

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 -

Barb Ann Hughes, an officer of
Mid Star Productions Ltd.
("Hughes")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Paul E. Love

FILE NO.: 97/863

DATE OF DECISION: March 18, 1998

DECISION

OVERVIEW

This is an appeal by Barb Ann Hughes (“Hughes”) from a Determination of the Director’s delegate dated November 5, 1997, which determined that Hughes was an officer of Mid Star Productions (“Mid Star”), and obliged to pay termination pay, pursuant to s. 96 of the *Employment Standards Act* (“Act”). The Director’s delegate determined in a Determination dated May 26, 1997, that an employee, Windy L. Markel (“Markel”), had been dismissed without notice, and ordered that Mid Star pay to Markel the sum of \$573.00 for two weeks notice, vacation pay of \$22.92, and interest of \$34.82 for a total of \$830.74. No appeal was filed from that Determination by Mid Star. Hughes appealed seeking to overturn the Determination that she was an officer, and overturn the earlier Determination that Markel was dismissed without notice.

ISSUE TO BE DECIDED

Was Hughes an officer of Mid Star at the time that the wages were earned by Markel?

FACTS

The Director’s delegate determined (May 26, 1997) that Markel was a telephone marketer employed by Mid Star in Victoria and was terminated wrongfully on May 21, 1996. Mid Star did not file an appeal of that Determination. The Director’s delegate subsequently, in the Determination of November 5, 1997 found that Markel was a officer of the company on the basis of a corporate records search dated April of 1997, a record of employment for Markel which was signed by Hughes on behalf of Mid Star, and Markel’s evidence that she was subject to the directions of Hughes during the course of her employment with Mid Star.

It appears that another officer of Mid Star, Mr. Doornenbal filed an appeal in this matter. That appeal was rejected by this Tribunal in a letter decision dated September 24, 1997 from the Registrar as it was not filed within 15 days of the date of receipt of the Determination. In that Decision the Tribunal held that it was satisfied that no reasonable excuse was advanced for a late appeal by Doornenbal of the liability of Mid Star.

In her written submissions of November 24, 1997, Hughes seeks to have this Tribunal overturn the Determination made on May 26, 1997 and find that Markel resigned or quit her job and was not fired by Mid Star. It is unnecessary to recite the arguments raised by Markel in connection with this argument. I am not satisfied by the information presented, that Hughes has filed an appeal to this Tribunal in a timely manner from the Determination of May 26, 1997, or that any reasonable excuse has been offered for the lateness of an appeal of the Determination of May 26, 1997.

ANALYSIS

I agree with the submission of the Officer's delegate that this Tribunal has already considered the issue of the indebtedness of Mid Star to Markel. The Tribunal dismissed Mr. Doornenbal's appeal of the Determination dated May 26, 1997. As a result, Mid Star is liable to Markel for payment of termination pay, vacation pay and interest in the total amount of \$830.74.

Once a final determination is issued against a corporation, finding an obligation on the corporation to pay wages, the principle of issue estoppel or res judicata, prevents the corporate directors from challenging the issue of liability of the corporation to the employee, save with the exception of fraud in the issuance of the Determination, or cogent new evidence, not available previously: *Seacorp Properties Inc* BC EST #D440/97.

As this matter is *res judicata* it is not necessary for me to determine whether Ms. Markel abandoned her position or whether she was dismissed for cause. I note, however, that at the time of the investigation by the Director's delegate, the position of Mid Star was that Markel had abandoned her position. The argument now raised by Ms. Hughes is that there was cause for dismissal. The only issue which remains for decision is whether Hughes was an officer of Mid Star at the time that the wages were earned. In the context of this case the narrow issue is whether Hughes was a director as of the date of termination.

The burden is on Ms. Hughes to persuade me that I ought to vary or rescind the Determination. Ms. Hughes has argued that at the relevant time she was not an officer of Mid-Star and thus is not liable for the sum of \$830.74, which the Director's delegate determined was due and owing to Markel. The Director's delegate has stated in its written submission dated December 4, 1997, that he did a corporate registry search on May 21, 1997, which revealed that Hughes was a Officer of Mid Star as of April 30, 1997. The Director's delegate submitted that the record of employment issued by Mid Star on June 20, 1996 was signed by Hughes. The Director's delegate indicated that he received information from Markel indicating that she was subject to the direction of Hughes during the course of the employment relationship. The submission also notes that another officer of Mid Star, Mr. Doornenbal, lives at the same address as Hughes and identified her as a common-law spouse, in his Statement of Affairs of Bankrupt.

Ms. Hughes submitted no evidence identifying when she became a officer or officer of Mid Star. In the submission of the Director's delegate dated December 4, 1997 he pointed out that Ms. Hughes had not submitted any argument or facts on the issue of whether she was an officer of the company at the time that the wages were earned. In a submission dated December 19, 1997 Ms. Hughes states that she was not an officer of the company at the time of termination, but she has filed no evidence on this point.

It would have been open to Ms. Hughes to file corporate records, or a copy of the annual report made by Mid Star to the Registrar of Companies to prove when she became an officer of Mid Star. As an officer of that company, she has a right to copies of those

documents. I draw an adverse inference against her for failing to file documents with this Tribunal, relevant to the issue in this appeal, that were within her power to produce.

Since there is some evidence supporting the Determination made by the Director's delegate, with no contrary evidence tendered by Ms. Hughes, I confirm the Determination made by the Officer's delegate.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated November 5, 1997 be confirmed.

Paul Love
Adjudicator
Employment Standards Tribunal