

An appeal

- by -

Edwin Allan Beck,
a Director or Officer of 536761 B.C. Ltd. operating as Cydney's Roadhouse
("Beck")

- 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

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2001/869

DATE OF DECISION: April 11, 2002

DECISION

THE APPEAL

This is an appeal filed by Edwin Allan Beck (“Beck”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Mr. Beck appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on December 7th, 2001 (the “Determination”) ordering him to pay the sum of \$16,782.96 on account of unpaid wages and interest owed to ten individuals, all former employees of 536761 B.C. Ltd. operating as “Cydney’s Roadhouse”.

The Determination was issued against Beck pursuant to section 96(1) of the *Act* which provides as follows:

Corporate officer’s liability for unpaid wages

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.

Previously, on August 28th, 2001, a Director’s delegate issued a determination against 536761 B.C. Ltd. operating as “Cydney’s Roadhouse”, ordering that firm to pay \$19,193.12 on account of unpaid wages and interest owed to the same ten former employees named in the Determination now under appeal. This latter corporate determination could have been appealed to the Tribunal, however, the appeal period expired on September 20th, 2001 with no appeal having been filed. Further, according to the information set out in the Determination now under appeal, no monies have been paid on account of the employees’ unpaid wages.

In light of the foregoing circumstances, the Director issued the section 96 Determination against Mr. Beck on the basis that he was both an officer and director of 536761 B.C. Ltd. when the employees’ wages were earned or should have been paid, namely, during the period from June 26th, 2001 to July 16th, 2001.

In accordance with the Tribunal Vice-Chair’s direction contained in a letter to the parties dated March 14th, 2002, this appeal is being adjudicated based on the parties’ written submissions (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). I have before me submissions from Beck, the delegate and one of the ten employees.

ISSUE ON APPEAL

Beck does not take issue with the calculations contained in the Determination. His appeal is based solely on the assertion that he was not a director or officer of 536761 B.C. Ltd. when the employees’ unpaid wage claims crystallized.

BACKGROUND FACTS

A “BC Online” corporate registry search, dated July 17th, 2001 and current as of June 29th, 2001, is appended to the Determination. This search indicates that 536761 B.C. Ltd.’s registered and records office is located at suite number 204, 1433 St. Paul Street, Kelowna, B.C. and that Mr. Beck is both an officer (secretary) and director of the firm. The only other corporate principal identified in the search is Cindy Lorraine Beck (president and director) who has the same residential address as Mr. Beck and is, I understand, his spouse.

In a brief undated handwritten note appended to his appeal form Beck states: “I’m including a copy of my resignation from the company which should be on file at St. Paul St. Kelowna, I do not know why it would not be included in the original search.” The document in question, headed “Resignation”, states that Beck is tendering his resignation as an officer and director of 536761 B.C. Ltd. “effective immediately” and is dated February 16th, 2000.

In a submission to the Tribunal dated December 30th, 2001 (filed January 3rd, 2002), Beck says that he resigned because he and his wife had disagreements about the the management of the business. The delegate’s submission, dated and filed January 4th, 2002, indicates that 536761 B.C. Ltd.’s registered and records office is a Kelowna law firm, A.B. Paige & Company Law Corporation. The delegate contacted the law firm in question and asked for a copy of Beck’s resignation only to receive a one-sentence letter, by fax, dated January 3rd, 2002, which states that: “...we confirm that as we are no longer the Registered and Records Office, we are not in a position to provide you with the documentation you requested”. The law firm’s letter does not indicate when it ceased to be the registered and records office nor does it indicate when Beck delivered his “resignation” to the registered and records office

Mr. Beck filed a further submission with the Tribunal, dated and filed January 30th, 2002, which includes a resolution dated July 12th, 2001, signed by Cindy Lorraine Beck, identified as the “sole Director of 536761 B.C. Ltd.” authorizing a change of location of the firm’s registered and records office from the law firm to another address. Beck’s January 30th submission also includes a “Notice to Change Offices” (Form 4) dated July 12th, 2001 and two “Annual Reports” (Form 16)--for the years ending February 17th 2000 and 2001--both of which are also dated July 12th, 2001. The two Annual Reports purport to show that Mr. Beck is no longer associated with 536761 B.C. Ltd. (his name has been struck out on the preprinted computer form which was forwarded, presumably, from the Registrar of Companies). The submission also includes a “Notice of Directors” (Form 9) dated July 12th, 2001 which states that as of February 16th, 2000, Mr. Beck was no longer a director of 536761 B.C. Ltd. Finally, there is a “cash transaction” which shows that the law firm which acted as registered and records office filed the above documents with the Registrar of Companies on July 17th, 2001.

FINDINGS

The timing of the filing of Beck's resignation raises a strong suspicion in my mind as to whether it is a *bona fide* document. The employees' wage claims span the period from June 26th to July 16th, 2001. The various corporate documents noted above were filed on July 17th, 2001. The Annual Report forms, computer generated by the Registrar of Companies and forwarded to 536761 B.C. Ltd.'s registered and records office, show that Mr. Beck was an officer and director according to the Registrar's records as of the date each of the report forms was generated. As noted above, the corporate search as of June 29th, 2001 indicated that Mr. Beck was both an officer and director of 536761 B.C. Ltd.

The Notice of Directors (Form 9) appears to have been prepared by the law firm and is dated July 12th, 2001 even though it purports to document that Mr. Beck ceased to be a director as of February 16th, 2000. One cannot help but wonder why Mr. Beck took so long to ensure that his resignation was delivered to the company's registered and records office and that appropriate and timely notices were delivered to the Registrar of Companies.

If a person is recorded as a corporate director or officer in the records maintained by the Registrar of Companies there is a rebuttable presumption that the records accurately reflect the individual's status (*Wilinofsky*, B.C.E.S.T. Decision No. D106/99). The burden of showing that the Registrar's records are inaccurate lies on the individual so named in the records. However, as observed by the reconsideration panel in *Director of Employment Standards (Michalkovic)*, B.C.E.S.T. Decision No. RD047/01, the Director can presumptively rely on corporate records on file with the Registrar of Companies and the person challenging those records must prove, by credible and cogent evidence, that the records are inaccurate.

In the case at hand, at the very least, Beck has displayed a cavalier attitude with respect to his alleged "resignation". One has to wonder why nearly a year and a half passed by without Beck taking steps to ensure that his resignation was properly recorded with the Registrar of Companies and in 536761 B.C. Ltd.'s internal corporate records held at its registered office. Tellingly, there is nothing in the material before me from the law firm that served as the registered and records office indicating that their office received a copy of Beck's resignation in a timely fashion.

Based on the material before me, I cannot reject the assumption that Mr. Beck created a form of resignation, backdated the document, and then arranged for the corporate records to be amended--but only *after* he realized that he was potentially liable for unpaid wages as an officer and director of 536761 B.C. Ltd. There is no independent corroborating evidence before me (such as evidence from the law firm that the resignation was delivered to the registered office on or near the date of the document) that would suggest Beck formally resigned his directorship and office in mid-February 2000. In sum, I am not satisfied that Beck has met his evidentiary burden of proving, by cogent and credible evidence, that he tendered a *bona fide* notice of resignation on February 16th, 2000. Further, even if Beck did deliver a timely form of resignation, he still might be liable under section 96 in view of the "functional test" (see *e.g.*, *Penner and Hauff*, B.C.E.S.T. Decision No. D371/96). The Director did not proceed against Beck on this latter basis and thus, even if I was satisfied that a timely and lawful resignation had been tendered, I would not have cancelled the Determination; rather, I would have simply referred this latter question back to the Director to be further investigated. However, on the basis of the available evidence, I am not

satisfied, on a balance of probabilities, that Beck had lawfully resigned as an officer or director of 536761 B.C. Ltd. when the employees' wage claims crystallized.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$16,782.96** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal