

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:	98/641
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 George E. Austin.

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 which was issued by the Tribunal on August 11, 1998 and numbered as BC EST #D345/98 (the "Original Decision").

The Original Decision varied a Determination made by a delegate of the Director of Employment Standards on May 8, 1998. The Director's delegate dismissed George Austin's ("Austin") claim for unpaid wages owed to him by Protective Stratagem Incorporated ("PSI") on the basis that Austin was a director of PSI and, as such, was not covered by the provisions of the *Act*.

Austin appealed, claiming that the Director's delegate erred in concluding that he was not owed wages because he was a director of PSI.

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" owing to him solely by virtue of the fact that he was a director?

FACTS

Austin alleged that he worked for PSI as Director of Operations from September, 1995 to July 3, 1997, at a monthly salary of \$2,000.00. He filed a complaint with the Employment Standards Branch claiming unpaid wages from June 1, 1997 to June 30, 1997, and provided pay stubs which indicated he had an hourly wage of \$11.00. Austin advised the Director that he had resigned from the position as a director of PSI on June 30, 1997. Austin further advised the Director that he was a director of PSI only for administrative convenience.

The Director determined that Austin was not an employee of PSI because a person who is a director or officer of a company is not an employee within the meaning of the *Act*. Having resigned his directorship on June 30, 1997 (which the Director found to be inaccurate, as a search of company records on May 5, 1998 indicated that he was still a director), the Director found that the *Act* did not apply to him.

Austin appealed, claiming that when he first went to work for PSI, the company was a sole proprietorship. It went public in an effort to raise capital, and Austin was given 6 shares of a possible 100,000. He indicated that the title Operations Director had no relation to the definition of a director contained in the *Employment Standards Act*. Austin claimed that the nature of his status with PSI was that of an employee, not a corporate director.

BC EST #D560/98
Reconsideration of BC EST #D345/98

On appeal, the Tribunal reiterated its decision in the *Annable* case (BCEST #D342/98) in rejecting the Director's determination.

The Adjudicator found no basis upon which to exclude directors or officers of companies from claiming unpaid wages. He 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 *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 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*.

BC EST #D560/98
Reconsideration of BC EST #D345/98

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 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 priority 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 corporate directors or officers to recover wage claims 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:

BC EST #D560/98
Reconsideration of BC EST #D345/98

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)].

BC EST #D560/98
Reconsideration of BC EST #D345/98

There may be appropriate circumstances where the Director may exercise her discretion not to enforce wage claims. However, we find that the Director has not only 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.

We find it inappropriate to interfere with the Original Decision (BCEST #D345/98).

ORDER

We order, pursuant to Section 116 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