

An Application for Reconsideration

- by -

Byron J. Seaman, a Director or Officer of No. 289 Taurus Ventures
- and - Prema Systems Ltd. - and - 544553 B.C. Ltd.
- and - 546414 British Columbia Ltd. (associated corporations)
("Seaman")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2001/774

DATE OF DECISION: January 25, 2002

DECISION

OVERVIEW

This is an application filed by Byron J. Seaman (“Seaman”) pursuant to section 116 of the *Employment Standards Act* (the “*Act*”) for reconsideration of an adjudicator’s decision issued on August 14th, 2001 (B.C.E.S.T. Decision No. D248/01). The adjudicator dismissed Seaman’s application for an extension of the time period to appeal a determination that had been issued against him under section 96 of the *Act*.

PREVIOUS PROCEEDINGS

On August 28th, 2000 a delegate of the Director of Employment Standards issued a determination against four corporations, namely: No. 289 Taurus Ventures Ltd., Prema Systems Ltd., 544553 B.C. Ltd. and 546414 British Columbia Ltd. (the “Corporate Determination”). Pursuant to the Corporate Determination, the four corporations were declared to be “associated corporations” as defined in section 95 of the *Act* and, accordingly, were “jointly and separately” (severally) liable to pay a former employee, John Babcock (“Babcock”), the sum of \$253,544.83 on account of unpaid wages and interest.

The Corporate Determination was appealed to the Tribunal but this appeal was dismissed.

On January 24th, 2001, the determination now before me was issued against Seaman pursuant to section 96 of the *Act*--which states that corporate directors and officers are personally liable for up to two months’ unpaid wages for each employee. I shall refer to this latter determination as the “Section 96 Determination”. The Section 96 Determination ordered Seaman to pay Babcock the sum of \$17,907.20 (representing two month’s wages and section 88 interest) by reason of Seaman’s status as a director and officer of all four firms named in the Corporate Determination.

On June 11th, 2001 (*i.e.*, about 4 1/2 months after the Section 96 Determination was issued) Seaman filed an appeal of the Section 96 Determination with the Tribunal. This latter appeal was not filed within the statutory time period set out in section 112(2) of the *Act* and thus Seaman applied for an extension of the appeal period pursuant to section 109(1)(b) of the *Act*.

As noted above, Seaman’s application for an extension of the appeal period was dismissed by way of reasons for decision issued on August 14th, 2001 (B.C.E.S.T. Decision No. D428/01). It is this latter decision that is the subject of the present application for reconsideration.

THE APPLICATION FOR RECONSIDERATION

Seaman’s application for reconsideration, filed on his behalf by legal counsel, is dated November 2nd, 2001 (*i.e.*, some 2 1/2 months after the adjudicator’s decision was issued). Counsel for Mr.

Seaman suggests that there has been a denial of natural justice and, further, raises arguments with respect to the correctness of the Corporate Determination

ANALYSIS

I have a very real concern about the timeliness of this application (see *e.g.*, *Unisource Canada Inc.*, B.C.E.S.T. Decision No. D122/98; *MacMillan Bloedel*, B.C.E.S.T. Decision No. D279/00; *Director of Employment Standards*, B.C.E.S.T. Decision No. RD046/01) particularly given that the very issue raised by both Seaman's appeal and this application is whether Seaman proceeded with all due dispatch to challenge the Section 96 Determination. There is no explanation before me as to why there was a delay in making this application.

The material before me discloses that Seaman has now paid the entire amount due under the Section 96 Determination and that the funds were disbursed to Mr. Babcock in early September 2001. If, at this late juncture, the Tribunal was to reverse itself and allow Seaman's appeal to go forward, there would inevitably be some prejudice to Mr. Babcock. I note that Seaman never applied for a suspension of the Section 96 Determination (see section 113) pending the hearing of his appeal and/or reconsideration application even though it was his right to do so (see *City of New Westminster*, B.C.E.S.T. Decision No. D118/99).

Quite apart from the timeliness of the instant application, I am not satisfied that this application is meritorious.

The adjudicator, in his decision, noted the uncontested fact that the Section 96 Determination was served by registered mail on January 30th, 2001 at a point in time when Seaman was represented by legal counsel. The Section 96 Determination contained a clear notice that any appeal must be filed by no later than February 16th, 2001. In fact, by reason of the deemed service provisions of the *Act* (see section 122), Seaman was lawfully served on January 30th, 2001. Thus, Seaman's appeal was filed nearly four months after the statutory appeal period expired.

The adjudicator turned his mind to the relevant considerations governing the exercise of the section 109(1)(b) discretion as expressed in previous Tribunal decisions (such as *Niemisto*, B.C.E.S.T. Decision No. D99/96 and *Berg*, B.C.E.S.T. Decision No. D212/97) and concluded that, *inter alia*, not only had Seaman failed to adequately explain why his appeal was not timely, in any event, the appeal, on its face, lacked merit.

I do not see that the adjudicator erred or proceeded on some wrong principle. I do not accept that there was any denial of natural justice in this case. Mr. Seaman was given fair and reasonable notice of the Section 96 Determination--he does not assert otherwise--and, for whatever reason, he simply chose to ignore the matter until a substantial period of time had passed by. I agree with the adjudicator that the Director was not under any obligation in this case to serve the Determination on Seaman's legal counsel as well as on Seaman himself.

Finally, and I note this simply for the sake of completeness, I do not accept counsel's submission that my recent decision in *ICON Laser Eye Centres Inc.* (B.C.E.S.T Decision No. D649/01) is relevant here. In *ICON*, unlike the present case, the directors/officers were not directors or officers of the *employer* firm.

ORDER

The application to vary or cancel the decision of the adjudicator in this matter is **refused**.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal