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-

Kenneth Crispin Richardson

and

Theresa Margaret Richardson

(collectively referred to as the "Richardsons")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	99/37
DATE OF DECISION:	April 7th, 1999

DECISION

OVERVIEW

This is an appeal brought by Kenneth Crispin Richardson and Theresa Margaret Richardson (collectively referred to as the "Richardsons") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on January 15th, 1999 (the "Determination").

The Director's delegate determined that the Richardsons owed $4,578.72 to Gordon Valouch ("Valouch") on account of unpaid wages. The delegate also found that one Alice Ponting ("Ponting") had an unpaid wage claim but that she was "adequately compensated" (and therefore without a remedy under the *Act*) when the Richardsons transferred ownership of an automobile to her. In addition, a $0 penalty was assessed pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation.*

For a variety of reasons, set out below, I am of the view that the most appropriate disposition of this appeal is to cancel the Determination. It may be that following further investigation by the Director, a new determination may be issued, however, that is a matter entirely within the Director's discretion. It is suffice to say that the Determination now under appeal simply cannot stand in its present form.

ANALYSIS

Status of the Parties

By way of the Determination, the Director's delegate found that the Richardsons were liable for unpaid wages earned by Valouch during the period late July 1997 to early May 1998. The "style of cause" refers to the Richardsons individually "operating as 477729 B.C. Ltd. operating as Silverton Country Inn". I shall henceforth refer to this lattered numbered company as the "corporate employer".

As noted at page 2, paragraph number 3, of the Determination, the Richardsons were the only two directors and shareholders of the corporate employer during the period April 17th, 1997 to June 13th, 1998. On this latter date, the Richardsons resigned as directors and transferred their shares to Ray and Corrine Nicholas (from whom the Richardsons originally acquired their shares on April 17th, 1997). As I understand the situation, the corporate employer has always, and continues to, operated the Silverton Country Inn which is situated in Silverton, B.C.

The style of cause is entirely inappropriate. Given the presence of the corporate employer, that party alone should have been named--the style of cause adopted would have only been appropriate

if the business had been operated as a partnership (two or more controlling parties) or proprietorship (a single controlling party).

If, in fact, the Silverton Country Inn was operated by a corporation--as apparently it was--then the Richardsons could only be held liable for unpaid wages by reason of section 96 of the *Act* which provides for a maximum director/officer personal liability of 2 months' wages per employee. Section 96 provides as follows:

> 96 (1) A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months' unpaid wages for each employee.
>
> (2) Despite subsection (1), a person who was a director or officer of a corporation is not personally liable for
>
> > (a) any liability to an employee under section 63, termination pay or money payable under a collective agreement in respect of individual or group terminations, if the corporation is in receivership or is subject to action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act,
> >
> > (b) vacation pay that becomes payable after the director or officer ceases to hold office, or
> >
> > (c) money that remains in an employee's time bank after the director or officer ceases to hold office.
>
> (3) This Act applies to the recovery of the unpaid wages from a person liable for them under subsection (1).

None of the exceptions set out in section 96(2) is relevant here.

Indeed, the delegate appears to have proceeded against the Richardsons under section 96 of the *Act*. At page 8 of the Determination, the delegate stated:

> "The responsibility for a debt under the Act is attached to persons who are officers or directors of a corporation at the time that the wages of the employee(s) were earned, or at the time the wages should have been paid. The assets of the corporation's directors and officers are liened at the time the unpaid wages were earned."

If the delegate intended to proceed against the Richardsons under section 96, then the Determination cannot stand because the liability purportedly imposed on them by way of the Determination exceeds the 2-month liability ceiling established by section 96(1).

However, in the very next paragraph found at page 8 of the Determination, the delegate asserts that the Richardsons are nonetheless liable for the full amount of the unpaid wage claims because:

> "Since the liability of Valouch's wages was incurred in its entirety during the time the Richardson's [sic] *were in control of the employer--477729 B.C. Ltd.*, the Richardson's [sic] are entirely responsible for the discharge of that liability even though 477729 B.C. Ltd. continues to operate the Silverton Country Inn under the ownership of Ray and Corrine Nicholas." (my *italics*)

This latter proposition, novel though it may be, does not have any foundation in the *Act*. Directors or officers can only be held personally liable in accordance with section 96 of the *Act*. The delegate attempts to sidestep this provision by maintaining that the Richardsons were, in fact, the *employer*. However, there is nothing in the material before me upon which it could be reasonably concluded that the Richardsons (jointly), rather than 4277729 B.C. Ltd., was the employer. Although, in limited circumstances, the "corporate veil" may be ignored such that directors or officers held liable as principals, there is nothing in the record before me to justify such a piercing of the corporate veil. Indeed, as can be seen from the italicized portion of the above-quoted paragraph, the delegate himself found that the numbered company was the employer.

The Partnership Question

Undoubtedly, a contributing factor to the present confused situation is the Richardsons' assertion--advanced during the delegate's investigation and again on appeal--that the complaints of Valouch and Ponting could not be determined under the *Act* because the relationship between the parties was one of partnership rather than employment.

In my opinion, both the Richardsons and the delegate have fallen into fundamental error on this point. A business may be operated as a proprietorship, a partnership, a limited partnership (the latter two governed by the *Partnership Act*) or a corporation (under the *Company Act*) but a single business enterprise cannot be more than one of these legal entities at the same time. These various forms of business organizations are mutually exclusive. Based on the information that I have before me, the delegate erred in concluding, at page 6 of the Determination, "that the richardson [sic] were the sole partners in the venture". So far as I can gather, the Silverton Country Inn was, at all material times, operated by a corporate entity the only shareholders, officers and directors of which were the Richardsons.

While the Richardsons referred, presumably in a colloquial sense, to Valouch and Ponting as their "partners", the legal reality, at best, is that the parties were to be co-shareholders in the corporate employer. Alternatively, it may be that the Richardsons intended for Valouch and Ponting to enter into some sort of partnership with the corporate employer--a partnership may consist of any combination of natural and corporate persons. Finally, it may be that the intention of the parties was that Valouch and Ponting would enter into some sort of contractual joint-venture agreement, short of full partnership, with the corporate employer.

The delegate was, in my view, correct in determining that there was no partnership between the Richardsons, on the one hand, and Valouch and Ponting, on the other. However, it does not necessarily follow from such a conclusion that Valouch and Ponting were, in fact, employees--although they may well have been employed by the corporate employer at least for some portion of their tenure with the Silverton Country Inn. In my view, the actual intention and nature of the relationship between the Richardsons and Valouch/Ponting needs to be more fully investigated.

Ponting's Unpaid Wage Claim

The delegate determined that Pointing was owed $3,775.68 in unpaid wages but nevertheless dismissed her claim for the following reasons (at page 8 of the Determination):

> "The Richardsons provided Ponting with a car valued from $6,000 - $9,000 during her employment. The complainants say this car was given to them at the insistence of Theresa Richardson. The employer indicates the car was signed over to Ponting in September 1997, but Ponting indicates she transferred the registration into her name in April 1998 when it became clear that they would not be paid for their work...Ponting took the vehicle with her when she left the hotel, and continues to use it to this day. Therefore, the delegate has determined that the car should be offset against Ponting's compensation. As a result the delegate finds Ponting has been adequately compensated for her services at the hotel."

Notwithstanding the apparent logic of the delegate's position, section 20 of the *Act* mandates how wages are to be paid and nowhere in that section is some form of "barter" permitted. If Ponting has a valid wage claim, then she is entitled to a determination in her favour--in money--for the amount of that claim

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be cancelled without prejudice to any further investigation (and, if appropriate, the issuance of a determination), that the Director may wish to conduct.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal