

An appeal

- by -

Kay Gallagher of Clancey's Family Restaurant Ltd.

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Carol L. Roberts

FILE No.: 2003A/303

DATE OF DECISION: February 3, 2004

DECISION

SUBMISSIONS

Kay Gallagher	On her own behalf
Narinder Hayer	On her own behalf
Gorgeana Melnychuk	On her own behalf
Rhona Beck	On behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Kay Gallagher, pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued October 22, 2003.

Seven former employees of Clancey's Family Restaurant Ltd. ("Clancey's") filed complaints with the Director alleging that they were owed wages, compensation for length of service and vacation pay.

Following an investigation, a delegate of the director determined that Clancey's had contravened sections 18, 58 and 63 of the Act, and that the employees were entitled to wages, vacation pay, compensation for length of service and interest in the total amount of \$4,896.57. The delegate also imposed a \$1,000 penalty on the employer, bringing its total liability to \$5,896.57.

Clancey's ceased operation in August, 2003. The delegate concluded that Ms. Gallagher was a director or officer of Clancey's, and found her personally liable for two month's unpaid wages for each employee.

Ms. Gallagher contends that the delegate erred in law in finding that she was a director.

The parties were advised by the Tribunal's Vice Chair that the appeal would be adjudicated based on their written submissions and that an oral hearing would not be held. This decision is based on written submissions.

ISSUE TO BE DECIDED

Whether the Director erred in law in finding that Ms. Gallagher was a director of Clancey's.

FACTS

Clancey's operated a restaurant that closed suddenly on August 13, 2003. Clancey's sole director and officer was James Forsythe. Upon Mr. Forsythe's death, his daughter, Laura Forsythe, inherited his estate and became the sole director. Clancey's lease was held by Ms. Forsythe's company, K.G.L. Services.

Kay Gallagher is a shareholder in Clancey's, as well as the bookkeeper for K.G.L. and Clancey's. The delegate found that Ms. Gallagher and Ms. Forsythe made the business decisions. Ms. Gallagher did not dispute that finding. Rather, she acknowledges her shareholdings, and her "statutory right" to make

decisions to protect her business investment. She further indicated in her letter of appeal that “we”, without naming any other party, although I infer it includes Ms. Forsythe, sold some of the restaurant equipment to pay the employees’ wages.

Georgeana Melnychuk was hired as the supervisor of the restaurant in March 2003. There is no dispute that she reported to Ms. Gallagher or Ms. Forsythe.

The delegate found that, as Clancey’s bookkeeper, Ms. Gallagher was aware of the company’s financial position, and had signing authority and control of Clancey’s account.

The delegate determined that Ms. Gallagher was a director of Clancey’s during the time the wages were earned and payable, and as such, personally responsible for two month’s wages.

ARGUMENT

Ms. Gallagher contended that she is not a director of Clancey’s and that a corporate search would have disclosed that.

She further asserts that she was not a “hands on” employee, and did not work in the restaurant. She says her sole involvement was to pick up timecards and to drop off paycheques. She submitted that, as a shareholder of a company, it was her right to enter her “place of investment” and to “have involvement with your business”. Her submission continues as follows:

When Laura and I took an interest as to what the future held for Clancey’s Restaurant, we were assessing the situation so that we could make a decision on how to protect all of the shareholders investments and since no one had the funds or the interest to invest anymore monies in Clancey’s and since it could not longer run on a day to day basis or pay it’s bills it was inevitable that it would shut down [reproduced as written]

The delegate submits that it is not necessary that Ms. Gallagher formally hold a directorship to be found liable for wages. She submits that Ms. Gallagher advised her that she was a shareholder and partner in the business, that she had signing authority over Clancey’s account, and that she was regarded by the employees as an owner.

Ms. Melnychuk submitted that she reported to either Ms. Forsythe or Ms. Gallagher about restaurant issues.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I am unable to find that burden has been met.

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- (a) the director erred in law
- (b) the director failed to observe the principles of natural justice in making the determination; or
- (c) evidence has become available that was not available at the time the determination was being made

Section 96 provides:

- (1) 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 month's unpaid wages for each employee.
- (2) Despite subsection (1), a person who was a director or officer of a corporation is not personally liable for
 - ...
 - (b) vacation pay that becomes payable after the director or officer ceases to hold office

The Act does not define the term “director”. As noted by this Tribunal on many occasions (see *Okrinetz* (BC EST #D354/97), *Folino* (BCEST #D102/99), *The Director of Employment Standards* (BC EST #RD47/01) whether or not an individual is identified as a director on corporate documents is irrelevant in making a determination that the individual performed the functions of a director. Past Tribunal decisions have adopted the definition of director contained in the *Company Act*, finding that if a person, not formally designated as a director, performs the functions of a director, he or she is nevertheless a director for the purposes of the *Act*.

The functions of a director are to manage or supervise the management of the affairs and business of the company. They must act in the best interests of the company. They appoint signing officers, share transfers and allotments, and are responsible for the appointment of senior management staff, among other things.

The evidence is that Ms. Gallagher was a significant shareholder of Clancey’s. She participated in discussions about Clancey’s future, including hiring and firing of management employees. She was the company’s bookkeeper, and was aware of its financial position. She had signing authority on the company’s account. She participated in the decision to close the operations to protect her investment. Further, in conjunction with other shareholders or officers, took steps to sell Clancey’s assets in order to pay the employees.

I am unable to find that the delegate erred in law in concluding that, for the purposes of the *Act*, Ms. Gallagher was a director of Clancey’s, and is personally liable for the wages of the employees.

The appeal is dismissed.

ORDER

I Order, pursuant to Section 115 of the *Act*, that the Determination dated October 22, 2003 be confirmed with respect to the issue of Ms. Gallagher’s personal liability. The amount of quantum is referred back the delegate in accordance with my Order in BC EST # D019/03.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal