

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 -

Jeffrey Kurtz
("Kurtz")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No: 1999/641

DATE OF DECISION: December 30, 1999

DECISION

OVERVIEW

This is an appeal brought by Jeffrey Kurtz (“Kurtz”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on September 30th, 1999 under file number ER 089-307 (the “Determination”).

On April 26th, 1999 a Director’s delegate issued a determination in the amount of \$17,684.26 against OptiVest Associates Inc., B & N Vision Associates and 1207162 Ontario Inc. on account of unpaid wages owed to 6 former employees. The three named firms were found to be “associated corporations” as defined by section 95 of the *Act*. I understand that on June 7th, 1999 a second determination, in the amount of \$217.23, was issued against all three firms on account of unpaid wages owed to another former employee. I shall refer to these two determinations as the “Corporate Determinations”. Neither Corporate Determination was appealed and the time for filing an appeal has now expired in each case.

I understand that the corporations named in the Corporate Determinations have ceased active operations and that, to date, no monies have been paid to the 7 employees.

The Determination now before me was issued against Kurtz 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 Determination was issued against Kurtz by reason of his status as an officer and director of OptiVest Associates Inc., B & N Vision Associates and 1207162 Ontario Inc. when the 7 former employees’ wages were earned or should have been paid.

Kurtz’s appeal (and that of a director/officer of 1207162 Ontario Inc., David Crombie, against whom a section 96 determination was also issued--see EST Decision No. 541/99 issued concurrently with these Reasons) is predicated on the assertion that the delegate failed to meet her obligation under section 77 of the *Act* (which states that a person under investigation must be given a reasonable opportunity to respond to allegations made against them) prior to issuing the Corporate Determinations. Kurtz also says that the:

“lack of notice...depriv[ed] him of the opportunity of raising...issues under section 96(2)...[namely] that he is not liable under the *Act*, the corporate entities having been placed into receivership in July of 1998. Receivership is one of the circumstances specifically set out by the Legislature in section 96(2) in which an

individual director will not be responsible". [see Kurtz's legal counsel submission to the Tribunal, dated November 17th, 1999 at page 2].

With respect to counsel's assertion that there were receivership proceedings in July 1998, I must observe that I have nothing before me in the way of documentary evidence to corroborate that assertion (although I have no reason at all to doubt counsel's assertion), nor is it clear whether one, two or all three firms were placed into receivership.

Kurtz also seeks a suspension of the Determination, pursuant to section 113 of the *Act*, pending a decision with respect to his appeal. These Reasons for Decision address only the suspension request.

ISSUE TO BE DECIDED

Should the Determination be suspended pending appeal and if so, on what terms and conditions?

ANALYSIS

The Director opposes the suspension request on the basis that the three corporations have no assets and thus it appears that any monies collected will be secured only from Kurtz and/or David Crombie. Alternatively, the Director requests that the Determination be suspended only if the full amount of the Determination is deposited with the Director.

It should be noted that there does not appear to be any dispute regarding the 7 employees' entitlement to unpaid wages. The employees worked in optical departments that were located in national retail department stores but were owned and operated by B & N Vision Associates (Zellers stores) and OptiVest Associates Inc. (The Bay stores). These latter two companies have ceased active operations; Revenue Canada apparently froze the companies' bank accounts which resulted in issued paycheques being dishonoured. In addition, subsequent payroll obligations were not met and thus the employees, in late January 1999, no longer continued to report for work. At all material times, Kurtz was an officer and/or director of both B & N Vision Associates and OptiVest Associates Inc. Although the Director contends that Kurtz was also an officer or director of 1207162 Ontario Inc. during the relevant period, that latter assertion is not unequivocally evidenced by the documents that are presently before me.

On the face of it, there is little, if any merit, to Kurtz's assertion that the Corporate Determinations were issued without his first being given an opportunity to respond. As noted in the Determination, the delegate made several unsuccessful efforts to contact Kurtz during her investigation. Once the Corporate Determinations were issued they were forwarded to the registered office of the three companies (all had the same address) as well as to Kurtz personally. Although a notice setting out the appeal period, as well as information regarding appeal procedures was contained in the determinations, neither Corporate Determination was appealed and the time for so doing has now expired.

In my view, there was a strong *prima facie* case for finding that B & N Vision Associates and OptiVest Associates Inc. were associated corporations as defined by section 95 of the *Act*, and as noted, prior to issuance of the Corporate Determinations neither company chose to advance *any* argument as to why they ought not to be associated. Further, Kurtz was clearly an officer or director of those two firms at all material times. There is no suggestion in any of the material before me that the 7 employees are not owed the wages awarded to them under the *Act*. In sum, the present appeal appears to have rather limited prospects for success other than with respect to the section 96(2) “receivership” defence [although approximately three-quarters of the employees’ wage claims consist of unpaid regular wages rather than compensation for length of service payable under section 63 of the *Act*-only the latter gives rise to a section 96(2)(a) defence; neither the subsection 96(2)(b) nor (c) defence seemingly applies].

The amount of the Determination is not inconsequential. The Corporate Determinations appear to have been issued after a proper investigation was conducted. Kurtz, in his capacity as the principal of both B & N Vision Associates and OptiVest Associates Inc., was given an opportunity to respond to the employees’ wage claims prior to the issuance of the Corporate Determinations but it would appear that he chose not to avail himself of the opportunity given to him. The Corporate Determinations were properly served on all three firms and yet none took any steps whatever to appeal. The responsibility for B & N Vision Associates’ and OptiVest Associates Inc.’s failure to appeal the determinations issued against them rests largely, if not exclusively, with Kurtz himself. B & N Vision Associates’ and OptiVest Associates Inc.’s liability is now a matter of *res judicata*; further, given Kurtz’s acknowledged status as an officer or director of those two firms when the employees’ wages were earned or payable, it would appear that even if his section 96(2) defence prevails, he will nonetheless have a significant monetary liability under section 96(1). Kurtz does not reside in the province of British Columbia rendering potential execution proceedings against him somewhat problematic, especially in the interim period before Kurtz’s appeal is finally resolved.

In light of all the foregoing, I do not consider it appropriate to suspend the Determination.

ORDER

Kurtz’s request, made pursuant to section 113 of the *Act*, for a suspension of the Determination pending a final decision on the merits of his appeal is refused.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal