

An appeal

- by -

Lorna Lee Burns  
("Burns")

- 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:** David B. Stevenson

**FILE No.:** 2004A/96

**DATE OF DECISION:** August 5, 2004

## DECISION

### SUBMISSIONS

Lorna Lee Burns	on her own behalf
Art Schievink	on behalf of Lorna's Design Draperies Ltd.
Cal Mitten	on behalf of the Director

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") brought by Lorna Lee Burns ("Burns") of a Determination that was issued on May 19, 2004 by a delegate of the Director of Employment Standards (the "Director").

Burns had filed a complaint with the Director claiming she was owed regular wages by Lorna's Design Draperies Ltd. ("the Company").

The Director determined the *Act* had not been contravened and that no further action would be taken on her claim.

Burns says the Determination is wrong and seeks to have the Tribunal grant her wage claim and her claim and vary the Determination to order it to be paid. Substantially, Burns challenges several of the findings, and conclusions, of fact made by the Director.

Burns has indicated in the appeal that an oral hearing may be necessary. The Tribunal, however, has reviewed the appeal and the materials on file and finds that an oral hearing is not necessary in order to decide this appeal.

### ISSUE

The issue in this appeal is whether Burns has shown any error in the Determination that justifies the intervention of the Tribunal to vary it or refer it back to the Director.

### THE FACTS

The Determination sets out the following background facts:

Lorna Burns and Art Schievink opened a drapery store in 100 Mile House, BC. It was called Lorna's Design Draperies Ltd. Both individuals were listed as directors of the Company, with the Corporate Registry Office of the Ministry of Finance. Both individuals had signing authority on the corporate banking account and both signed the lease agreement for the store. Lorna Burns signed a notarized letter, dated March 18, 2004, which stated that effective immediately, she was resigning as officer, director and employee of the Company.

The Director found, on the facts, that Burns was a "controlling mind" of the Company and was listed and functioned as a director of the business.

## ARGUMENT AND ANALYSIS

The burden is on Burns, as the appellant, to persuade the Tribunal that the Determination was wrong and justifies the Tribunal's intervention. An appeal to the Tribunal is not a re-investigation of the complaint nor is it intended to be simply an opportunity to re-argue positions taken during the investigation. The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

- 112 (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
- (a) the director erred in law;*
  - (b) the director failed to observe the principles of natural justice in making the determination;*
  - (c) evidence has become available that was not available at the time the determination was made.*

In this appeal, Burns submits that the Director erred in concluding she was not entitled to claim wages against the Company under the *Act*. While Burns has framed the appeal as a failure by the director to observe principles of natural justice, it is more properly framed as a question of whether the Director erred in law by refusing to continue to investigate her complaint because of the Director's finding that Burns was a "controlling mind" of the business and was listed and functioned as a director of the Company.

In its analysis, the Determination contains the following:

The key factor to examine, in this case, is whether or not the complainant performed the functions of a director of the Company. If she did, then my determination would be that she should not be able to access the minimum standard entitlements that a regular employee (who was also not a director) would be entitled to, under the *Act*.

The reasoning for this position is that someone who is a director of a company should not have the same protection under the *Act* as a person who is/was not a controlling mind of the company.

If the Determination was based solely on the analysis described in the above paragraphs, the appeal would succeed, the Determination would be set aside and the matter would be referred back to the Director or decided by the Tribunal from the material on file. The question of whether Burns was a director of the Company and functioned as such is secondary, and largely irrelevant, to the central question which the Director had to decide in this case. The Tribunal has rejected the contention that a director, or officer, of a corporation cannot be an employee under the *Act*. There is, in fact, nothing in the *Act* that precludes a director of a company from being an employee under the legislation or disentitles such person to use of the wage recovery mechanism found in the *Act*. The Tribunal has recognized the potential inconsistency in a director, who can be made personally liable for unpaid wages under Section 96 of the *Act*, also being an employee and in *Director of Employment Standards (Re Annable)*, BC EST #D559/98 (Reconsideration of BC EST #D342/98), but has indicated such circumstances only justifies a more searching assessment of the relationship between the director/officer and the company:

It would be appropriate, in the Tribunal's view, for the Director to have regard to the facts in each case, looking to issues of whether the employee/director was a controlling mind of the corporation, whether the directorship was merely for administrative convenience and whether the directorship was real or a sham.

While I disagree with this part of the Director's analysis, however, I am not convinced there is any error in the result. As a matter of law under the *Act*, the key factor to examine in the circumstances of this particular complaint was whether Burns was a "controlling mind" of the Company and the Director did consider that question. The Determination states:

. . . it is the Director's position that the *Act* was not intended to consider that a director with a controlling mind could also be an employee entitled to wage protection described in the *Act*.

Generally, the above more accurately conforms to the proper analytical approach to Burns' complaint, which required the Director to examine whether she was a "controlling mind" of the Company. The Director found, on balance, that Burns was a "controlling mind" of the Company. There is ample support for that finding.

In *Barry McPhee*, BC EST #D183/97, the following comment is found:

The *Act* exists, in large part, for the benefit and protection of employees who otherwise have no control over decisions of their employer about the terms and conditions under which they will be employed. A key purpose is to ensure the application of minimum standards of compensation and conditions of employment, including hours of work, overtime pay, leaves of absence, annual and statutory holidays and holiday pay and length of service compensation for termination without notice, for those employees. Despite the broad language used to define who is an employee, it is not a reasonable interpretation of that language, taking into account the scope, purposes and the over-all objectives of the *Act*, to conclude it is intended to embrace the controlling minds of the company.

The Tribunal has not accepted that the "controlling mind" of a corporation can be an employee for the purposes of the *Act*.

Burns argues that she because she did not get her way on some matters, the Director should not have concluded she was a controlling mind of the Company. It is not necessary, however, that a person be the prevailing authority within a company in order to be considered to be a "controlling mind". What is required in that context is evidence showing the person to be part of the group making key decisions relating to the business (see, for example, *Richard Trus*, BC EST #D520/99). There is ample evidence in the material on file, confirmed in the appeal, that Burns participated in such decisions, even if she did not get her way on all of them.

There is nothing to indicate Burns' position with the Company was simply a matter of administrative convenience or that her directorship was a sham.

In sum, Burns has not shown any error in the Determination that would justify the intervention of the Tribunal to vary it or refer it back to the Director. The appeal is dismissed.

**ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated May 19, 2004 be confirmed.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**