

Citation: Verna Alison Callihoo and Brian Harold Sanders (Re)
2020 BCEST 72

An appeal

- by -

Verna Alison Callihoo
("Callihoo")

- and by -

Brian Harold Sanders
("Brian Sanders")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Kenneth Wm. Thornicroft

FILE NOS.: 2020/032 & 2020/034

DATE OF DECISION: June 18, 2020

DECISION

SUBMISSIONS

Darryl Sanders

on behalf of Verna Alison Callihoo and Brian Harold Sanders

OVERVIEW

1. These two appeals concern separate, but essentially identical, determinations issued under section 96 of the *Employment Standards Act* (the “ESA”) as against Verna Alison Callihoo (Tribunal File Number 2020/032; “Callihoo”) and Brian Harold Sanders (Tribunal File Number 2020/034; “Brian Sanders”). Section 96(1) provides as follows: “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 2 months’ unpaid wages for each employee.” In this case, the corporate employer was Sandman Enterprises Ltd. (“Sandman”).
2. Both appellants have authorized Darryl Sanders to act as their agent in these appeals. Darryl Sanders was also named in a separate section 96 determination (see Tribunal File Number 2020/039), and I am concurrently issuing separate reasons for decision in that matter, as well as in the appeal filed by Sandman (discussed in greater detail, below). By way of those decisions, I am dismissing both the Sandman and the Darryl Sanders appeals (see *Sandman*, 2020 BCEST 70, and *Sanders*, 2020 BCEST 71).
3. In these two appeals, both appellants maintain that the determinations should be set aside because the Director of Employment Standards erred in law or otherwise failed to observe the principles of natural justice. The reasons for appeal filed on behalf of Ms. Callihoo and Mr. Brian Sanders are identical:

I [Ms. Callihoo or Brian Sanders] have not been a Director or officer of Sandman Enterprises Ltd as of Jan 13 2017. [sic]

I have no vested interest or control of day to day activities in this company since I resigned on the above date.
4. The material filed in each appeal includes separate copies of identical resignation letters that read as follows:

Jan 13 ,2017

To WHOM IT MAY CONCERN,

I [Ms. Callihoo or Brian Sanders] resign my position as Officer and director of Sandman Enterprises as of this Date to pursue other interests.

[signature]

[sic]
5. The evidence before the Tribunal regarding the appellants’ status is largely, if not exclusively, hearsay evidence. BC Registry Services records indicate that both appellants resigned as Sandman *directors* as of January 13, 2017, but continued on as *officers* at least until October 24, 2018. Neither appellant has filed

any further evidence – such as a sworn declaration or even a simple written statement – indicating that they actually resigned their separate *offices* as of January 13, 2017.

6. However, BC Registry Services documents only establish a rebuttable presumption regarding an individual's status (see *Director of Employment Standards – and – Michalkovic*, BC EST # RD047/01). If the two appellants' resignation letters are *bona fide*, the appellants would appear to have rebutted the presumption, flowing from the BC Registry Service records, that they were Sandman officers when the complainant's unpaid wage claim crystallized.
7. Nevertheless, and despite some concerns I have regarding the veracity and probative value of the evidence submitted, in my view, these two matters should be referred back to the Director pursuant to section 114(2)(a) of the *ESA*.

THE CORPORATE DETERMINATION

8. On October 24, 2019, Shannon Corregan, a delegate of the Director of Employment Standards (the "delegate"), issued a determination (the "Corporate Determination") against Sandman pursuant to section 79 of the *ESA*. By way of the Corporate Determination, Sandman was ordered to pay \$4,249.88 on account of unpaid wages and interest owed to a former employee (the "complainant"). Further, and also by way of the Corporate Determination, Sandman was ordered to pay an additional \$3,000 on account of six separate \$500 monetary penalties (see section 98 of the *ESA*). Accordingly, the total amount payable under the Corporate Determination is \$7,249.88.
9. As noted above, in reasons for decision that are being issued concurrently with these reasons, I am dismissing Sandman's appeal. The Sandman appeal is untimely and, in my view, also wholly unmeritorious. I am also issuing, concurrent with these reasons, my reasons for decision in the Darryl Sanders appeal, dismissing it under section 114(1)(f) of the *ESA*.

THE SECTION 96 DETERMINATIONS

10. The two section 96 determinations issued against the present appellants on February 14, 2020, are virtually identical, as are the delegate's accompanying "Reasons for the Determination" (the "delegate's reasons"). Both appellants have been ordered to pay \$2,358.95 on account of unpaid wages and section 88 interest owed to the complainant.
11. In issuing the section 96 determinations, the delegate relied on BC Registry Services records that showed both appellants to be Sandman officers as of October 24, 2018. The complainant's wages were earned during the period from early April to late July 2018.
12. The delegate's reasons (at page R2 in each case) provide the following background information:

A copy of the Corporate Determination was sent to [Ms. Callihoo or Brian Sanders], naming [her or him] as a director and officer. [Ms. Callihoo or Brian Sanders] did not reply to the determination to dispute [her or his] liability as an officer. Additionally, the Director of Employment Standards issued a [demand for records and a – Note: this phrase only appears in the Brian Sanders reasons] determination against Sandman respect of a different complaint [sic]. A copy of this [demand and this – Note: this phrase only appears in the Brian Sanders reasons] determination was sent to

[Ms. Callihoo or Brian Sanders], naming [her or him] as a director and officer. [Ms. Callihoo or Brian Sanders] did not contact the Branch to dispute [her or his] liability as a director or officer. I find that [Ms. Callihoo or Brian Sanders] was an officer between April 6, 2018 and July 25, 2018, when [the complainant's] wages were earned or should have been paid.

13. The Corporate Determination was issued following an oral complaint hearing at which Sandman was represented by Darryl Sanders. The section 112(5) record in the Darryl Sanders appeal shows that the delegate had extensive communications with him prior to issuing the section 96 determination against him. However, the records in both the Callihoo and Brian Sanders appeals do not contain any evidence whatsoever demonstrating that the delegate directly contacted either person regarding their possible section 96 liability to the complainant, prior to issuing the determinations against them. I note, for example, that in the Darryl Sanders matter, the delegate had extensive e-mail communications with him and also issued a “preliminary findings” letter (and sought his response) prior to issuing the determination.
14. The Tribunal has consistently held that in this essentially identical factual situation, the Director of Employment Standards did not adequately comply with the obligation imposed by section 77: “If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.”
15. In general, where there has been a failure to comply with section 77 in circumstances such as those presented in these two appeals, the determination may be treated as a nullity, and the matter is referred back to the Director for further investigation (see, for example, *Field*, BC EST # D034/03; *Robertson*, BC EST # D031/09; *Porteous*, BC EST # D092/10; *Reid*, 2018 BCEST 8; *Snell*, 2018 BCEST 113; and *Hummell*, 2018 BCEST 114).

INTERIM ORDERS

16. Pursuant to subsection 114(2)(a) of the *ESA*, these two matters are referred back to the Director for further investigation. The Director shall afford Ms. Callihoo and Mr. Brian Sanders a reasonable opportunity to participate in the Director’s further investigation.
17. The Director shall complete this further investigation and report, in writing, to the Tribunal by no later than 90 days from the date of these reasons.
18. Upon receipt of the Director’s report, and after hearing from the parties, the Tribunal will issue final reasons for decision, and final orders, with respect to these two appeals.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal