kenneth Archibald*, BC EST #D090/00, Section 96 of the *Act*, which has the effect of imposing a personal unpaid wage liability on corporate officers and directors, is an extraordinary exception to the general principle that corporate directors and officers are not personally liable for corporate debts. The exceptional nature of the remedy compels that it be narrowly construed [see *e.g.*, *Barrette v. Crabtree Estate, supra.*; *Re Westar Mining, supra.*; *Jonah v. Quinte Transport (1986) Ltd.* (1994), 50 A.C.W.S. (3d) 435 (Ont. S.C.)]. The legislature did not consider it either appropriate or necessary to impose a general personal liability on corporate directors and officers for all wage liabilities accrued under the *Act* by the corporation. In *Archibald, supra*, the Tribunal noted the legislative limitations on a director's and officer's liability:

While, to some, it may seem harsh that corporate officers and directors are personally liable for employees' unpaid wages, it should be noted that there are various limitations on their liability; it is not "open-ended". First, the liability is "capped" at 2 months' wages per employee; second, officers and directors have the ability to limit their liability by ensuring that employees' wages are kept current; third, in the event of a impending payroll shortfall, directors can further limit their continuing liability through resignation; and fourth, officers and directors are not liable for compensation for length of service if the corporation is in receivership, bankruptcy or is the subject of some other similar insolvency proceeding.

It would be quite inconsistent with the above comments, which in my view accurately capture the correct approach to director/officer liability under the *Act*, if that liability could be expanded because the corporation failed to comply with the registration requirements of the *Company Act*. More particularly, had the legislature intended Section 96 to apply only to directors or officers of provincially registered corporations, it could have done so. In the absence of such an expression of intent, it makes no sense to find Dow personally liable for all wage liabilities accrued under the *Act* when he is a director or officer of a corporation.

The appeal succeeds on the above point and the Determination must be cancelled.

In light of the above finding, it is not necessary to address the argument that ASPI Europe should have been associated with Growthexperts under Section 95 and the other directors or officers of that corporation should also have been held liable for some of the wage liability accrued under the *Act*.

For the benefit of the complainants, I want to be clear that my decision to cancel the Determination flows from the conclusion that the Director erred in treating Growthexperts as a proprietorship and Dow as a personally liable for the entire wage liability of that 'proprietorship'. I have not reached any conclusion on the liability of Growthexperts as a corporation or of Dow as a director/officer of a corporation.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated July 9, 2002 be cancelled.

David B. Stevenson
Adjudicator
Employment Standards Tribunal