

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 -

Robyn Kelln, a Director or Officer of Heritage Car & Truck Rentals Ltd.

("Heritage")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: John M. Orr

FILE No.: 2000/475

DATE OF DECISION: December 13, 2000

DECISION

OVERVIEW

This is an appeal by Robyn Kelln (“Kelln”) pursuant to section 112 of the *Employment Standards Act* (“the *Act*”) from a determination dated June 13, 2000 (#ER 073561) by the Director of Employment Standards (“the Director”).

The Director found that Robyn Kelln was a director or officer of Heritage Car and Truck Rentals Ltd. (“Heritage”) and in that capacity was personally liable for two months wages owing to a former employee of Heritage.

Robyn Kelln has appealed the determination against him personally as a director or officer.

FACTS

On April 22, 2000 the Director issued a determination against Heritage in favour of a former employee in the amount of \$23,928.43. Despite having been served with the determination Heritage did not appeal that determination within the timeframe set out in the *Act*. Heritage did apply to the tribunal for an extension of time to file an appeal but on September the 11th 2000 the Tribunal rejected that application having found no reasonable explanation for the delay by Heritage in pursuing an appeal.

On June 13 2000 the Director issued this determination against Robyn Kelln and the appeal herein was filed on July 6 2000, which was within the time limits.

The reasons for the appeal are stated as follows:

1. The original pay plan was changed by mutual agreement and confirmed by writing "Exhibit A"
2. Alex Thomson did not do the work in question. From May 98 to April 99. We supplied time cards from other employees. Note: affidavits from 3 employees will follow confirming Alex Thomson was absent on at least two days per week and several days in the off-season.

ANALYSIS

I have reviewed the original determination and the current determination under appeal and it is clear that the two reasons for the appeal as stated above relate solely to the amount owed to the former employee by Heritage. As noted above the determination against Heritage was not successfully appealed. It cannot be appealed collaterally through this appeal of the personal liability.

In *Re: Kerry Steinemann* (1996) BC EST #D180/96 and in several cases thereafter this Tribunal has held that there are generally only two issues that arise on an appeal by a director or officer found liable for wages. The first issue is whether or not the individual named in the determination was in fact a director or officer of the corporation at the time that the wages were earned or became payable. The second issue is whether the determination exceeded the two-month wage limit. The tribunal has consistently held that a director or officer is not entitled to re-open the determination against the corporate body. The principle of issue estoppel applies. Where the director or officer failed to ensure that the corporation appealed the corporate determination in time, the director or officer is precluded from rearguing the merits except in limited circumstances which do not apply here: *Perfecto Mondo Bistro* BC EST #D205/96, *Re: Seacorp* BC EST #D440/97, *Re: 4230 Investments Ltd.* BC EST #D079/00.

In this case Robyn Kelln does not deny that he was a director or officer of Heritage at the time that the wages were earned or became payable. He also does not suggest that the Director has calculated wages beyond the two-month wage limit. He does say that the wages were altered by a written agreement and that the former employee was only entitled to \$2,750.00 per month. I note that this amount is generally consistent with the calculations made by the Director when vacation pay and interest are taken into consideration.

In conclusion I find that there is no basis upon which the Director's determination should be cancelled or a varied.

ORDER:

Pursuant to section 115 of the *Act* I order that the determination is confirmed.

John M. Orr

John M. Orr
Adjudicator
Employment Standards Tribunal