

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of a reconsideration pursuant to Section 116 of the  
*Employment Standards Act* R.S.B.C. 1996, c.113

-by-

The Director of Employment Standards  
(the "Director")

- of a Decision issued by -

The Employment Standards Tribunal  
(the "Tribunal")

**PANEL:** C. L. Roberts, J. McConchie, G. Crampton

**FILE NO:** 98/640

**DATE OF DECISION:** December 18, 1998

## **DECISION**

This is a decision based on written submissions by Graeme Moore on behalf of the Director of Employment Standards, and by Mark Annable.

### **OVERVIEW**

This is an application by the Director of Employment Standards (the "Director"), under Section 116(2) of the *Employment Standards Act* ("the *Act*"), for a reconsideration of a Decision which was issued by the Tribunal on August 11, 1998 and numbered as BC EST #D342/98 (the "Original Decision").

The Original Decision varied a Determination made by a delegate of the Director of Employment Standards on April 27, 1998. The Director's delegate dismissed Mark Annable's ("Annable") claim for unpaid wages owed to him by Dix Developments Ltd ("Dix") on the basis that Annable was a director of Dix, and a licensed real estate agent and, as such, was not covered by the provisions of the *Act*. The Director's delegate further determined that if Annable was covered under the *Act*, he would still not be entitled to wages or compensation for length of service, since there was no record of hours worked, and that Annable had voluntarily resigned from his employment.

Annable appealed, claiming that the Director's delegate erred in concluding that he was not owed wages because he was a director of Dix, that the payments did not fall within the definition of "wages" in the *Act*, and that Annable was precluded from filing a claim on the basis that he was a licensed real estate. At the time of the appeal, Annable had received compensation for length of service.

### **ISSUE TO BE DECIDED**

Did the Adjudicator err in the Original Decision in finding that a company director was not entitled to use the wage recovery mechanisms of the *Act* in pursuing "wages" owed to him solely by virtue of the fact that he was a director?

### **FACTS**

Dix was a company involved in real estate investments. Business was carried on by or through a number of other related companies, including Dix (Bay Villas) Capital Ltd., Dix (Maui Court) Capital Ltd., Dix (River Colony Estates) Capital Ltd. and Dix (River Front Court) Capital Ltd., which operated as the Dix Group of Companies. Together, those companies were in the business of selling real estate limited partnership units and real estate debentures. Each company represented separate units of multiple unit residential complexes. Kerry Dix was the President of all of those companies.

Annable began working for Dix from October 16, 1995 on the Maui Court project as a salesman and was paid on a commission basis. His position title was Vice-President, Operations and Finance. Annable was hired at an annual base salary of \$40,000 plus bonuses, which were payable upon the completion of the sale of all of the units. His duties were to assist purchasers (or

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"investors") of a unit to obtain mortgage financing. He had no role in the marketing or sale of the units. Annable was to receive a bonus upon the complete sale of units in each of the projects.

Annable became a Director of Dix (River Colony Estates) Capital Ltd. on August 30, 1996, Dix (River Front Court) Capital Ltd. on March 6, 1997, and Dix (Bay Villas) Capital Ltd. on June 24, 1997. He resigned as a Director of Dix (River Colony Estates) Capital Ltd. on November 10, 1997, and was removed as director and officer of the two remaining companies by Kerry Dix on July 17, 1997. His last day of work with Dix was July 18, 1997.

On July 17, 1997, Annable requested payment of bonuses owed. Annable alleged that at that point, Kerry Dix, the president of Dix, escorted him to the door and told him he was on stress leave. Kerry Dix advised the Director's delegate that Annable's resignation of his directorships coincided with his leaving Dix, and that Annable quit. Kerry Dix further advised the Director's delegate that the claim represented director's bonuses, not wages, paid only upon the successful completion of each project. Kerry Dix alleged that Annable quit before the projects were completed. Kerry Dix died after making this submission and Dix ceased operations after his death.

The Director's delegate found that the various companies, of which Annable was a director, were associated for the purpose of Section 95 of the *Act* and that his claims for bonuses were director's fees, which did not fall within the statutory definition of "wages". The Director's delegate also determined that the "Maui" bonus was not owed. She found insufficient evidence to support Annable's contention that the Maui project had been completed. The delegate was also unable to conclude, on a balance of probabilities, that the bonus fell within the definition of wages, as it was not related to hours of work, production or efficiency.

On appeal, the Tribunal found that the payment was a bonus which was a contractual obligation, not a discretionary payment, to be paid upon the sale of all of the units in the development. The Adjudicator found that the Maui project was fully subscribed by the end of March 1996, and that Annable was entitled to the bonus, which he characterized as a commission or money payable for work, and fell within the statutory definition of "wages". The Tribunal also found that Annable was entitled to be paid a bonus for the San Diego "River Colony" project, the "River Front" project, and the "Bay Villas" project, which were characterized by the Director's delegate as director's fees.

The Tribunal found that Annable was constructively dismissed when he inquired about Dix's failure to pay him either the Maui or the San Diego bonus on July 15. Kerry Dix purportedly advised Annable to be patient and that the bonuses would be paid shortly. He was placed on stress leave the following day.

On appeal, Annable did not dispute the Director's conclusion that he was a director or officer of three of the Dix Group of companies. At both the appeal and on reconsideration, Annable argued that there was nothing in the *Act* which precluded him from recovering wages. The Original Decision found no basis upon which to exclude directors or officers of companies from claiming unpaid wages. The Adjudicator stated:

I do not find any merit whatsoever in the position advanced on behalf of the Director in this case, and it should be noted, other cases. There is *nothing* in the *Act* that purports to exclude directors or officers from claiming unpaid wages. While it is true that directors or officers can be held liable for up to 2 months' unpaid wages for those employees who were not paid by the corporation, this provision does not act as a bar to any claim that might be advanced by a director or officer so long as that individual meets the statutory definition of "employee" (as

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Annable clearly does) and the claim is for "wages" as defined in the Act (as is the case here with respect to the claims now before me). Directors or officers are not listed among the various categories of individuals who are excluded from the provisions of the *Act* in Sections 31 and 32 of the *Employment Standards Regulation*.

**ARGUMENT**

The Director seeks a reconsideration of the Decision on the grounds that:

- 1) the Tribunal made an error of law; and
- 2) it is inconsistent with other Tribunal decisions which are indistinguishable on the facts.

The Tribunal has established a two-stage analysis for deciding whether it should exercise its discretionary reconsideration power (see *Milan Holdings Ltd.* (BC EST #D313/98). At the first stage, the panel decides whether the matters raised in the application in fact warrant reconsideration.

The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases.  
(*Milan Holdings*, p. 7)

The Tribunal agrees that this decision warrants an exercise of its reconsideration power. The application raises significant issues of principle and procedure which will have important consequences for future cases.

The second stage of the analysis involves a consideration of the merits of the reconsideration application.

The Director contends that the Tribunal erred in law in imposing a statutory duty on the Director to assist directors of a company in recovering unpaid wages. The Director argues that company directors should not be found to have the same status as "employees" under the *Act* as such a finding would be contrary to the remedial purposes of the *Act*.

The Director also argues that the Original Decision is inconsistent with previous Tribunal decisions: *Barry McPhee*, (BC EST #D183/97); *Caba Mexican Restaurant*, (BC EST #D370/96) and *Nicole O'Brien* (BC EST #D412/98). The Director contends that these decisions make a distinction between employees and employers, and stand for the proposition that, despite the broad definition contained in the *Act*, an employee cannot be found to include the controlling mind of the employer, or a partner of a business. The Director contends that the same principle applies to an officer and director.

It is the Director's policy not to pursue claims from directors and officers of a corporation for unpaid wages because officers and directors of corporations are personally liable for the payment of wages to employees. The Director acknowledges that this policy is not based on any specific words in the *Act* or *Regulation*, but argues that there are good reasons for adopting this policy. Those reasons include the fact that a company is a legal entity, controlled by its directors and

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officers and those individuals make decisions about what the company will do. The Director relies on the definition of "employer" in the *Act* in support of the argument that officers and directors who work for the company cannot be "employees."

The Director also contends that because the *Act* holds directors and officers personally liable for up to two month's unpaid wages, it would be improper to allow those same persons to stand with other employees in a statutorily preferred place.

The Director also contends that if the Tribunal decision were upheld, it could be open to abuse by company directors who might defer payment of wages with the ability to secure them through the statutory process provided by the *Act*.

Finally, the Director also argues that the *Act* grants broad discretion to the Director to decide whether or not to enforce a claim for benefits (*Canadian Imperial Bank of Commerce v. General Wholesale Products Corp.*, B.C.S.C unreported, New Westminster Registry No. C910211, June 18, 1991), and specific legislative authority not to enforce claims by corporate directors or officers to recover wages is unnecessary.

## **ANALYSIS**

The panel does not agree with the Director that the Original Decision is indistinguishable from the *O'Brien, McPhee and Mexican Restaurant* decisions noted above. As the Adjudicator noted in *Barry McPhee*:

...  
In spite of the above observations, the *Act* does not exclude the application of the normal concepts of the law of master and servant. In this context, Courts have stated partners cannot be employed by the partnership, any more than a person can be his own employee. This notion has also been extended to directors of companies, who, it has been decided, are not considered to be employees at common law unless they can prove an independent contract of employment...

Despite the broad language used to define who is an employee, it is not a reasonable interpretation of that language, taking into account the scope, purposes and the over-all objectives of the *Act*, to conclude it is intended to embrace the controlling minds of the company...

Further, the Adjudicator said:

I do not wish to be taken as saying a person who is an employer could never be an employee under the *Act*. But in such a case (as it is in this one), the onus would be on the person asserting the status of employee to show a clearly worded agreement establishing the employer/employee relationship, the authority by which the company is able to establish the relationship with that person, the services to be performed for the "salary" to be paid and the capacity in which the person is performing the services. It will be seldom a controlling mind of a company will be found to be an employee under the *Act*...

That is, the Tribunal must carefully consider the context in which a company director or officer seeks to claim employee rights and must pay particular attention to the purposes and overall objectives of the *Act*.

In *Barry McPhee*, the Tribunal did not finally dispose of the question of whether being a corporate director prevents a person from being an "employee" under the *Act*.

The Adjudicator in *Nicole O'Brien* commented as follows:

There is nothing in the Determinations to indicate what the Director's current policy is with respect to not enforcing remedies under the *Act* for "corporate part-owners/employees."

We also note the comments of Professor Mark Thompson in "Rights and Responsibilities in a Changing Workplace" in this regard. At page 154, Professor Thompson notes that "officers of corporations are themselves employees, and they may not be in a position to influence financial decisions to protect other employees' interests."

The *Act* is silent on the issue of whether corporate directors are disentitled from enforcing wage claims under the statutory employment standards scheme. The Determination has the effect of amending the statutory definition of "employee" contained in the *Act*.

The Tribunal is a creature of statute. Its powers are defined and limited by the *Employment Standards Act*. The legislation does not give the Tribunal power to decide fundamental issues such as who is entitled to pursue a claim for wages. It follows then, that we do not agree that the Director is empowered to do what the Tribunal cannot.

We note, on this point, the Director's argument that the *Act* "lacks a clear statement of disentitlement of corporate directors and officers to the wage recovery mechanisms like that contained in the Ontario *Employment Standards Act*." In fact, it has been held that a director can be an employee under the *Ontario Act*:

Whether the officer or director is, in addition to that capacity, an employee to perform services for the company for remuneration depends upon the terms of the agreement made between the company (usually acting through or under the authority of the board of directors) and the individual. By the definition of wages, there must be a contract of employment. Whether the relationship of employer and employee exists depends upon the evidence in the individual case....  
*D.J.'s Family Centre Ltd.* (1997) 14 O.R. (2d) 615.

Also, where a claimant was a director of the company but had no equity in the company, he was found to be an employee of the purposes of the *Act*. [*Re: Ornnstien (554111 Ontario Ltd.) E.S.C.* 96-250 (Bradbury)].

There may be appropriate circumstances where the Director may exercise her discretion not to enforce wage claims. However, we find that the Director has taken on the role properly exercised only by the Legislature in establishing a blanket policy which disentitles all employee/directors from wage claims where circumstances may dictate it would be inappropriate to do so. She has also fettered her discretion in doing so. It would be appropriate, in the Tribunal's view, for the Director to have regard to the facts in each case, looking to issues of whether the employee/director was a controlling mind of the corporation, whether the directorship was merely for administrative convenience and whether the directorship was real or a sham.

We find that the Adjudicator did not err in the Original Decision by deciding that the "blanket policy" of the Director should be overturned.

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The Director also disputed several findings of fact made by the Adjudicator, and contended that where it is clear that one party will not present evidence at a hearing, it is incumbent upon the Adjudicator to scrutinize the evidence carefully.

We find that the Director has failed to demonstrate how the Adjudicator erred in his findings of fact, and that he did not carefully scrutinize the evidence before him. The panel appreciates however, that it may be difficult for a party who did not appear at the appeal hearing to make arguments on this issue.

We note that Dix could have been represented by his executor or executor's counsel, and was not. There are no rules either of fairness or evidence that this Tribunal is aware of which requires an adjudicator to scrutinize the evidence of one party where the other party fails to appear.

**ORDER**

We order, under Section 116(1) of the *Act*, that the application for reconsideration is dismissed.

**Carol Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**

**John L. McConchie**  
**Adjudicator**  
**Employment Standards Tribunal**

**Geoffrey Crampton**  
**Chair**  
**Employment Standards Tribunal**