

**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 -

June Linda F. Bernard, Director/Officer of  
First Nations Artists Corporation

(“Bernard”)

- of a Determination issued by -

The Director Of Employment Standards  
(the “Director”)

**ADJUDICATOR:** Lorna Pawluk

**FILE NO.:** 98/72

**DATE OF DECISION:** April 2, 1998

## DECISION

### OVERVIEW

This is an appeal by Bernard pursuant to Section 112 of the *Employment Standards Act* (the "Act") of a Determination issued on September 24, 1997 by the Director of Employment Standards ("the Director").

### ISSUE TO BE DECIDED

The issue is whether Barnard is personally liable as a director of the employer, First Nations Artists Corporation ("FNAC"), for sums owed to a former employee Kristina Sherry House ("House" or the employee) pursuant to a Determination issued September 24, 1997 by a delegate of the Director.

### FACTS

A Determination issued on September 24, 1997 found that House was owed \$8,624.81 in unpaid wages, overtime, vacation pay and compensation for length of service by FNAC. That Determination was confirmed by this Tribunal in B.C.E.S.T. #D015/98. In another Determination dated September 24, 1997, the Director's delegate found that Bernard, as an FNAC director, was personally liable for \$4,591.71 to House for unpaid wages. The Determination found that Bernard had contravened sections 17, 18, 58 and 63 of the *Act* and ordered her to cease these contraventions. It is that Determination which is appealed here.

In a submission dated February 3, 1998, counsel on behalf of Bernard referred to his letterfax of December 12, 1997 and reiterates the position outlined there:

The Determination issued September 24, 1997 by Mr. Ages which pertains to the personal liability of June Bernard as a Director/Officer of the Employer should be reconsidered. While the calculations in connection with the wages owing by the Employer are reduced by the wages already paid the same was not done with respect to the Director/Officer's liability. It appears inconsistent and even unfair to recognize in one set of calculations that a certain amount of wages have already been paid by the Employer, but to not also do so in a related set of calculations. The Director/Officer's liability, if any, should also be reduced proportionately to take into account wages already paid over a two month period.

Though given until February 23, 1998 to file further submissions in this appeal, Bernard made no further argument on this point.

**ANALYSIS**

Section 96(1) of the *Act* imposes liability for unpaid wages on a director where the employer corporation should have paid:

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  
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,  
vacation pay that becomes payable after the director or officer ceases to hold office, or  
money that remains in an employee's time bank after the director or officer ceases to hold office.

Section 1 of the *Act* defines "wages" this way:

"wages" includes  
salaries, commissions or money, paid or payable by an employer to an employee for work,  
money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,  
money, including the amount of any liability under section 64, required to be paid by an employer to an employee under this Act,  
money required to be paid in accordance with a determination or an order of the tribunal, and  
in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefit, to a fund, insurer or other person,

but does not include

gratuities,  
money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,  
allowances or expenses, and  
penalties;

(3) This Act applies to the recovery of the unpaid wages from a person liable for them under subsection (1).

The combination of these two provisions means that Bernard is personally liable for two months unpaid wages to House; compensation for length of service under section 63 if the company is not in receivership or involved in proceedings under an "insolvency Act"; vacation pay payable before the director ceased to hold office; and money remaining in the employee's time bank before the director ceases to hold office.

The Determination outlined the total liability of FNAC to House and the portion of it for which Bernard was personally liable. It is argued that the Determination outlining Bernard's personal liability does not take into account amounts paid to House by First Nations Artists Corporation; however the submissions do not make it clear precisely what sums have been paid to House by First Nations and why House is not liable for certain sums under the provisions of section 96. Moreover, the sums owed by Bernard is less than that owed by FNAC so that it would appear that Bernard has, in fact been credited with sums already paid. Finally, it is not open to Bernard to challenge amounts not challenged by the employer in the original Determination (*Kerry Steinman B.C.E.S.T. #D180/96*). The onus is on the appellant to demonstrate the error in the Determination and this has not been done here.

**ORDER**

Pursuant to section 115 of the Act, I confirm the Determination dated September 24, 1997.

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**Lorna Pawluk**  
**Adjudicator**  
**Employment Standards Tribunal**