

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 -

James Elderton, a director of Wildflower Productions Inc.
- and -
Stephanie Elderton, a director of Wildflower Productions Inc.

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE No: 1999/592 & 1999/593

DATE OF HEARING: January 13, 2000

DATE OF DECISION: February 11, 2000

DECISION

APPEARANCES:

James Elderton	on his own behalf and on behalf of Stephanie Elderton directors of Wildflower Productions Inc.
Beverly Nicole Cain	On her own behalf
David Hechenberger	On his own behalf
Durwin Partridge	On his own behalf
David Oliver	Delegate of the Director

OVERVIEW

This is an appeal by James Elderton ("Mr Elderton") and Stephanie Elderton ("Ms Elderton") directors of Wildflower Productions Inc. ("Wildflower" or "the company") pursuant to Section 112 of the Employment Standards Act (the "*Act*") from Determinations (No. 095549) both dated September 09, 1999 by the Director of Employment Standards (the "Director") against each of them as directors of the company.

Wildflower is a corporation set-up to do business in the making of movies and videos. The officers of the corporation are Stephanie and James Elderton. The Director's delegate found that they are the sole directors of the company. In the spring of 1999 Wildflower employed Beverly Nicole (Nicky) Cain ("Cain") and Durwin Partridge ("Partridge") to work for the company in various aspects of the movie/video making business.

David Hechenberger ("Hechenberger") had been employed for some time with Wildflower and his employment ended about the time that Cain and Partridge joined the company. Hechenberger complained that he did not receive his wages for the last 10 days of his employment. Wildflower says that Hechenberger owed the company 10 days work and therefore he was not entitled to the last 10 days pay.

Cain and Partridge worked for Wildflower from early April until late July 1999. During that whole time period Wildflower only paid them the sum of \$200.00 in total. Wildflower submits that Cain and Partridge were independent contractors and as such were not entitled to wages. Their earnings would have flowed from the profits from completed projects. The Director's delegate determined that all three were employees and that wages were owed to Hechenberger, Partridge and Cain and issued a Determination against the company for the full amount of the unpaid wages.

In the two determinations appealed herein the Director's delegate determined that in accordance with section 96 of the *Act* Mr and Mrs Elderton were personally liable for two (2) months wages for each employee.

The company appealed the substantive determination on the basis that the alleged employees were in fact independent contractors and therefore not entitled to wages. That appeal was dismissed and the Determination confirmed in *Re: Wildflower Productions Inc.* Bcest #D064/00.

When the company filed the appeal, Form 1 appeal notices were also filed on behalf of Mr and Ms Elderton appealing the determinations against them as directors of the company.

ISSUES TO BE DECIDED

The issue to be decided in this case is whether the Determinations against Mr. and Ms. Elderton in their capacity as directors of Wildflower should be cancelled, varied, or confirmed.

PRELIMINARY ISSUE

Adjournment Application

The Determinations against Wildflower and the directors were issued on September 09, 1999 and the appeals filed on October 04, 1999. The deadline for response to the appeals was set by the Tribunal for October 25, 1999. Submissions were received and a hearing of the appeals was scheduled to be heard on January 13, 2000. The first hearing date was adjourned at the request of the Director. This hearing date, of February 01, 2000, was scheduled to be convenient and available to all parties including legal counsel for Wildflower.

Wildflower was originally represented by counsel who filed the appeal on behalf of the company and the directors. All the arrangements for convenient dates were made with the company's counsel. It was suggested by Mr Elderton at this hearing that they had not received timely notice of the hearing dates but I am satisfied on reviewing the file that their counsel was well informed and had adequate notice.

James Elderton appeared on behalf of himself, Ms Elderton and the company. At the commencement of the hearing he requested an adjournment. He had applied for the adjournment to the Tribunal's office on the day before the hearing and was told to make his application to the adjudicator. He stated that they were no longer represented by counsel and that his wife Stephanie Elderton was ill and could not attend the hearing. On questioning Mr Elderton was unable to say when counsel had withdrawn from the case but it was more than a week ago. He had only picked-up the file from the lawyer's office on Friday, January 28, 2000. He submitted that he had not had sufficient time to prepare for the hearing.

Mr Elderton also submitted that his wife was a party to one determination and an essential witness for the company but she was ill and could not attend. A doctor's letter was submitted which confirmed that as of January 28 Ms Elderton had a kidney infection and had a high fever. Mr Elderton stated that she had not improved and was still running a fever.

Mr Elderton conceded that there was no evidence that Ms Elderton could give that would be different from his own but that her evidence would support his.

Mr Elderton also pointed-out that his wife was considered disabled because of scoliosis and some spinal fractures. However he confirmed that her non-appearance was not related to her handicap but was a result solely of her current infection.

The Director's delegate pointed-out that Ms Elderton had recently attended a number of other related hearings. The other parties objected to any further adjournments pointing-out the many months that the Eldertons had to prepare and that while it was unfortunate that Ms Elderton was unwell, her illness was chronic and there was no guarantee that she could attend at any future date. Mr Elderton confirmed that his wife did suffer from these infections on a chronic basis and he could not say when she would be available for the hearing.

I declined to grant the adjournment at the commencement of the hearing. While I certainly accept that Ms Elderton was unable to attend I was not satisfied that she was an essential witness as Mr Elderton stated that there was no issue about Ms Elderton being a director of the company and no issue about the calculation of the wages owing. I was also not prepared to grant an adjournment on the basis of lack of preparation. The Eldertons have had since October 4, 1999 to be prepared for the hearing. They are the appellants and as such has some onus to know why they are appealing and to be prepared to argue the appeal.

I was also most concerned that the Eldertons had made no efforts to be ready for the appeal. There was very little evidence of any diligence on Mr Elderton's part to make sure that the hearing could proceed as scheduled. He knew his wife was ill over a week prior to the hearing and knew that counsel had withdrawn but made no application for adjournment until the day before the hearing was scheduled.

A further point requires comment. Ms Elderton submitted a letter stating that there was a discrimination issue under the *Human Rights Act*. I sought clarification from Mr Elderton who stated that his wife's view was that if I declined to grant an adjournment I was discriminating against her on the basis of her disability. I can only say that this is not the case. Mr Elderton assured me that his wife's inability to attend was unrelated to her disability. She was ill from an infection not associated with her physical disability. In any case the reasons for not granting the adjournment are as set-out above. These include the lack of diligence by the Eldertons, the short notice of the application, the length of time that the Eldertons had to prepare their case, the prejudice to the other parties, the uncertainty of any reasonable return date, and the fact that Mr Elderton is able to represent Ms Elderton and to present their case adequately at the hearing.

THE FACTS AND ANALYSIS

The notice of appeal on behalf of the directors is identical to the appeal filed by the company and essentially argues that no wages are owing to Hechenberger, Partridge, or Cain because they were not "employees". There are no submissions made in relation to the directors' liability under section 96.

The previous adjudication referred to above confirmed that Hechenberger, Partridge and Cain were indeed employees and entitled to wages. Once the corporate determination is confirmed the issues which arise under section 96 are limited to whether a person was a director or officer at the material time, or whether the amount of personal liability was calculated correctly.

In his evidence at the hearing Mr Elderton confirmed that both he and Ms Elderton were directors and officers of the company at the material time. He also testified that he did not dispute the amount of wages found owing in accordance with section 96. His submission was that the director's liability was dependent on the corporate liability and he relied on the submissions made on behalf of the company.

Having found that the company was liable to pay wages to these employees there is no valid ground remaining to support the directors' appeals and they are dismissed and the determinations confirmed.

ORDER

Pursuant to Section 115 of the *Act* I order that the two determinations herein are confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal