

An appeal

- by -

David Wilson, a Director or Officer of 0788164 B.C. Ltd.
carrying on business as Yianni's Greek Taverna
(“Wilson”)

- 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 (as amended)

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2007A/155

DATE OF DECISION: February 14, 2008

7. The Determination states that a BC On-Line search of the Registrar of Companies, conducted on November 7, 2007, showed that Yianni's was incorporated on April 13, 2007 and that as of October 29, 2007, Wilson was listed as a director of Yianni's. The registered and records office of Yianni's shown on the search is the home and mailing address for Wilson.
8. The amount of the Determination was found to be equivalent to two months' wages for the employees covered by the corporate Determination.
9. The Determination was issued quickly as the business had closed and there was a concern on the part of the Director that there were insufficient assets in the business to satisfy the amount found owing. The Determination also indicates that attempts to reach the directors/officers of the company were unsuccessful.

ARGUMENT

10. Wilson says the Director relied on inaccurate and unreliable information in finding he was a director/officer of Yianni's. The appeal asserts the following facts:
 1. Wilson became a director of Yianni's on April 23, 2007 for the sole purpose of creating the numbered company and obtaining the necessary registrations on behalf of Gerald Stephen Windsor, another director of Yianni's, and the company.
 2. Wilson had tendered his resignation as a director and/or officer of Yianni's on or about July 11, 2007. Wilson has attached a copy of a letter, dated July 11, 2007 and addressed to Yianni's business address to the attention of Mr. Windsor. The body of the letter reads:

“Please accept this letter as my resignation as director and / or officer of the above noted company. I trust that you will advise the registry of companies and any other party required and to change the corporate office to the above operating location.”

There is an acknowledgement of receipt, said to have been initialled by Mr. Windsor.

11. Wilson argues that under Section 128(2) of the *Business Corporations Act*, [SBC 2002] ch. 57, the delivery of the resignation letter to the company was effective resignation and he was not a director when the wages of the affected employees were earned or became payable.
12. Wilson also says that in any event, he did not participate in the daily activities of the business and carried out no functions typical of a director or officer.
13. In the alternative, Wilson says the amount found owing by the Director to the affected employees was based on inaccurate and unreliable information and should be varied.
14. The reply of the Director says that some elements of the complaint investigation indicated Wilson was involved to some extent in the operations of the company in late September, and refers to information received from one of the former employees that Wilson purchased some wine for the business and asked if other supplies were needed. The Director also says there was information that Wilson was a secured creditor of the business. Attempts by the Director to secure the input of Mr. Windsor in respect of the resignation were not successful. Neither piece of information provided with this appeal is found in the

Determination or the Section 112 record. The Director points out that the registered and records office of Yianni's continues to be the address of property owned by Wilson.

15. The Director submits the Tribunal has not accepted that appeals from director/officer Determinations can challenge the wage calculation made in the corporate Determination and, even if the Tribunal were inclined to revisit the corporate Determination, Wilson has provided no evidence indicating any error in that respect.
16. In his final reply, Wilson submits that any involvement he had in the business was not in the capacity of director or officer and was minimal. Wilson says the continuation of his home address as the registered and records office of the company is insufficient to make him a director.

ANALYSIS

17. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

112. (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

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

18. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to show an error in the Determination under one of the statutory grounds. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law (see *Britco Structures Ltd.*, BC EST #D260/03).
19. The Director was entitled to conclude, from the information contained in corporate records, that Wilson was a director of Yianni's: see *Wilnofsky*, BCEST #D106/99 and *Director of Employment Standards (Re Laurent Michalkovic)*, BC EST #RD047/01. The Tribunal has accepted and applied the following propositions:

1. The corporate records, primarily those available through the Registrar of Companies or available at a corporation's registered and records office, raise a rebuttable presumption that a person is a director or officer. In other words, the Director of Employment Standards may presumptively rely on those corporate records to establish director or officer status.

2. It is then open to the person, who, according to the corporate records, is a director or officer, to prove on the balance of probabilities that the company records are *inaccurate*, for example, because the person resigned and the documents were not properly processed, a person is not properly appointed etc.

3. There may well be circumstances where it would be inappropriate to find that a person is a director or officer despite being recorded as such. However, it will be the rare and exceptional case

to be decided on all the circumstances of the particular case and not simply by showing that he or she did not actually perform the functions, duties or tasks of a director or officer.

4. The determination of director/officer status should be narrowly construed, at least with respect to Section 96.

20. The evidence required to overcome the presumption must be credible and cogent.
21. Wilson has submitted a letter dated July 11, 2007 which he says is evidence of an effective resignation having taken place at a time prior to the period when the wages of the affected employees were earned or payable. Wilson says that letter overcomes the presumption raised by the corporate records.
22. Assuming the letter of resignation is a bona fide document, it was not filed with the Registrar of Companies, given that as of October 29, 2007 those records show Wilson continued to be a director of Yianni's and is supported only by Wilson's assertion - given through counsel - that it was actually delivered to the company on or about the date shown on it. In respect of such alleged resignations, the Tribunal has been reluctant to accept that an apparently timely but uncorroborated resignation is sufficient to rebut the presumption founded on the corporate record.
23. The complaint investigation was, for good reason, done quickly. It does not appear the Director was made aware of Wilson's alleged resignation during the investigation, but it is unclear that omission was any more a product of Wilson's lack of response than it was a product of the expeditious handling of the complaints by the Director. There is a suggestion that there was little opportunity given to Wilson to address this aspect of the investigation. No fault or blame for this is being attributed, but as a result, this appeal has revealed gaps in the investigation, the Determination and the record in respect of the alleged resignation which raise questions that I am unable to adequately address at this time.
24. While some of the available information raises concerns about the validity of the alleged resignation, there has been little or no investigation behind it. I am satisfied that the question of whether Wilson continued to be a director or officer of Yianni's at the time the wages of the affected employees were earned or payable should be referred back and examined further. The Director, as the person responsible under the *Act* for the investigating complaints and making Determinations, should perform and complete that function before the authority of the Tribunal under Section 112 of the *Act* is invoked. I anticipate the Director will examine the circumstances of both the alleged resignation and Wilson's involvement in the company after July 11, 2007.
25. Accordingly, I am referring this part of the Determination back to the Director.
26. In this appeal, Wilson has raised a question about the correctness of the calculation made by the Director of the wage amount owing to the affected employees. I agree with the submission of the Director that in this appeal Wilson is limited to arguing those issues which arise under Section 96 of the *Act*, which is whether the personal liability imposed by the Director accurately reflects the amounts for which a director is liable under that Section 96 and whether he was a director or officer of Yianni's at the time the wages of the affected employees were earned or payable. The latter question is referred back.
27. In respect of the former question, the amount of wages owing to the affected employees has been decided by the Director in the corporate Determination. The basis for the calculation of those amounts is clearly set out in the corporate Determination. An appeal was filed on the corporate Determination and that appeal has been dismissed. Wilson has provided no evidence to challenge the conclusion of the Director

that the wages payable under this Determination are within the limit on wages for which a director is liable under Section 96 of the *Act*.

28. This part of the appeal is dismissed.

ORDER

29. Pursuant to Section 115 of the *Act*, I order the Determination dated November 5, 2007 be referred back to the Director on the question of whether Wilson was a director or officer of Yianni's at the time the wages of the affected employees were earned or payable.

David B. Stevenson
Member
Employment Standards Tribunal