

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113

- by -

Roger Flowerdew  
("Flowerdew")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No:** 1999/565

**DATE OF HEARING:** January 24, 1999

**DATE OF DECISION:** February 7, 2000

**DECISION**

**APPEARANCES:**

|                 |   |
|-----------------|---|
| Roger Flowerdew | on his own behalf                                 |
| No appearance   | on behalf of Stuart Sellers                       |
| No appearance   | on behalf of Stephen Smith                        |
| No appearance   | on behalf of the Director of Employment Standards |

**OVERVIEW**

This is an appeal brought by Roger Flowerdew (“Flowerdew”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on August 31st, 1999 under file number ER 096-154 (the “Determination”).

On August 30th, 1999, a determination was issued against Softwex International Ltd. (“Softwex”), in the amount of \$4,494.22, reflecting compensation for length of service (see section 63 of the *Act*) payable to two former Softwex employees, Stuart Sellers and Stephen Smith. In the Determination now under appeal, the Director’s delegate held that Flowerdew was a director of Softwex International Ltd. and, pursuant to the provisions of section 96 of the *Act*, was therefore liable for the compensation for length of service payable to Messrs. Sellers and Smith.

Flowerdew’s appeal was heard at the Tribunal’s offices in Vancouver on January 24th, 2000. Although Flowerdew appeared and testified on his own behalf, somewhat surprisingly, the delegate chose not to appear at the hearing. Similarly, neither complainant employee appeared at the appeal hearing.

**ISSUE TO BE DECIDED**

Flowerdew’s position could not be more straight-forward--he simply says that he was *never* a director of Softwex although he was, at one time, an officer of the company but not when the two complainants’ claims for termination pay crystallized.

**THE DETERMINATION**

Section 96 of the *Act* provides, subject to certain exceptions, that a corporate director or officer may be held liable for up to 2 months’ unpaid wages for each employee of the corporation. Monies payable as compensation for length of service are considered to be “wages” as defined in section 1 of the *Act*.

The Determination is rather unclear as to whether or not Flowerdew is alleged to have been an officer or a director (or both) of Softwex. The Determination is in the form of a letter addressed to Flowerdew which contains the following reference at the outset:

**Re: Director of Employment Standards**  
**-Vs-**  
**Roger Flowerdew, a Director or Officer of Softwex International Ltd.**  
**Amount Owing: \$4,494.92**

On the first page in the Determination, in the body of the letter, the delegate asserts that “You [*i.e.*, Flowerdew] are a Director of Softwex International Ltd. (a copy of Company Search attached).” The Determination then continues: “Based on the evidence from [Softwex C.E.O.], you were a Director or Officer of this company at the time these wages were earned or should have been paid.” At the top of page 2 of the Determination, the delegate states that a “BC OnLine” corporate search shows “Roger Flowerdew was listed as a Director/Officer” and continues “Roger Flowerdew was a Director/Officer of Softwex International Ltd. and was so appointed at the time the wages were earned and became payable.” Finally, the Determination states:

**Determination**

You are Director of Softwex International Ltd. and personally responsible for full amount payable. [sic]

**FINDINGS**

As noted above, the Determination does not clearly indicate whether the Director is proceeding against Flowerdew as a Softwex director or as an officer. In my view, section 96 determinations ought to unequivocally indicate whether the person is alleged to have been an officer or director or both. One could certainly make a good argument that the Determination only claims against Flowerdew as a Softwex director.

In any event, regardless of whether the Director is proceeding against Flowerdew as a Softwex director or a Softwex officer, the Determination cannot stand. As noted above, the Director’s delegate relied on a “BC OnLine” corporate search, undertaken on August 16th, 1999, as evidence of Flowerdew’s status as a Softwex director and officer. However, that search specifically indicates that Flowerdew is *not* a Softwex director; rather, the search states that Flowerdew is a Softwex officer, namely, the “Vice-President, Corporate Development”. There is *no evidence* before me--recall that neither the Director’s delegate nor the complainants testified before me--that would suggest Flowerdew performed the *functions* (see *Penner and Hauff*, B.C.E.S.T. Decision No. 371/96) of a Softwex director, or for that matter, a Softwex officer, during the material time frame.

As for the claim that Flowerdew was a Softwex officer at the material time, although the corporate search shows that Flowerdew was a Softwex officer when the two complainants’ claims for compensation for length of service crystallized (in latter part of February 1999), corporate searches only raise a *rebuttable presumption* regarding an individual’s status (see *Wilnofsky*, B.C.E.S.T. Decision No. 106/99). In the present appeal, Flowerdew testified, under oath, that he was an officer of Softwex prior to mid-November 1998 at which time he resigned his office. Apparently, Softwex failed to file the appropriate notice with the the Registrar of Companies. Flowerdew’s apparently credible evidence as to his relationship with Softwex stands

wholly uncontradicted. Flowerdew tendered at the appeal hearing a written statement from Softwex's president confirming Flowerdew's resignation in mid-November 1998.

Following his resignation, Flowerdew did continue as an officer of Softwex's parent company but I note that this other company--Softwex International **Inc.**--has not been named, to my knowledge, in any corporate determination nor has it ever been declared an "associated corporation" (see section 95 of the *Act*) of Softwex International Ltd.

Even if the parent company is, as a matter of law, "associated" with its subsidiary--in my view, an entirely reasonable proposition--it should be noted that, in any event, Flowerdew's employment as an officer of the parent company ended in January 1999 (*i.e.*, prior to the crystallization of the complainants' claims for compensation for length of service) when Flowerdew was terminated, apparently without proper notice (or severance pay in lieu of notice) or just cause, by Softwex International Inc.

Compensation for length of service payable pursuant to section 63 of the *Act* is not earned--unlike, say, vacation pay (section 58)--during the course of an employee's service and is then payable on some specific date. Indeed, compensation for length of service may *never* be payable if, for example, an employer has "just cause" for termination or, if there is no just cause, the employer gives the employee appropriate written notice of termination or if the employee voluntarily resigns. Vacation pay is earned over the course of employment and must be paid, on termination, irrespective of whether or not the employer had just cause, gave proper notice, or if the employee quit. On the other hand, compensation for length of service is only "earned" and only becomes payable (assuming no other statutory defence applies) when the employer terminates an employee without just cause and without having given prior written notice; in such circumstances, the termination pay then becomes payable as "wages" (see section 1 definition) and must be paid within 48 hours after termination [see section 18(1)].

Thus, even if the Director had made a section 95 declaration regarding the two companies, Flowerdew would not have been liable, under section 96, for the two complainants' unpaid compensation for length of service since those latter monies were not earned and did not become payable until after mid-February 1999 by which time Flowerdew had already ceased to be an officer of Softwex International Inc.

## **ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination be cancelled.

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**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**