

An appeal

- by -

Reginald D. Gordon, a Director or Officer of Newcom Concepts Corp.  
("Gordon")

- 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:** Paul E. Love

**FILE No.:** 2001/800

**DATE OF DECISION:** January 31, 2001

## DECISION

### OVERVIEW

This is an appeal by Reginald D. Gordon, from a Determination dated November 2, 2001 (the “Determination”) issued by a Delegate of the Director of Employment Standards (“*Delegate*”) pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “*Act*”), concerning two employees, Douglas Hollett and Carrie A. Janni (“*Employees*”). The Determination found that Mr. Gordon was a director or officer of Newcom Concepts Corp (“*Newcom*”) at the time when wages were earned or should have been paid to the *Employees*. Mr. Gordon argued that he had resigned from the office of director and secretary on December 31, 1999. A search of the Records of the Registrar of Companies, using BC Online and conducted by the Delegate on February 8, 2001, showed that Mr. Gordon was an officer of *Newcom*, but not a director of *Newcom*. The Delegate’s submission to the Tribunal incorrectly identified Mr. Gordon as a director. In the Determination the Delegate failed to distinguish Mr. Gordon’s status as a director, officer or director and officer. The Delegate referred to Mr. Gordon as a director or officer. While Mr. Gordon provided evidence that lawyers for *Newcom*, on January 26, 2000, faxed him a form of a letter of resignation dated December 31, 1999, and he signed the form supplied by him, he did not supply any proof of delivery of the letter to the registered office for *Newcom*. There is clearly an intent to resign the offices of director and officer. In his appeal material he did not assert that he delivered the resignation to the company, nor did he file any abstract of the company’s records showing that it received the resignation. Section 130 of the Company Act specifies that a resignation of a director “*becomes effective at the time a written resignation is delivered to the registered office of the company or at the time specified in the resignation, whichever is later*”. I am, however, left in an unclear state as to whether there has been an error in the records of the Registrar of Companies, and Mr. Gordon’s relationship with *Newcom*. This error can be cleared up by further investigation, and I ordered that the matter be referred to the Director to make further inquiries concerning the resignation letter dated December 30, 1999 and particularly,

- (a) who was registered in the records of *Newcom Concepts Corp.*, and with the Registrar of Companies, as directors and officers on the date of the complaint,
- (b) whether the letter of Reginald D. Gordon dated December 30, 1999 was submitted by him to the Registered and Records office of *Newcom Concepts Corp.*,
- (c) whether *Newcom Concepts Corp.* filed any documents affecting a change of directors/officers with the Registrar of Companies, and the nature of the documents filed.

**ISSUE:**

Did the Delegate err in determining that Mr. Gordon was a director or officer of Newcom Concepts Corp. as of the date wages were owed or should have been paid to the Employees?

**FACTS**

The Tribunal gave notice to the parties on January 9, 2002, that his appeal would be decided upon written submissions received from the parties, without an oral hearing. I decided this case after considering the written submission of Mr. Gordon, the Delegate, and Doug Hallet. Ms. Jani did not file a submission.

The Delegate issued a Determination on March 26, 2001 in favour of Douglas Hollet and Carrie A. Jani, in the amount of \$9,828.60 including interest. That Determination was confirmed on appeal by Decision BCEST #D372/01 on July 11, 2001. On November 2, 2001, the Delegate issued a Determination against Mr. Gordon, pursuant to s. 96 of the *Act* for two months wages for each employee. The Delegate imposed liability on Mr. Gordon, pursuant to s. 96 of the *Act* on the basis of a search of the Records of the Registrar of Companies, using BC Online and conducted by the Delegate on February 8, 2001. This search showed that Mr. Reginald D. Gordon was recorded as an officer (secretary) of Newcom. There is no historical search which sets out the relationship between Mr. Gordon and this company, over the time period of the employment relationship. He is not recorded as a director of Newcom on that search. The amount set out in the Determination in respect of Mr. Hallet which was \$8,200, and in respect of Ms. Jani which is \$267.21. Mr. Gordon has not made any submissions concerning the amount awarded.

**ARGUMENT:**

Mr. Gordon submits that he was not a director or officer of Newcom at the time that the wages were earned, because he resigned those offices on or about December 30, 1999. He says that he was not in the position to control the wage loss to the employees, and therefore should not be responsible under s. 96 of the *Act*.

**ANALYSIS**

In an appeal under the *Act*, the burden rests with the appellant, in this case Mr. Gordon, to show that there was an error in the Determination such that I should vary or cancel the Determination. Section 96 of the *Act* reads as follows:

*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.*

In *Director of Employment Standards, BCEST #D371/00 (Petersen, Jeffries, Falzon)*, the Tribunal set forth a number of principles in connection with s. 96:

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.
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 should be narrowly construed, at least with respect to Section 96.

In this case, Mr. Roberts is registered as an officer of Newcom Concepts Corp. with the Registrar of Companies. This creates a rebuttable presumption that Mr. Roberts was an officer. It is up to him to adduce evidence to show this is not the case.

The evidence adduced by him to show that he was not a director or officer consists his statement in the appeal document, a fax dated January 26, 2000 which enclosed a form of resignation, and a signed letter of resignation. The statement is as follows:

Please find the attached copy of a faxed Letter of Resignation Dated December 30, 1999. As of that date I was no longer on the board of directors of Newcom Concepts Corp. And I have contracted the Law firm of Devlin Jensen and spoke with Mr. Michael T. Shannon and he assured me that I was no longer a board member as of December 30<sup>th</sup>, 1999 and he would look into the matter and correct the matter.

The lost wages of Douglas Hollet and Carrie Jani occurred after I resigned and I had no control over the wage loss so I am not responsible for the Determination ER File NO 105630.

The further evidence consists of a fax cover page sent to Reg Gordon from Michael T. Shannon, dated January 26, 2000, which bears a fax transmission stamp of the same date, with the notation:

“PLEASE SEE COPY OF ATTACHED LETTER, EXECUTE IT AND FAX IT  
BACK TO ME”

The attachment to the fax cover sheet is a letter dated December 30, 1999 to the Newcom Concepts Corp Board of Directors re “ Resignation of Reginald Gordon, Secretary and Director Newcom Concepts Corp.”, which reads “Effective December 30, 1999, I resign as a Director and Secretary of Newcom Concepts Corp”.

The letter of resignation filed with the Tribunal, bears the date of December 30, 1999 and 01/26/00 9:27 which I take to be January 26, 2000 the date that it was transmitted from Mr. Shannon to Mr. Gordon. That letter is signed by Francis Gordon. It appears that Mr. Shannon was the solicitor for Newcom.

In summary, the evidence supporting the resignation is Mr. Gordon’s statement that he resigned, a copy of a fax transmission from the company’s solicitors to Mr. Gordon containing a resignation letter, and a copy of the resignation letter signed by Mr. Gordon.

There are gaps in the evidence here sufficient to cause me concern with regard to the allegation of resignation. Firstly, there is no evidence when Mr. Gordon signed the letter. I have been presented with a copy of the letter dated December 30, 1999 signed by Mr. Gordon, although, given the correspondence from Michael T. Shannon, the letter could not have been signed on December 30, 1999. I can surmise that this letter was signed no earlier than January 26, 2000. The date on the resignation letter cannot be genuine, given the fax cover sheet from Mr. Shannon.

Secondly, there is no evidence if or when Mr. Gordon delivered the signed resignation to Mr. Shannon. Thirdly, there is no evidence from Newcom, or from Mr. Shannon that he received the resignation or filed the resignation in the records of the company. I have not been provided with any abstract of the company’s records which would prove delivery of the resignation to the company.

I note that in this case I am asked to accept the evidence of Mr. Gordon, that he resigned when, the records of the Registrar of Companies show that he was an officer. In order for a resignation to take effect a director must comply with s. 130 (2) of the *Company Act, R.S.B.C. 1996, c. 62*, which reads as follows:

*(2) Every resignation of a director becomes effective at the time a written resignation is delivered to the registered office of the company or at the time specified in the resignation, whichever is later.*

I see no reason why the requirement for resignation for an officer should be any less onerous. Resignation is a right of the person holding an office. Employees who resign must communicate their intention to resign to the Employer.

In order to resign from the position of director or officer it is not sufficient to communicate “orally” one’s intention to resign. One must, at the very minimum, sign and deliver to the registered office of the company a written resignation. In order to establish an effectual resignation, an appellant must establish that the registered office of the company received the resignation. It is not enough to provide a fax from a law firm enclosing a draft resignation, and a signed copy of the resignation, for neither of these bits of evidence confirm delivery of the resignation to the office. A resignation does not become effective until, at minimum, the date the resignation is delivered to the record’s office of the company.

In the Determination, the Delegate refers to Mr. Gordon as a director or officer. In a written submission dated November 23, 2001, the Delegate submits that Mr. Gordon is a director. The company search which accompanied that submission shows that Mr. Gordon is not a director but that he is an officer. The evidence of the company search filed by the Delegate is equivocal in the sense that I cannot tell whether Mr. Gordon was once a director and an officer and that the Registrar of Companies affected a change in that situation by removing him from a directorship but not removing him from his position as an officer. Completely absent from the submission of Mr. Gordon is any evidence that he delivered the resignation.

It appears that the Delegate has erred by not identifying Mr. Gordon as a director, an officer or both. The Delegate’s submission on November 23, 2001 that Mr. Gordon was a director, is not supported by the search filed. I am concerned that there is some evidence of Mr. Gordon’s intent to resign a position as director and secretary, and that there is not sufficient historical information to determine if Mr. Gordon was at one time both a director and an officer. The resignation implies that he was a director and an officer. The company search conducted by the Delegate, some time after the date of the alleged resignation, may reflect the registration of a change in status from director and officer to officer, when the alleged intent was to resign both as director and officer. Perhaps he was just an officer and not a director all along. The Determination issued in this case is very brief, and did not clearly distinguish whether Mr. Gordon was an officer, or a director and an officer. I am left in the dark as to the true status of Mr. Gordon.

At this time, I am not, however convinced that the Determination ought to be cancelled. I am unclear of the historical relationship between Newcom and Mr. Gordon. I am unclear whether he was a director and an officer, or just an officer. I am unclear whether he submitted his resignation to Newcom. All this uncertainty can be resolved by further investigation. In order to address this appeal properly I need to know:

- (a) what the records of the company and the Registrar of Companies showed as the directors on the date of the complaint;

(b) what evidence is there, if any, that Mr. Gordon delivered his resignation to the registered and records office of the company, and the company received the resignation;

(c) was any notice of change of directors prepared by the company, and submitted for filing to the Registrar of Companies and if so when;

**ORDER**

Pursuant to s. 115 of the *Act* I order that this matter be referred back to the Director to make further inquiries concerning the resignation letter dated December 30, 1999 and particularly to inquire,

(a) who was registered in the records of Newcom Concepts Corp., and with the Registrar of Companies, as directors and officers on the date of the complaint,

(b) whether the letter of Reginald D. Gordon dated December 30, 1999 was submitted by him to the Registered and Records office of Newcom Concepts Corp.,

(c) whether Newcom Concepts Corp. filed any documents affecting a change of directors/officers with the Registrar of Companies, and the nature of the documents filed.

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**Paul E. Love**  
**Adjudicator**  
**Employment Standards Tribunal**