

An appeal

- by -

Mark Craig a Director or Officer of Turner Catering Inc.
("Craig")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2004A/75

DATE OF DECISION: June 29, 2004

me two [sic]. I did not even know of Turner Catering that time of incorporation. [sic] I became a shareholder/lender as of December 21, 1999.

Mr. Craig's position is further set out in a two-page memorandum attached to his appeal form in which he reiterates that he "was never legitimately appointed a Director or Officer of Turner Catering, Inc.". I consider that the above particulars more aptly raise an allegation that the Director erred in law in issuing a section 96(1) determination against Mr. Craig [see 112(1)(a) of the *Act*].

FINDINGS AND ANALYSIS

The material in the record includes the corporate determination issued against Turner on February 25th, 2004. This latter determination provides for payment of unpaid wages (including regular wages, vacation pay and, for one employee, compensation for length of service) owed to six former Turner employees as well as for three separate \$500 administrative penalties. The employees' unpaid wages were payable in October 2003.

Among other business activities, Turner operated a restaurant known as "Sea to You" and all six employees worked at this restaurant. According to the Reasons for the Determination" (at p. 1) appended to the corporate determination:

[Turner] ran into financial difficulties. Canada Customs and Revenue Agency (CCRA) seized the assets of the airport catering business in September 2003. The leaseholder of Sea To You Restaurant seized the assets of the business on October 24, 2003.

[Turner] has advised there are no funds to pay outstanding wages. CCRA seized and sold most of the assets of the company. Unfortunately CCRA takes a legal priority over the payment of wages. The company is no longer operating and has no assets. The Directors and Officers of the company have been asked to pay outstanding wages, but to date have not done so.

The record also includes a corporate registry search conducted by the Ministry of Labour on November 17th, 2003 with respect to Turner. This search indicates that the company was incorporated on February 10th, 1998 and that as of October 30th, 2003, Mark Craig was a director *but not an officer* of the company.

Thus, the material before me specifically shows that the Director erred at least to the extent of asserting liability against Mr. Craig under section 96(1) on the basis that he was a Turner officer. There is nothing in the material before me, nor does the Director's delegate argue, that Mr. Craig should be held liable as a Turner officer since he was "functioning" in that capacity (see *Kovacs*, B.C.E.S.T. Decision No. D076/97 and *Folino*, B.C.E.S.T. Decision No. D102/99). At the very least, the Determination must be varied to reflect that fact that Mr. Craig cannot be held liable under section 96(1) as a corporate officer.

I now turn to the question of Mr. Craig's status, and concomitant personal liability, as a director.

As previously noted, the Corporate Registry search indicates that Mr. Craig was a Turner director as of October 30th, 2003. This record raises a rebuttable presumption that Mr. Craig was a Turner director when the employees' wage claims crystallized (see *Wilinofsky*, B.C.E.S.T. Decision No. D106/99 and *Director of Employment Standards*, B.C.E.S.T. Decision No. RD047/01).

The record includes a copy of a formal “Notice of Directors” filed with Registrar of Companies on September 26th, 2003. This Notice indicates that Mark Craig was appointed as a director of Turner Catering Inc. on August 11th, 2003. The record also includes a one-page document headed “Directors’ Meeting Minutes” relating to a Directors’ meeting that apparently took place on October 31st, 2003 at 2:15 P.M. The penultimate paragraph of that latter document reads as follows: “At the end of the meeting, Mark Craig submitted his resignation as a Director, effective 5:00 p.m.”. By submitting a resignation of his directorship, Mr. Craig obviously conceded that he was, in fact, a Turner director.

Thus, on the face of the material before me it is abundantly and unassailably clear that when the employees’ unpaid wage claims crystallized, Mr. Craig was a director of Turner Catering Inc. That being the case, Mr. Craig is personally liable for the employees’ unpaid wages (each of the employees’ claims falls below the 2-month statutory "ceiling") unless he can bring himself within one or more of the statutory exceptions set out in section 96(2) and there is nothing in the material before me that would suggest any of these defences apply here (nor has Mr. Craig raised any of those defences in his appeal documents).

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be varied to delete any reference to Mr. Craig’s liability thereunder as a corporate officer of Turner Catering Inc. In all other respects the Determination is confirmed as issued in the amount of **\$5,844.15** together with interest to be calculated pursuant to section 88 of the *Act*.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal