

An appeal

- by -

Dyan Judith Van Dam, a Director or Officer of Van Four Enterprises Ltd  
operating as De Dutch Pannekoek House  
("Ms. Van Dam")

- 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

**TRIBUNAL MEMBER:** David B. Stevenson

**FILE No.:** 2004A/39

**DATE OF DECISION:** May 21, 2004

## DECISION

### SUBMISSIONS

|                     |                           |
|---------------------|---------------------------|
| Dyan Van Dam        | on her own behalf         |
| Kiley Moore-Dempsey | on her own behalf         |
| Victor Lee          | on behalf of the Director |

### OVERVIEW

This decision addresses an appeal brought pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Dyan Judith Van Dam, a Director or Officer of Van Four Enterprises Ltd. operating as De Dutch Pannekoek House (“Ms. Van Dam”) of a Determination that was issued on February 6, 2004 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Ms. Van Dam was a Director or Officer of Van Four Enterprises Ltd. operating as De Dutch Pannekoek House, an employer found to have contravened provisions of the *Act*, and under Section 96 of the *Act*, was ordered to pay an amount of \$7,688.17.

The appeal is based on evidence having become available that was not available at the time the Determination was made. Ms. Van Dam says this evidence shows she was a director in name only.

The Tribunal has reviewed the appeal and the materials and has decided an oral hearing is not necessary in order to decide this appeal.

### ISSUE

The issue in this appeal is whether Ms. Van Dam has shown the Director erred in finding she was a director or officer of Van Four Enterprises Ltd. operating as De Dutch Pannekoek House and liable under Section 96 of the *Act*.

### THE FACTS

The Determination set out the following facts:

- A Determination was issued on February 6, 2004 against Van Four Enterprises Ltd. operating as De Dutch Pannekoek House in the amount of \$8,188.17, an amount which included wages found owing to seven former employees (the “employees”) of Van Four Enterprises Ltd. operating as De Dutch Pannekoek House, interest and an administrative penalty in the amount of \$500.00.
- The wages found owing related to regular wages earned by the employees in November and December, 2002, annual vacation and, in some cases, statutory holiday pay earned during their period of employment and compensation for length of service.

- Van Four Enterprises Ltd. was incorporated on April 23, 1996.
- As of April 29, 2003, Ms. Van Dam was listed as a director/officer of Van Four Enterprises Ltd. operating as De Dutch Pannekoek House in a BC Online search of the Registrar of Companies.

A copy of the result of the BC Online search is included in the Record. No dispute is taken with the correctness of the document or with the finding that Ms. Van Dam was listed as a director/officer of Van Four Enterprises Ltd. operating as De Dutch Pannekoek House at the time the wages of the employees were earned or should have been paid. In support of her appeal, Ms. Van Dam has submitted several documents relating to the closing of the business, which I take was the primary cause of the non-payment of wages and the resulting complaints made to the Director by the employees.

The Documents include legal correspondence, a Notice of Termination of Sublease addressed to Van Four Enterprises Ltd., Sylvia Van Dam and Hans G. Van Dam, a Notice of Termination of Franchise Agreement, addressed to the same persons, an unsigned Surrender of Lease document between the named Landlord, Brosis International Inc. (the Tenant) and Bain Van Dam and Ms. Van Dam (the Indemnifiers) and a Writ of Summons and Statement of Claim in an action between the Landlord, as Plaintiff, and the Tenant and Indemnifiers as Defendants.

Ms. Van Dam says these documents show how she had no real authority either as a director or officer of Van Four Enterprises Ltd. and that it was Hans Van Dam who effectively shut the company down and created the wage claims.

In reply to the appeal, the Director does not object to the documents provided, but says they do not support the appeal and, in some respects, operate against the argument being made by Ms. Van Dam. In any event, says the Director, there is no dispute that the corporate records are accurate and no “rare and exceptional” circumstances exist that would justify a conclusion Ms. Van Dam should not be found to be a director/officer for the purposes of Section 96 of the *Act*.

One of the employees, Kiley Moore-Dempsey, has filed a submission challenging Ms. Van Dam’s claim that she was “not involved in the running of the business”.

Ms. Van Dam’s mother, Sylvia Van Dam, has also filed a submission on behalf of her daughter. The tenor of her submission is that Ms. Van Dam was persuaded by her stepfather, Hans Van Dam, to become a director of Van Four Enterprises Ltd. on assurances from him that being a director of the company “would never affect her in any way”.

## **ARGUMENT AND ANALYSIS**

The burden is on Ms. Van Dam, as the appellant, to persuade the Tribunal that the Determination is wrong and requires the Tribunal’s intervention. More particularly, in this case, Ms. Van Dam has the burden of showing circumstances that would make it appropriate for the Tribunal to find she was not a director/officer notwithstanding she was recorded as such. That is not an easy burden to satisfy.

As the Tribunal stated in *Director of Employment Standards (Re Michalkovic)*, BC EST #RD047/01, it will be the rare and exceptional case where an individual who is recorded as a director/officer with the Registrar of Companies will be found not to be a director/officer for the purposes of Section 96 of the *Act*

and such a finding will not be decided simply on whether the individual actually performs the duties, functions or tasks of a director/officer.

In this case, Ms. Van Dam identifies and argues what are basically two reasons for asking the Tribunal to reverse the Director's finding that she was a director or officer of Van Four Enterprises Ltd. for the purposes of Section 96 of the *Act*. The first is that, although she was registered as both a director and officer of the corporation, she was a director and officer in name only. That her stepfather, who from all appearances was the "controlling mind" of the corporation, did not allow her to be involved in the financial aspects of operating the business. She had no real authority in respect of key decisions relating to the running of the business. The second is that she was assured by her stepfather that being a director and officer of the company would not affect her in any way.

In respect of the first reason, Ms. Van Dam is really saying no more than that she did not have the authority, relative to her stepfather, to effectively function as a corporate director and officer. However, the argument that a person listed as a director and officer may avoid liability for unpaid wages simply by showing he or she does not actually perform the duties, functions and tasks of a director and officer was specifically rejected in *Director of Employment Standards (Re Michalkovic)*, *supra*. I do not find the second reason provides any basis for the result sought by Ms. Van Dam. Persons who agree to be appointed as directors and officers of corporations must be aware of their responsibilities and of the potential risks of holding such positions. In my view, it would be a dangerous precedent, and quite inconsistent with the purposes and objectives of the *Act*, generally, and Section 96, specifically, to endorse a principle that a person who voluntarily consented to be named a director and officer of a corporation might avoid liability for unpaid wages by showing he or she was uninformed, misinformed or misled about the potential risks of being named a director and officer.

While I have the utmost sympathy for the predicament in which Ms. Van Dam has placed herself, I must apply the law as it is and do not find the circumstances of this case to be one of those rare and exceptional cases where an individual who is recorded as a director/officer with the Registrar of Companies will be found not to be a director/officer for the purposes of Section 96 of the *Act*.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated February 6, 2004 be confirmed in the amount of \$7,688.17, together with any interest that has accrued pursuant to Section 88 of the *Act*.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**