

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-

Michael David Sawers,
Director of FCC (1995) Holdings Ltd.
(the “Appellant”)

-of a Determination issued by-

The Director of Employment Standards
(the “Director”)

ADJUDICATOR:	E. Casey McCabe
FILE NO.:	97/397
DATE OF DECISION:	October 24, 1997

DECISION

APPEARANCES

Michael David Sawers for himself

Lesley A. Christensen for the Director of Employment Standards

OVERVIEW

This is an application for reconsideration of Employment Standards Tribunal Decision No. D174/97 dated April 28, 1997. In that decision Adjudicator Thornicroft confirmed a Determination dated January 10, 1997. The Determination dated January 10, 1997 found that Mr. Sawers during the relevant period was the sole director and officer of F.C.C. (1995) Holdings Inc. ("FCC"). Accordingly, Mr. Sawers was held liable for unpaid wages of \$2,056.80 owed to a former FCC employee and was also liable for a \$500.00 penalty arising from the appellant's failure to produce payroll records. Mr. Sawers was held liable for the unpaid wages by virtue of his being a director of the company at the time the liability for wages arose.

The Determination for wages against FCC was not appealed nor was the \$500.00 penalty. However, Mr. Sawers did appeal the finding of personal liability made under Section 96(1) of the *Act*. Mr. Sawers appealed the Determination against him on the basis that the employee, Mr Parrotta, had been paid in full and that, secondly, Mr. Parrotta was not an employee but rather a sub-contractor who was not entitled to claim wages under the *Act*.

The appeal on those grounds was dismissed on the basis that the substantive matters raised by Mr. Sawers were res judicata. The principle of issue estoppel was applied against Mr. Sawers which had the effect of preventing Mr. Sawers from using the ruling made against him personally to reopen the Determination that had already been issued against the corporate entity FCC.

ISSUE RAISED ON RECONSIDERATION

Was Mr. Sawers liable under Section 96(1) of the *Act* if, at the time the Determination was issued, he was no longer a director of the company?

ANALYSIS

Mr. Sawers argues that he was not a director of FCC at the time the Determination was issued and therefore should not be held personally liable as a director of the corporation pursuant to Section 96(1) of the *Act*. The evidence discloses that FCC (1995) Holdings Inc. was incorporated on January 5, 1995. The appellant agreed to become a director of the company. However, the sole member of the company, who was issued one common share, was Mr. Sawers' son, Jeffrey F. Sawers. On February 26, 1996 a Form 10 and 11 pursuant to Sections 137 and 156 of the *Company Act* was executed giving Notice of Change of Directors. That notice, dated February 26, 1996 indicated that Michael D. Sawers ceased to be a director of FCC on February 5, 1996 and that Jeffrey F. Sawers became a director on the same date. However, the file material indicates that that document was not submitted to the Companies Branch until April 1997. Nothing turns on that fact in my view. The question under Section 96 is whether Michael D. Sawers was a director of FCC at the time the liability for wages arose. The wages claimed by Mr. Parrotta were found to have been earned between October 19, 1995 and November 29, 1995. Michael D. Sawers was a director of the company during that time.

Section 96 of the *Act* reads:

96. (1) (a) 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 two months' unpaid wages for each employee.

It is clear that Michael D. Sawers was a director of FCC during the relevant period of October 19 through November 29, 1995. A Determination was issued by the Director's delegate on January 10, 1997. An appeal decision (BC EST #D174/97) confirmed that Determination. Mr. Sawers argues that because he resigned as a director effective February 5, 1996 he should not be held personally liable under Section 96(1). I disagree with Mr. Sawers. The *Act* clearly states the time frame during which liability may be imposed for unpaid wages on a director of a corporation against which a determination has been made. The time frame stated in Section 96 is “. . . the time wages of an employee of the corporation were earned or should have been paid . . .”.

The question is not whether a director held office at the time a Determination was made. Rather, the question is whether a person was a director of the corporation at the time the employee earned his wages or should have been paid those wages. The purpose of the section is to allow a remedy for a complainant where a Determination is made against a corporation that is unable or unwilling to pay. The *Act* seeks to balance the interests of an employee who has not been paid wages against the interests of the employer and the directors of that corporation. The *Act* contemplates that in cases where a corporation is not able to fulfil its obligations a

complainant may seek a remedy against the directors of

that corporation personally. The balancing of interests of the employee and the directors comes in the limitation of that remedy to a period of two months. For the above reasons I dismiss this application for reconsideration.

ORDER

Pursuant to Section 116 of the *Act* I confirm the order made in BC EST #D174/97 dated April 28, 1997.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal