

**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 -

Phillip John Morgan, a Director or Officer of New Shuttle Inc.  
("Morgan")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 2000/518 & 2000/519

**DATE OF HEARING:** November 30, 2000

**DATE OF DECISION:** January 02, 2001

**DECISION**

**APPEARANCES:**

Phillip John Morgan	on his own behalf
Gerry Aggett	on his own behalf
Michael Muelleder	on his own behalf
Ian MacNeill, I.R.O. & Terri L. Walowina, E.S.O.	for the Director of Employment Standards

**OVERVIEW**

I have before me two appeals, both filed by Phillip John Morgan (“Morgan”), pursuant to section 112 of the *Employment Standards Act* (the “Act”). Mr. Morgan appeals two separate determinations issued against him by a delegate of the Director of Employment Standards (the “Director”). Both determinations were issued against Mr. Morgan in accordance with the provisions of section 96(1) of the *Act* which states that a corporate director or officer is personally liable for up to 2 months’ unpaid wages owed to corporate employees so long as those unpaid wages “were earned or should have been paid” while the individual in question was a corporate officer or director. The corporate director/officer liability established by section 96(1) of the *Act* is subject to certain statutory and regulatory defences, none of which is applicable here.

The first appeal (EST File No. 2000/518) concerns a determination issued against Morgan for \$3,597.46 on account of 2 months’ unpaid wages owed to a former employee of New Shuttle Inc. (“New Shuttle”), Gerry Aggett (“Aggett”).

The second appeal (EST File No. 2000/519) concerns a determination issued against Morgan for \$684.39 on account of unpaid wages owed to a former New Shuttle employee, Michael Muelleder (“Muelleder”).

These two appeals were heard together in Nanaimo on November 30th, 2000 together with two other appeals filed by New Shuttle against, respectively, a wage determination issued in favour of Aggett and a penalty determination issued against New Shuttle. My reasons for dismissing those latter two appeals are being issued separately under BC EST. Decision No. #D542/00. Mr. Morgan, Mr. Aggett, Mr. Muelleder and the Director’s representatives, Mr. MacNeill and Ms. Walowina, all appeared at the appeal hearing.

**ISSUES ON APPEAL**

Morgan concedes that he was a director and officer of New Shuttle when Aggett’s and Muelleder’s wage claims crystallized (although he subsequently resigned his office and

directorship in late August of this year). Morgan's principal concern in each appeal relates to the complainants' unpaid wage entitlement and, more specifically, their total earnings (from which Morgan's 2-month personal liability may be deducted) during their respective periods of employment with New Shuttle.

Since Morgan's liability to each of the two complainants is set out in a separate determination (from which separate appeals have been filed) I propose to address Morgan's liability to each of Aggett and Mueller separately.

## **FINDINGS AND ANALYSIS**

### *The "Morgan/Aggett" appeal*

Mr. Morgan was a director and officer of New Shuttle when a determination was issued ordering that firm to pay Aggett the sum of \$18,563.15 on account of unpaid wages. The "New Shuttle/Aggett" corporate determination was issued on December 16th, 1999 under file number 93623. New Shuttle appealed the corporate determination, however, New Shuttle's appeal was subsequently dismissed as abandoned (see B.C.E.S.T. Decision No. D542/00, issued concurrently with these reasons for decision).

The calculation schedule appended to the "New Shuttle/Aggett" determination shows that Aggett earned \$19,896.60 (not including 4% vacation pay) during his 2-year tenure with New Shuttle (the report spans the period June 23rd, 1998 to June 24th, 1999). In his appeal documents, Morgan asserts that "it is not clear where the Director calculated the 'Total Earnings' number of \$19,896.60" and that he believes the correct figure ought to be \$19,727.85.

The delegate appended a 15-page "wage calculation report" to the "New Shuttle/Aggett" determination; this report clearly sets out, by both day and week, Aggett's earnings (including regular and overtime pay) during his employ. Since New Shuttle failed to provide the delegate with any payroll records relating to Aggett, the delegate relied on the records provided by Aggett himself and the delegate's calculations have now been confirmed by reason of the decision in BC EST. Decision No. #D542/00. Certainly, there is nothing in the material before me that would call into question the delegate's calculations.

The delegate expressly set out, at page 2 of the "Morgan/Aggett" section 96 determination, the calculations relating to Morgan's 2-month unpaid wage liability; these calculations are predicated on a "12-month earnings" figure of \$19,896.60. I have reviewed the delegate's calculations and find them to be entirely correct and otherwise in order.

It follows that this appeal must be dismissed. I shall now turn to the appeal of the section 96 determination issued against Morgan in favour of Mueller.

### *The "Morgan/Mueller" appeal*

On June 25th, 1999 a determination was issued against New Shuttle, in favour of Mueller, in the amount of \$6,504.45. This latter corporate determination was unsuccessfully appealed to the Tribunal by New Shuttle--in B.C.E.S.T. Decision No. D403/99, issued September 22nd, 1999, Adjudicator Stevenson confirmed the \$6,504.45 award in favour of Mueller. Subsequently, on

December 22nd, 1999, the Director issued a section 96 determination against Morgan awarding Muelleder the sum of \$2,064.39. There was an error contained in this latter section 96 determination (concerning the total amount of wages that had been earned by Muelleder during his 6-month tenure with New Shuttle) and, accordingly, the delegate subsequently issued a second “corrected” determination. It is this second determination, in the amount of \$684.39, that is now under appeal before me.

At the appeal hearing, the delegate requested that I cancel the prior December 22nd, 1999 section 96 determination ordering Morgan to pay Muelleder the sum of \$2,064.39 and I granted that request. Thus, there is now only one outstanding section 96 determination issued against Morgan in favour of Muelleder. As previously noted, this latter section 96 determination orders Morgan to pay Muelleder the sum of \$684.39. The delegate’s calculations with respect to this latter sum are set out at the bottom of page 2 of the determination and are based on Muelleder having earned \$9,124.10 during his 6 month (approximately) tenure with New Shuttle (June 21st to December 15th, 1998).

In his appeal documents, Morgan states that:

“The basis of this appeal...is based on the Employment Standards Branch calculation of my personal liability in this matter.

It is not clear where the Director calculated the new ‘Total Earnings’ number of \$9,124.10.”

Muelleder’s total earnings of \$9,124.10 (not including 4% vacation pay) are set out, in some detail, in an 8-page wage calculation report appended to the June 25th, 1999 determination issued against New Shuttle in favour of Muelleder. It will be recalled that this June 25th determination was unsuccessfully appealed by New Shuttle (Mr. Morgan acted on its behalf with respect to this latter appeal) resulting in a September 22nd, 1999 Tribunal decision (B.C.E.S.T. Decision No. 403/99) confirming the June 25th determination.

As set out at page 2 of the Morgan/Muelleder section 96 determination, the delegate simply calculated Morgan’s 2-month wage liability based on Muelleder having earned \$9,124.10 during his tenure with New Shuttle. Accordingly, Morgan was liable to pay Muelleder 2-months’ wages, namely, \$3,168.69 plus concomitant vacation pay and interest. After accounting for the sum of \$2,500 that was paid to Muelleder (via the offices of the Employment Standards Branch) after the issuance of the corporate determination, a section 96 determination was issued against Morgan for the “net” amount due of \$684.39.

The evidence before me shows that Morgan paid the Director five \$500 monthly installments toward his liability to Muelleder; these payments were made on January 12th, February 15th, March 15th, April 15th and May 24th, 2000 after which time the payments ceased--at that point Morgan apparently took the erroneous position that his liability had been fully satisfied. There is no evidence before me with respect to any other payments having been made by Morgan on account of his liability to Muelleder and, accordingly, so far as I can gather, the section 96 determination appears to be entirely in order.

In light of the foregoing, this appeal was similarly be dismissed.

**ORDERS**

Pursuant to section 115(1)(a) of the *Act*, I order that the June 30th, 2000 Determination issued against Phillip John Morgan in favour of Gerry Aggett be confirmed as issued in the amount of **\$3,597.46** together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Pursuant to section 115(1)(a) of the *Act*, I order that the December 22nd, 1999 Determination ordering Phillip John Morgan to pay Michael Muelleder the sum of \$2,064.39 be cancelled.

Pursuant to section 115(1)(a) of the *Act*, I order that the June 30th, 2000 Determination issued against Phillip John Morgan in favour of Michael Muelleder be confirmed as issued in the amount of **\$684.39** together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

***KENNETH WM. THORNICROFT***

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**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**