

**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 -

Wanda Card

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

<b>ADJUDICATOR:</b>	John M. Orr
<b>FILE No:</b>	1998/738
<b>DATE OF HEARING:</b>	March 15, 1999
<b>DATE OF DECISION:</b>	March 23, 1999

**DECISION**

**APPEARANCES**

Wanda Card	On her own behalf
Peter Weinrich	Advocate for Wanda Card
Gerry Omstead	Delegate of the Director
Paul Hurst	On behalf of Victoria Street Community Association

**OVERVIEW**

This is an appeal by Wanda Card ("Ms Card") pursuant to Section 112 of the *Employment Standards Act* (the "Act") from a Determination (File No. 070122) dated November 03, 1998 by the Director of Employment Standards (the "Director").

Ms Card was the bookkeeper and a director of a non-profit Society called the Victoria Street Community Association ("the Association"). She was employed by the Association for just over 3 years when her employment was terminated on May 22, 1998. Ms Card was owed holiday pay and claimed compensation for length of service. The Association's position is that Ms Card resigned and was therefore not entitled to compensation. The Director found that Ms Card was a director of the association and as such could not claim against the association for wages.

Ms Card appeals on the grounds that the Determination was wrong in fact and law. Firstly, she says she was not a director of the Association but merely a staff representative and secondly, even if she was a director, that should not preclude her from collecting wages rightly owed. A third issue arose as to whether Ms Card was entitled to claim for overtime but the Association says that she was the office manager and as a "manager" she is not entitled to claim for overtime.

**ISSUES TO BE DECIDED**

The issues to be decided in this case are:

1. Was Ms Card a director of the Association ?
2. If Ms Card was a director does this preclude her from claiming wages from the Association ?
3. Was Ms Card a "manager" and therefore precluded from claiming for overtime ?
4. Was Ms Card's employment terminated by the Association for just cause or did she terminate her own employment ?

**FACTS**

The facts were in dispute and I heard evidence from Ms Card, Michael Walker (a former director and officer of the Association), and Paul Hurst. I carefully weighed the evidence and was cognizant of the need to assess it in terms of the test recommended in *Faryna v. Chorny*, [1952] 2 D.L.R., 354 (B.C.C.A.). The following facts are as I find them after hearing and weighing all of the evidence.

Ms Card was hired as a bookkeeper for the Association. She did the books for the main association and for a number of separately funded sub-projects. Her duties also included a number of general office duties and "gopher" work. She was called the "office manager". It was clear on all of the evidence that Ms Card may have managed the office but she did not manage any other employees of the Association. There was a separate Executive Director and an Assistant to the Executive Director. There was also a Centre Coordinator and a Site Supervisor. None of these positions reported to Ms Card. I find on the evidence before me that Ms Card did not act in an executive capacity.

At an Annual General Meeting of the Association it was resolved to augment the board with directors selected from amongst and by the staff. Ms Card was chosen to be a staff representative on the board. She attended the board meetings and carried out all the functions of a board member including full voting rights. She would naturally and properly absent herself from personnel matters where there might be a conflict of interest. In all other respects she performed all the functions of a director of the board including the election of officers. She was one of 13 board members.

There was an issue between Ms Card and some members of the board in the Spring of 1998. Ms Card had taken much of the bookkeeping records to her home to be able to work on the year ends to get ready for the auditors. Other members were concerned that things were not progressing quickly enough as future funding depended on completion of the audits. Ms Card sent a letter dated April 14, 1998 resigning as the staff representative. She was not officially removed from registration as a director until May 11, 1998.

In the Spring of 1998 it was clear the Association was running into funding difficulties. On May 8, 1998 a motion was passed by the directors (Ms Card was not in attendance) that notice be given to all staff that there were to be lay-offs. Ms Card became aware of the motion on May 12, 1998. She decided to put together a proposal for the board that included her taking some time off that had previously been agreed, combined with some holiday time, and some part time work for the Association to ensure that all year-end reports were completed properly. She build in some time in place of severance and proposed that, if this was all agreeable, her employment could end on June 30th, 1998.

On Thursday May 21, 1998, an officer of the Association, Tim McHugh, met with Ms Card and told her that the board had accepted her proposal but that he just wanted to check that she would also be able to do the accounts payable and the payroll during the time that she had allocated to work for the Association. Ms Card confirmed that she would continue with these tasks up to June 30th.

On Friday May 22, 1998 Ms Card had completed the payroll and prepared the cheques including her own. On her lunch break two other employees told her that they had heard that she had quit her

job. When she returned to the office she went to see McHugh who told her that the Board had accepted her resignation forthwith. Ms Card's paycheque was taken from her and amended. She went home for the weekend and phoned in on Monday morning to see if she should go to work. She was told no. She testified and I accept that she had no intention of resigning at that time.

## **ANALYSIS**

The *Act* does not define the term "director" but the *Society Act* defines director as follows:

*"director" includes Trustee, officer, member of an executive committee and a person occupying any such position by whatever name called.*

This definition is not exclusive as it says that director "includes" such positions, but it does indicate that the actual title is not conclusive either. In this case Ms Card was known as a Staff Representative but is clear that she performed all the usual functions of a director except where there might be a conflict of interest. She was registered as a director. She attended meetings, voted on all issues, except personnel matters, including the election of officers, approval of minutes, and all normal business functions of the Association. However, it could not be said that she was the "controlling mind" of the organization. She was one of only thirteen members.

I have no doubt that she was a director of the Association up to point of her resignation on April 14, 1998.

The second issue is whether as a director Ms Card is precluded from making a claim for wages. In the Determination the director's delegate states that as a director *"you play a part in the direction and control of the business. You are responsible for the wages earned by the employees"*. He goes on to conclude, *"Even if the Act gave the Branch jurisdiction in this matter, the avenue of recovery of wages would be to yourself as you are personally liable for up to 2 months wages of an employee. I find that the Branch does not have jurisdiction in the recovery of your wages."*

In my opinion this conclusion by the delegate is incorrect for two reasons. Firstly, Ms Card was not a director at the time for which she is claiming. She resigned on April 14, 1998 and the late filing of the official change of directors is not effective to extend that time. Secondly, and more importantly, there is nothing in the *Act* that disentitles corporate or society directors from enforcing wage claims under the statutory employment standards scheme.

It has been noted in previous decisions of the Tribunal that it is the Director's policy not to pursue claims from directors and officers of a corporation for unpaid wages because they are personally liable for payment of wages to employees. The delegate at this hearing did not refer to such a policy but the wording of the determination applies the same logic. The Director has previously acknowledged that this policy is not based on any specific words in the *Act* or *Regulation*.

Neither the Director nor this Tribunal have the authority to create a category of employees not entitled to claim for wages. Such powers are defined and limited by the *Employment Standards Act* and its *Regulations*. The Director's policy and the ability of corporate directors to claim for wages is discussed in *The Director of Employment Standards* (BC EST #D559/98; a Reconsideration of BC EST #D342/98) which found against the Director on this issue. There are many cases where a person genuinely employed by a corporation or society is also elected or

appointed to sit as a director or appointed as an officer. This should not preclude them from the protection of the *Act*. Likewise there may be genuine cases where a director or officer also enters into an employment contract with the corporation or society. There is no logical reason why such employment contracts should not be enforceable against the corporation.

In conclusion, on this issue, I find that Ms Card's claim is not barred by her position as a director either before or after her resignation from the board.

On the third point, it became very clear during the hearing that Ms Card was not a "manager". Part One of the *Regulation* defines manager as follows:

*"manager" means*

- (a) *a person whose primary employment duties consist of supervising and directing other employees, or*
- (b) *a person employed in an executive capacity;*

Ms Card may have been called an office manager but all she managed was the office. She did not supervise nor direct other employees and did not act in an executive capacity. This issue is only important as regards to any outstanding claim for overtime as managers are excluded from such provisions by Section 34 of the *Regulation*.

The fourth issue in this case related to the nature of the termination of Ms Card's employment. Ms Card became aware of potential lay-offs and put together a proposal to the employer for consideration which would have seen a reduction in working hours, a using up of vacation time and some savings for the employer. The proposal would have seen her employment end at the end of June, 1998. The employer then purported to accept this as a resignation.

This Tribunal has held in many previous decisions that there are two elements that must be established by the employer who asserts that an employee has resigned. The act of resigning is personal to the employee and there must be clear and unequivocal evidence of either a verbal resignation or an act establishing the subjective intent to resign and a carrying out of that intent by the employee.

I am satisfied that Ms Card did not intend to resign as of May 22, 1998 and, if the employer had not told her not to return to work, she would have continued to work until June 30th, 1998 and longer if the fortunes of the Association had improved with renewed funding. I am also satisfied that she did not carry out the act of leaving her employment even if there was some intent indicated to do so in the future.

There is no evidence to say that Ms Card was dismissed for cause or retired. I find that she is entitled to compensation in accordance with section 63 (2)(b) of the *Act*.

In conclusion I find as follows:

1. Ms Card was a director of the Association up to, but not after, April 14, 1998;
2. Despite being a director Ms Card is entitled to make a claim for wages including holiday pay, severance, and overtime;

3. Ms Card was not a manager as defined by the *Regulation*;
4. Ms Card did not terminate her own employment, retire, nor was she dismissed for just cause. She is entitled to compensation for length of service.

**ORDER**

I order, under Section 115 of the *Act*, that the Determination is referred back to the Director to determine the amount of wages owing by the Association to Ms Card including compensation for length of service, overtime, and holiday pay.

**John M. Orr**  
**Adjudicator**  
**Employment Standards Tribunal**