

An appeal

- by -

Thomas Winters III operating as Growthexperts Group Inc.
("Winters")

- 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.: 2002/408

DATE OF DECISION: December 10, 2002

DECISION

OVERVIEW

This is an appeal by Thomas Winters III operating as Growthexperts Group Inc. (“Winters”) of a Determination by the Director of Employment Standards (the “Director”) dated July 9, 2002 (the “Determination”). The Determination concluded Winters 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.

Winters denies all of the allegations made and rejects all of the conclusions found in the Determination, including the wage liability calculations. More specifically, Winters says the Determination wrongly concluded that Growthexperts Group Inc. (“Growthexperts”) was a ‘proprietorship’ and, in any event, was wrong to conclude he was a person ‘in control’ of the business of Growthexperts at the time wages were earned. Additionally, Winters says the calculations of wages owed are “fallacious” and without basis.

ISSUE

The issue in this appeal is whether Winters has demonstrated the Determination was sufficiently wrong in its conclusions of fact in its interpretation of the law or its calculations of the wages owed 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. Winters and Mr. Scott Dow 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 Winters and Mr. Dow 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, Winters indicated he had resigned from Growthexperts as a director or officer effective September 15, 2001 and provided a copy of his letter of resignation during the investigation.

ARGUMENT AND ANALYSIS

The burden is on Winters to persuade the Tribunal that the Determination is wrong in law, in fact or in some combination of law and fact (see *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96)). An appeal to the Tribunal is not simply an opportunity to re-argue positions taken during the investigation. No new information has been provided to the Tribunal in this appeal.

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. The appeal simply states that most of the employees were part time, with many working only when they felt like it, and that there is no basis for the calculations of wages owing made by the Director. Winters has not provided any factual support for the assertions made. He has failed to meet the burden on this point and this aspect of his appeal is summarily dismissed.

The second argument made by Winters is that the director should not have treated Growthexperts as a proprietorship. He says in the appeal:

1. The entity in question Growthexperts Group Inc. possessed a valid British Columbia taxpayer identification number and to which tax payments were made for more than two (2) years.
2. Mr. Winters was informed by the company's attorney that the company was authorized to do business in the province of British Columbia and the company was so involved for more than one (1) year prior to his involvement as a Director and Consultant . . .

I start by noting my agreement with the conclusion, based 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*. This ground of appeal raises a question of the application and interpretation of the *Act*, and particularly Section 96, to the circumstances of such a corporation. 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 *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; . . .

As stated above, the Director found Winters, and Mr. Dow, to be liable as proprietors of Growthexperts on the reasoning that Growthexperts was not incorporated as a ‘company’ nor registered as 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.

However, I 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 either Section 96 of the *Act*. In the context of the argument being considered here, the term “corporation” is used. Applying the governing definition, Growthexperts was a corporation. 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*. A more fundamental question is whether, because of the failure by Growthexperts to incorporate or register in this province under the *Company Act*, the Director was justified in treating Growthexperts as a ‘proprietorship’, and Winter 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 Winters personally liable for all wage liabilities accrued under the *Act* when he is a director or officer of a corporation.

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

As a result of the above conclusion, it is unnecessary to consider whether the Director was correct in finding Winters was a person “in control” of the ‘proprietorship’.

For the benefit of the complainants, I will summarize my decision. Winters has failed to show the wage liability calculations made by the Director were wrong in any respect. The Director erred in treating Growthexperts as a proprietorship and Winters as a personally responsible for the entire wage liability of that ‘proprietorship’. Winters has not demonstrated the Director erred in concluding Winters was a director/officer of Growthexperts during the relevant period of time. I have not reached any conclusion on the liability of Growthexperts as a corporation or of Winters 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