

An appeal

- by -

Sunwest Glazing Inc.
("Sunwest" or the "Employer")

- 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: Ib S. Petersen

FILE No.: 2000/412

DATE OF HEARING: September 1, 2000

DATE OF DECISION: February 5, 2001

DECISION

APPEARANCES:

Mr. Ken Maggs	on behalf of the Employer
Ms. Pat Maggs	
Mr. Steve Pulham	on behalf of himself
Ms. Judy McKay	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued on June 7, 2000 which determined that the Employer was liable for \$2,816.82 on account of vacation pay to Pulham.

ISSUES

The Employer appeals and says that Pulham was a director and shareholder of the Employer and was an independent contractor for part of the time in question. The issues in the instant case, therefore, in my view, boils down to whether or not Pulham was an employee for the purposes of the *Act* for all or part of his association with Sunwest. The central aspect of this is whether or not he was a director or officer. There is also an issue as to whether or not he was an independent contractor.

FACTS

At the hearing, Ken and Pat Maggs testified on behalf of the Employer. Pulham also testified.

For the most part the material facts were not in dispute. Pulham worked with Sunwest from August 10, 1998 to December 8, 1999. According to the Determination, Sunwest agreed that he was an employee from August 10, 1998 to March 31, 1999 and, further, took the position that he was an independent contractor from April 1, 1999 to December 8, 1999. When the relationship between Pulham and Sunwest came to an end in December 1999, he filed a claim with the Employment Standards Branch for vacation pay, expenses and compensation for length of service. The delegate determined that he was not entitled to the expenses claimed nor was he entitled to compensation for length of service as Sunwest. The delegate found that Sunwest had just cause for the termination. Pulham did not appeal those conclusions. The only matter before me is whether he is entitled to the vacation pay. The Director’s delegate and Pulham agree that there was an error in the Determination and that

the amount owing is \$975 for the period August 10, 1998 to April 1, 1999 and not \$1,465 as stated in the Determination.

Maggs explained that Sunwest was his idea. He stated that he set up the company with his wife in 1997. From some of the correspondence it appears that the company was actually set up in 1998. In any event, nothing turns on this. At that time both he and Pulham worked for the another company and were co-workers. The two discussed the idea and agreed to set up a business. Both became shareholders and directors in that business. Shortly after the business had been established, Pulham invited another individual, Mike Smith, to join the business. This individual apparently had some funds to invest and, moreover, was qualified to do the fabrication work involved with the business. He worked for one the suppliers at the time. Pulham invited Smith to join the business without consulting Ken Maggs though the latter agreed that it was “logical” given the need for more funds and Smith’s experience. Initially, Pulham had been 50% shareholder with Ken Maggs. As well both were officers of the company, Maggs was the president and Pulham held the office of secretary. Maggs later relinquished the office of president to Gail Wooley. When Smith joined the business, he became a shareholder as well, and now each of the three had 1/3 of the common shares.

Initially, all three continued working for their respective employers while developing the business of Sunwest. Smith did fabrication, Pulham did sales, and Maggs was the general manager. Some time later, Pulham left his employment and started working full time for Sunwest, responsible for sales. However, Maggs testified that from the time Pulham became a full time employee of Sunwest he made all decisions, wrote most cheques and was responsible for bringing in most of the work. This work, however, was predominantly smaller jobs. Ken Maggs testified that, in his view, the company could not carry on in this manner. He stated that Pulham could not be properly compensated and there was need for a further capital infusion into he company. Maggs, therefore, approached a friend of his in Ontario, initially for a loan to fund a major project.

On March 21, 1999, Ken Maggs had a meeting in Ontario with his friend, a Tim Draper, who apparently was willing to invest in the company. However, Draper wanted a 50% share of the company. He was prepared to accept that Smith became shop foreman at a “good salary” but that his shareholding be cancelled. He would also be given some guarantee of secure employment for a year. Apparently, Smith had not met his end of the bargain and invested funds into the company. It appears that all concerned ultimately accepted the cancellation of Smith’s shareholding and giving Draper one half of the shares in the company. Maggs also testified that he explained to Draper that Pulham could not carry on at the level of compensation he was then receiving and Draper apparently agreed to boost his salary to \$50,000 per annum. Upon his return, around March 25 or 26, Maggs met with Pulham and discussed the situation. Maggs testified that, in his view, Pulham was upset that control of the company was slipping away from him.

Shortly thereafter, Pulham went looking for a new location for the company's plant. There was some disagreement as to the location of the plant. Eventually, it was agreed to locate the plant in Langley, B.C. Maggs testified that Pulham and he signed the lease and wrote post-dated cheques for the lease payments.

Pulham operated sales out of his Burnaby home. Maggs explained that he asked Pulham to come to Langley on a once or twice weekly basis but that Pulham refused, preferring to operate out of Burnaby. Most of the sales at the time were in the Vancouver area and, from Maggs' perspective, Pulham was not willing to change the focus of his sales efforts from that area. It appears that Maggs was prepared to allow Pulham some time to "come around" and adjust to the new situation. However, at the end of April 1999, it appeared to Maggs that Pulham was not cooperating. Draper apparently wanted him "fired". Maggs believed that Pulham needed more time. However, he testified, the company was "floundering" and the reason was that sales was not performing. At the time, the company's expenses were approximately \$28,000 per month and revenues were \$10-12,000. Maggs and Draper decided to change Sunwest's relationship with Pulham from employee status to an independent contractor relationship. In Maggs words, "if he acted like one, he should be one." There were some negotiations between the parties and a number of different arrangements suggested. Ultimately, Sunwest offered Pulham a retainer of \$2,000 per months plus \$500 for expenses. That arrangement would allow Pulham to focus on the Vancouver area. Pulham was also told to start invoicing Sunwest as a contractor. Sunwest was no longer interested in pursuing smaller projects, under \$1000, and Pulham was given the freedom to do such projects on his own. Maggs candidly testified that Pulham had little choice in the matter: Draper told him that Pulham had to be a contractor or he had no job.

There is no dispute that in September 1999, Pulham resigned as a director and officer. From the evidence at the hearing, it appears that he still maintained his 25% share in the Employer. In cross examination, Maggs agreed that there were no formal directors' meetings, but said that there were many informal meetings. In my view, given the size of the company, that is not surprising. Essentially, there were only 4-5 persons working for or with Sunwest: Ken and Pat Maggs (who did bookkeeping), Smith, Pulham and Glen Maggs (who did some subcontracting for the Employer).

Pulham testified that he was an employee of Sunwest between August 1998 and March 31, 1999. From April 1, 1999 he became a "subcontractor" as mentioned above. He testified that the terms and conditions offered to him changed numerous times between the end of March and April 6-7, 1999. He agreed that he was a director at this time. He explained, however, that after April 1, his role was basically confined to sales. Until that time, he was doing "whatever"--purchasing, installation etc. However, he also agreed that he had signing authority for Sunwest for cheques of up to \$500 and that he signed credit applications on behalf of it. He also agreed that he hired installers to work for Sunwest.

At the end of May, Pulham wrote to Pat Maggs that he no longer wished to be a “subcontractor” and wanted to (again) become an employee of the company. On June 5, Pat Maggs replied that she could not “confirm” that he had become an employee until “Ken [Maggs] and Tim [Draper] have come to a decision”.

In December 1999, Pulham’s association with the Employer was terminated.

ANALYSIS

The delegate concluded that Pulham did not exercise the functions of a director or officer. As well, she did not accept that he was an independent contractor from April 1, 1999. With respect to the first issue, the delegate found that the (faxed) correspondence between Pulham and Sunwest indicate that he did not have much control of the affairs of the company. The delegate was of the view that Ken Maggs made the primary decisions as to how the company carried on its business. With respect to the second issue--whether Pulham was an independent contractor--the delegate considered the traditional common law tests in the context of the *Act* and concluded that he was an employee.

As mentioned earlier, the issue is Pulham’s employee status under the *Act*?

The *Act* defines an “employee” broadly (Section 1).

“employees” includes

- (a) a person ... receiving or entitled to wages for work performed for another,
- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,

An “employer” includes a person

- (a) who has or had control or direction of an employee, or
- (b) who is or was responsible, directly or indirectly, for the employment of an employee;

“work” means the labour or services an employee performs for an employer whether in the employee’s residence or elsewhere;

These definitions are to be given a broad and liberal interpretation. The basic purpose of the *Act* is the protection of employees through minimum standards of employment and that an interpretation which extends that protection is to be preferred over one which does not (*Machtiger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986). Moreover, my interpretation must

take into account the purposes of the *Act* (*Interpretation Act*). The Tribunal has on many occasions confirmed the remedial nature of the *Act*. Section 2 provides (in part):

2. The purposes of this Act are as follows:

- (a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;

I turn first to the issue of employee versus independent contractor. The Employer did not in any substantial manner address the test required to establish an independent contractor relationship. Given the onus on the Appellant, that is fatal with respect to this ground of appeal. Based on the evidence at the hearing, and the legal principles, I would have little difficulty in characterizing this relationship as an employment relationship which--aside from the issues arising from the director or officer status--would be protected by the *Act*. In my view, the delegate thoroughly canvassed the issue of independent contractor status and I agree with the delegate's conclusions on this point.

Even if I accepted that the parties intended the relationship to be an independent contractor relationship, for a period anyway, and there is some support for this in the evidence, in *Straume v. Point Grey Holdings Ltd.*, [1990] B.C.J. No. 365 (B.C.S.C.), the court noted, at page 3, that "the declared intention and classification of the contract parties may not bind statutory or third parties not party to the contract as against its true nature". While the parties' intent is relevant in an action for wrongful dismissal, *i.e.*, an action founded in contract, and may be a relevant factor before the Tribunal, I do not agree, in view of the remedial nature of the statute, that much weight should be placed on this factor. As well, Section 4 of the *Act* specifically provides that an agreement to waive any of the requirements is of no effect.

The central issue in this case is whether Pulham was a director and officer of Sunwest and, if so, what consequences flows from that. I now turn to that issue.

From August 1998 to September 1999, there is no dispute that Pulham was a director and officer according to the corporate records. He was a director according to the Registrar of Companies. In addition, he was an officer of the company, the corporate secretary. The delegate, nevertheless, considered whether or not he did, in fact, perform the functions of a director or officer. The parties agree that he was an employee during most of this period, *i.e.*, employed under a contract of employment which, as indicated above, in my view, does not necessarily mean that he was an employee for the purposes of the *Act*. From April 1, 1999 to September 1, 1999, when he resigned as a director and officer, the parties do not agree that Pulham was an employee during this period: Sunwest says that he was an independent contractor and, therefore, is not entitled to the protection of the *Act*; Pulham says that he was an employee and entitled to that protection. As noted above, I agree with the delegate that Pulham was an employee, though not necessarily for the purposes of the *Act*. After September 1, 1999, it is clear that Pulham was no longer a director and officer of Sunwest.

In my view the delegate erred when she determined that Pulham was not a “real” director and officer between August 1998 and September 1999.

Though officers and directors are often considered in the same breath, it is, in my view, necessary to distinguish between the two. These terms are not synonymous.

There is some support for a functional test with respect to director or officer status in the Tribunal’s jurisprudence (see, for example, *Sindia (c.o.b. R. Moore Contracting Ltd.)*, BCEST #D131/99. In *Sindia* the Adjudicator stated:

“Taking that approach, with which I agree, if I accept that it is not necessary to be recorded in the official company records as a director to have liability under Section 96, *then the flip side surely has to be that being recorded as such may not be sufficient in itself to establish liability*. If the registration as director or officer is merely token and there is no accompanying exercise of typical director or officer tasks, duties or functions, liability under Section 96 may not exist...” [emphasis added]

This comment, however, must be considered in the factual context of the case. In *Sindia*, which arose under Section 96 of the *Act*, dealing with director or officer liability, there was evidence that the appellant had resigned as a director or officer some years prior to the (director’s) determination under appeal. The Director argued that the appellant was a director or officer according to the Registrar of Companies at the time the corporate determination was issued, some two years after the alleged resignation. The Adjudicator decided that the evidence of the resignation could not simply be dismissed out of hand and referred the matter back to the Director for further investigation. In my view, this case does not stand for the broad proposition that there is a “flip-side” to the argument that it is possible to be a director or officer without being on the corporate records as such.

In *Michalkovich*, BCEST #D056/00, the Adjudicator noted as follows:

“As the Tribunal has previously noted, corporate searches only raise a rebuttable presumption regarding an individual’s status (see *Wilnofsky*, BCEST #D106/99). Further, one may be considered to be an officer or a director even if not so named in corporate records (see *Penner and Hauff*, BCEST #D371/96) and *logic would suggest that the opposite result may also hold.*” [emphasis added]

In *Michalkovich*, the Adjudicator cancelled a Determination which found that Michalkovic was liable as a director under Section 96 of the *Act* for compensation for length of service to two former employees. Corporate records, attached to the Determination, indicated that he was not a director. The records did, however, indicate that he was an officer, “vice-president, technology.” Based on the evidence before him, the Adjudicator found that there was

nothing that would support a conclusion that Michalkovic “performed the functions ... of a director during the material time ...” As well, the uncontradicted evidence before the Adjudicator demonstrated that he “did not have any of the usual authorities or powers associated with a corporate officer.” His officer title was merely a title to improve his status with the Employer’s customers (*Wilnofsky*, BCEST #D106/99; *Penner and Hauff*, BCEST #D371/96. The Adjudicator disposed of the case as follows:

“In my view, this Determination must be cancelled because, first, it is predicated on the demonstrably false assertion that Michalkovic was a Softwex director. Second, even if it could be said that the Determination was issued on the alternative basis that Michalkovic was a Softwex officer (and I have some very real concerns about that point), *the uncontradicted evidence before me clearly shows that Michalkovic’s duties in the organization were not those that might ordinarily be ascribed to a corporate officer.*” [emphasis added]

The appellant in question in that case did not have signing authority nor did he have authority to hire or fire employees. His main task was to provide computer software expertise. Michalkovic did not report to Softwex’ president but to another officer. In the result, in *Michalkovic*, the Adjudicator found that the officer title was merely a title. Consequently, I do not agree that these two cases, *Michalkovic* and *Sindia*, stand for the broad proposition that there is a “flip-side” to the argument that it is possible to be a director or officer without being on the corporate records as such.

The B.C. *Company Act* which defines “director” to include “every person, by whatever name designated, who performs the functions of a director” (Section 1). Directors are elected by the shareholders to manage or supervise the management of the affairs and business of the corporation (Section 117 of the *Company Act*) and are ultimately responsible to the shareholders. They are subject to removal by the shareholders. Directors are elected to a company’s board either through presence at a shareholders meeting and did not refuse the appointment or by written consent (Section 112, *Company Act*). In other words, they have to express consent to become directors.

The situation is not quite as clear for officers. Officers are appointed by the directors, and they are subject to removal by the directors. Their responsibilities are to operate the corporation in accordance with the directives of the directors. Officers are most often employees of the corporation. The *Company Act* does not define “officer.” Officers get their titles, functions and authority from the corporation itself and from its articles. The *Company Act* defines “senior officer” broadly to mean:

“the chair or any vice chair of the board of directors, the president, any vice president, the secretary, any vice-president, the treasurer or the general manager of the corporation or any other individual who performs

the functions of the corporation similar to those normally performed by an individual holding those offices, and the 5 highest paid employees of the corporation, including any individual referred to in this definition”

This definition is of some assistance. The definition implies a functional test. On the other hand, I would be reluctant to accept that someone, for example, merely by holding the title of vice-president, or simply being one of the highest paid employees, is to be regarded as an officer for the purposes of the *Act*. Officers may or may not be recorded with the Registrar of Companies or in the company’s official records. Typically some officers--like the president and secretary--may be found in the company’s records (Section 113, *Company Act*). It is unlikely that a person is appointed chair of the board of directors, president and secretary without his or her consent. As well, those titles connote some degree of performance of functions within the organization that would be consistent with the status as officers. They are more likely to be “controlling minds” of the organization. All the same, I would generally be reluctant to accept that a person who, according to the corporate records, is an officer, is not an officer unless there is “*credible and cogent evidence that the Registrar’s records are inaccurate.*” With respect to others, claimed to be officers, but not registered as such on the corporate records, a functional test may indicate whether or not they are, in fact, officers.

It is clear, on the Tribunal’s case law, that a person may be a director or officer without being recorded as such in the company’s records (see, for example, *Gordon*, BCEST #D537/97; *Penner and Hauff*, above; *Okrainetz*, BCEST #D354/97). In cases mentioned, the Tribunal applied a functional test and considered whether or not the person in question exercised the functions, duties or tasks that a corporate director or officer would, in the usual course of events, would exercise. In *Wilinofsky*, BCEST #D106/99, the leading case, relied upon by the Adjudicator in *Sindia*, the Adjudicator stated:

“... where an individual is recorded as an officer or director of a company in the records maintained by the Registrar, a rebuttable presumption arises that the individual actually is a director or officer ... of the company *This presumption, however, may be rebutted by credible and cogent evidence that the Registrar’s records are inaccurate--the burden of proving that one is not a corporate director or officer rests with the individual who denies such status.*” [emphasis added]

In *Archibald*, BCEST #D090/00, the Tribunal noted:

“Both our Court of Appeal and the Supreme Court of Canada have repeatedly stressed that employment standards legislation, being “benefits-conferring” legislation, should be interpreted in a “broad and generous manner” On the other hand, our Court of Appeal and the Supreme Court of Canada have both recognized that the imposition of a

personal unpaid wage liability on corporate officers and directors is an extraordinary exception to the general principle that directors and officers are not personally liable for corporate debts. Accordingly, while the Act as a whole is to be interpreted in a broad and generous fashion, *the provisions imposing a personal liability on corporate directors and officers should be narrowly construed ...*” [emphasis added]

In my view, the case law reviewed here and in *Wilinofsky* stands for the following propositions:

1. The corporate records, primarily those available through the Registrar of Companies or available at a corporations 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 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 or a director or officer.
4. As well, the determination of director-officer status should be narrowly construed, at least with respect to Section 96.

Having concluded, as I have that--everything else being equal--Pulham was an employee of Sunwest at the material time, the question, however, is whether he was an employee for the purposes of the *Act* given his status as a director and officer and his involvement in the running of the company.

In *McPhee*, BCEST #183/97, the adjudicator considered the broad definitions of “employee” and “employer” contained in the *Act* and noted:

“... the Act does not exclude the application of the normal concepts of the law of master and servant. In this context, Courts have stated that partners cannot be employed by a 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 board 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....

I do not wish to be taken as saying that a person who is an employer could never be an employee under the Act. But in such a case (as 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...* [emphasis added]

(See also *Trus*, BCEST #520/99 and *Super Cat International Enterprises Ltd.*, BCEST #483/98). I agree with the comments in *Annable*, BCEST #D559/98, reconsideration of BCEST #D342/98, where the reconsideration panel stated that *McPhee*, above, did not finally dispose of the question of whether being a corporate director prevents a person from being an employee. The panel in that case found that there may well be circumstances where a corporate director can be an employee. The Director must “have regard to the facts of 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.” I echo those sentiments.

These principles are applicable to the instant case.

Based on the evidence before me at the hearing, Pulham was a director and officer--and, as well, in my view, functioned as such--at least until September 1999. Pulham was one of the founders of the firm. Initially, he was a 50-50 owner with Maggs. Later, when Smith joined, he owned a third of the shares. The firm was at the material time a small firm with essentially only 4-5 individuals involved: Pat Maggs was the (paid) bookkeeper, Smith responsible for fabrication, Pulham responsible for sales, and Ken Maggs responsible for general management. Pulham did not attend directors meetings because none were held. On the other hand, in cross examination he agreed that he did not request that such meetings be held. While there were no directors’ meetings, the decision making process in the business appears to have been relatively informal. Pulham did not disagree with Maggs’ characterization of the events surrounding Smith joining Sunwest, namely that Pulham invited him to join without consultation with Maggs. This, in my view, is inconsistent with Pulham being a mere employee. It also appears that Pulham was involved in the decision making process to bring in Draper. When Maggs returned from Ontario he discussed Draper’s conditions for investing in the firm with Pulham. Had he been simply an employee, or a *pro forma* director, there would have been no need to involve him in these discussions.

But he was more than an employee, he was a shareholder and a director. In other words, he was involved with the major decisions involving the company. I also consider it relevant that Pulham had signing authority for two company accounts. I understood that the \$500 limit also applied to Maggs. He signed credit application for the business with suppliers. He was intimately involved in the decision as to where to locate the new plant, even if he did not succeed in having it located where he wanted, namely in Burnaby. He signed for the lease of Sunwest's new plant and he issued post-dated cheques for the rent. While the Determination suggested that Ken Maggs made all major decisions, clearly he was unable to move Pulham from Burnaby to Langley. Considering all of the circumstances, Pulham can be considered a director and officer of the Employer at the material time. Moreover, he was one of the controlling minds of the Employer. It follows that I disagree with the Determination in this regard. In the result, I am of the view that Pulham is not entitled to vacation pay for the period August 1998 to September 1, 1999. I am of the view that he was not an employee for the purposes of the *Act* until after September 1, 1999. After that time, he was an employee and, as such, entitled to vacation pay. I refer the calculation of the amount he is entitled to back to the Director.

Lastly, I would like to apologize to the parties for the time it has taken to write this decision. I appreciate the parties patience in that regard.

ORDER

Pursuant to Section 115 of the Act, I order that the Determination in this matter, dated June 7, 2000 be referred back to the Director for calculation of vacation pay entitlement.

IB S. PETERSEN

Ib S. Petersen
Adjudicator
Employment Standards Tribunal