

**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-

David Wilinofsky

and

Ron J. Wilinofsky

- of two Determinations issued by -

The Director of Employment Standards

(the "Director")

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE Nos.:** 98/812 and 98/814

**DATE OF HEARING:** March 9th, 1999

**DATE OF DECISION:** March 23rd, 1999

**DECISION**

**APPEARANCES**

David Wilinofsky	on his own behalf
Ron J. Wilinofsky	on his own behalf
Mary Andersin	on her own behalf
No appearance	for the Director of Employment Standards

**OVERVIEW**

On November 30th, 1998, a determination in the amount of \$1,449.59 was issued by a delegate of the Director of Employment Standards (the "Director") under file number 059-159 against 511630 B.C. Ltd. on account of unpaid wages owed to a former employee of the company, Ms. Mary Andersin ("Anderson"). I shall refer to this latter determination as the "Corporate Determination".

On November 30th, 1998, and under the same file number, the Director's delegate also issued two further (and essentially identical) determinations against David Wilinofsky and Ron J. Wilinofsky (who are brothers) for \$1,449.59. These latter two determinations were issued on the basis that both gentlemen were directors and/or officers of 511630 B.C. Ltd. and, therefore, by reason of section 96 of the *Employment Standards Act* (the "Act"), personally liable for Ms. Andersin's unpaid wages. I should also add that in each of the two director/officer determinations, an additional \$0 penalty was levied pursuant to section 98 of the *Act*.

There are two appeals before me brought by David Wilinofsky (EST File No. 98/812) and Ron J. Wilinofsky (EST File No. 98/814), respectively, pursuant to section 112 of the *Act*. These two appeals were heard together (along with a third appeal by 511630 B.C. Ltd. of a \$500 penalty determination) at the Tribunal's Vancouver offices on March 9th, 1999. During the appeal hearing I received evidence and submissions from both appellants as well as a brief oral submission from the respondent employee, Ms. Andersin. The Director did not appear at the appeal hearing although her delegate did file a written submission regarding both appeals.

While it may have been the present appellants' intention to also appeal the Corporate Determination, no such appeal has ever been formally filed with the Tribunal and the relevant appeal period governing such an appeal has now expired. However, even if a timely appeal of the Corporate Determination had been filed, or, alternatively, if the Tribunal was inclined to extend the appeal period pursuant to section 109(1)(b) of the *Act*, such an appeal appears to have little, if any, chance of success in light of the Tribunal's decisions in *Tri-West Tractor Ltd.* (B.C.E.S.T. No. D268/96) and *Kaiser Stables Ltd.* (B.C.E.S.T. No. D058/97)--a summary of some the relevant

particulars regarding 511630 B.C. Ltd.'s failure to participate in the delegate's investigation of Ms. Andersin's initial complaint can be found in B.C.E.S.T. Decision No. 105/99 (in which I confirmed the \$500 penalty issued against the employer for failure to produce employment records).

## ISSUE TO BE DECIDED

Although both appellants sought to challenge the amount of the determinations issued against them on the basis that the amount of Ms. Andersin's wage claim was incorrectly determined in the first instance, in light of the above facts, the only issue before me is whether or not the two appellants were, in fact and in law, directors or officers of 511630 B.C. Ltd. when Ms. Andersin's unpaid wage claim crystallized.

## FACTS AND ANALYSIS

David Wilinofsky concedes that at all material times he was an officer and director of 511630 B.C. Ltd. Indeed, in his "statutory declaration" filed in support of his appeal he describes himself as "the sole director, officer, shareholder and manager" of the 511630 B.C. Ltd. Thus, the determination issued against David Wilinofsky must be confirmed.

Ron J. Wilinofsky's status is less clear. While he was recorded, at all material times (the key date being Ms. Andersin's last day of employment, namely, January 6th, 1998), on the corporate records maintained by the B.C. Registrar of Companies as the director of 511630 B.C. Ltd., he never was an officer of that company and even Ms. Andersin confirms that Ron J. Wilinofsky, to her knowledge, never had any active role in the management of 511630 B.C. Ltd. In short, Ron J. Wilinofsky's status, he submits, was solely as an original subscriber to a "shelf company" that eventually became the vehicle by which his brother operated his clothing manufacturers' sales agency business.

Ron J. Wilinofsky's uncontradicted sworn evidence is as follows:

- 511630 B.C. Ltd. was incorporated by Ron J. Wilinofsky in early January 1996 as a "shelf company", the sole subscriber being Ron J. Wilinofsky;
- the company remained dormant until February 1st, 1996 when it became the vehicle for David Wilinofsky's clothing business and at this time Ron J. Wilinofsky resigned as a director/officer and David Wilinofsky was appointed as 511630 B.C. Ltd.'s sole officer (president/secretary), director and became the only shareholder--Ron J. Wilinofsky was appointed, by a consent director's resolution, as the company's solicitor;
- although Ron J. Wilinofsky's resignation is dated February 1st, 1996, this resignation was not filed with the B.C. Registrar of Companies until September 9th, 1998 when a Form 9 (Resignation of Director) was filed with the Registrar (the effective date of the resignation was noted as February 1st, 1996).

As noted above, the foregoing evidence of Ron J. Wilinofsky is uncontradicted. Clearly, the delegate proceeded against Ron J. Wilinofsky only because he was named as the company's sole director in Registrar's records--the delegate does not assert that he had any active role in the business whatsoever (the only active manager of the business was David Wilinofsky and yet David

was not listed as an officer or director in the Registrar's records until September 9th, 1998 when, in effect, David's name was substituted for his brother's).

Section 130(1) of the B.C. *Company Act* provides that "a director ceases to hold office when...he...resigns". This resignation must be submitted, in writing, to the company and is not effective until delivered to the company's registered officer [section 130(2)]. Thus, by virtue of these latter statutory provisions, Ron J. Wilinofsky ceased to be a director of 511630 B.C. Ltd. as of February 1st, 1996.

There is no evidence before me upon which I could conclude that Ron J. Wilinofsky was, at any time, a director or officer of 511630 B.C. Ltd. by virtue of the "functional test" set out in *Penner and Hauff* (B.C.E.S.T. Decision No. D371/96). Section 132 of the *Company Act* states that Ron J. Wilinofsky's resignation should have been filed (by way of a "Form 9") with the Registrar within 14 days after he resigned, but the failure to so file only rendered the company potentially liable to a \$50 *per diem* fine; a "failure to file" does not invalidate the resignation. Further, I should note that it is the *company's* obligation, not the individual director's, to file the Form 9; indeed, *only* the company can file a Form 9 with the Registrar.

In my view, where an individual is recorded as an officer or director of a company in the records maintained by the Registrar, a rebuttable presumption arises that the individual actually is a director or officer, as the case may be, of the company in question. This presumption, however, may be rebutted by credible and cogent evidence that the Registrar's records are inaccurate--the burden of proving that one is not a corporate director or officer lies with the individual who denies such status.

I have reviewed the relevant corporate records before me and I find them to be credible. The fact that Ron J. Wilinofsky was recorded as the sole director of 511630 B.C. Ltd. during the period January 1996 until September 9th, 1998 appears to be traceable to a simple oversight on his part to file the requisite Form 9 with the Registrar in February 1996. Accordingly, Ron J. Wilinofsky's appeal is allowed and the determination relating to this appellant is cancelled.

## **ORDER**

Pursuant to section 115 of the *Act*, I order that the determination issued against David Wilinofsky be confirmed as issued in the amount of **\$1,449.59** together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Pursuant to section 115 of the *Act*, I order that the determination issued against Ron J. Wilinofsky be cancelled.

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**Kenneth Wm. Thornicroft, *Adjudicator***