

An appeal

- by -

Laura Forsythe 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/304

DATE OF DECISION: February 3, 2004

DECISION

SUBMISSIONS

| | |
|----------------|---|
| Laura Forsythe | On her own behalf |
| Rhona Beck | On behalf of the Director of Employment Standards |

OVERVIEW

This is an appeal by Laura Forsythe, 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. Forsythe was a director or officer of Clancey's, and found her personally liable for two month's unpaid wages for each employee.

Ms. Forsythe contends that the delegate failed to observe principles of natural justice in making the determination.

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 failed to observe the principles of natural justice in finding that Ms. Forsythe was a director of Clancey's, and personally liable for wages owing to the employees.

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 Ltd. K.G.L. Services Ltd. was also a shareholder in Clancey's.

The delegate determined that Ms. Forsythe made decisions to hire and fire management personnel, and concluded that she was a director of Clancey's.

The delegate determined that Ms. Forsythe was a director of Clancey's during the time the wages were earned and payable. Because Clancey's had ceased its operations, she issued the corporate determination simultaneously with the determinations against the corporate directors and officers, concluding that they were responsible for unpaid wages pursuant to section 96 of the Act, and as such, responsible for unpaid wages.

ARGUMENT

Ms. Forsythe contends that she is not a director of Clancey's, and that she has never been a director.

She asserts that Clancey's was formed by four partners, one of which was her father. She says that her father was also a director of the company, and that she became the executrix of his estate on October 12, 2001. She asserts that she had "limited involvement" with Clancey's, and that her "role as a shareholder" was to make suggestions about the company's direction. Ms. Forsythe says that she "tried to be helpful" to the persons who had better knowledge of the operations of the restaurant than she did, since she did not live in Prince George where the restaurant was located, so she wrote cheques to the Receiver General and the landlord.

Ms. Forsythe contends that she was not a director, and did not act in the capacity of a director.

Nowhere in her appeal documents does Ms. Forsythe disclose how, in her view, the delegate failed to observe the principles of natural justice.

The delegate submits that Ms. Forsythe was aware of the allegations, the evidence in support of the allegations, and the opportunity to respond to them. The delegate submitted a chronology of successful and unsuccessful communications with Ms. Forsythe between August 27, 2003 and October 1, 2003, including Ms. Forsythe's responses.

The delegate notes that, while Ms. Forsythe denies that she is a director of Clancey's, she acknowledges that she is a shareholder and trustee.

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

Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker. Nothing in Ms. Forsythe's submission relates to a denial of her right to know the case against her, her right to respond, or any other principle of natural justice. I infer from her submission that she is simply of the view that the delegate came to a wrong decision.

While simply disagreeing with the delegate is not a ground of appeal, I have nevertheless addressed the arguments raised by Ms. Forsythe.

Section 96(1) provides that 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.

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, is 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. Forsythe, through her company, was the beneficial director of Clancey’s. She was also, through her company, a major shareholder and the leaseholder. She participated in discussions about Clancey’s future. She terminated the employment of the manager of operations and, with other shareholders, made a decision to hire a replacement. She says that Clancey’s “used one of her bank accounts” to pay the employees as well as the lease payments. She took steps to remove two managers from signing authority on Clancey’s account, and participated in the decision to close the operations. Further, Ms. Forsythe advised the delegate that she was taking steps to sell Clancey’s assets in order to pay the employees.

I have also had regard to a December 19, 2002 letter Ms. Forsythe sent to one of the managers of Clancey’s, which stated, in part as follows:

My father was the sole director of this company and now that position has been passed onto me. As well, my company KGL Services Ltd. holds the lease to Clancey’s. I feel I have no choice but to terminate your employment...

In light of all of the evidence, I find that not only did Ms. Forsythe perform the functions of a director of Clancey’s, she saw herself as one, and held herself out as one. Therefore, I find no basis for her argument that she is not 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. Forsythe'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