

An appeal

- by -

Parm K. Pooni a Director or Officer of Securcom Security & Communication  
Services Ltd.

("Pooni")

- 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/143

**DATE OF DECISION:** October 15, 2004

## DECISION

### SUBMISSIONS

Douglas J. Conolly	on behalf of Parm K. Pooni
Therese Kitney	on her own behalf
Rod Bianchini	on behalf of the Director

### OVERVIEW

This decision addresses an appeal brought pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by Parm K. Pooni, a Director or Officer of Securcom Security & Communication Systems Ltd. (“Pooni”) of a Determination that was issued on July 14, 2004 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Pooni was a Director or Officer of Securcom Security & Communication Systems Ltd., an employer found to have contravened provisions of the *Act*, and under Section 96 of the *Act*, was ordered to pay an amount of \$5018.50.

In this appeal, counsel for Pooni says the Director erred in law in finding Pooni was a Director or Officer of Securcom Security & Communication Systems Ltd. and failed to comply with principles of natural justice in making the Determination.

The appeal indicates that, “credibility is central to the issue of whether Ms. Pooni performed any of the functions of a director of Securcom between June 1, 2002 and July 28, 2002”. An oral hearing was not specifically requested. The appeal indicated an affidavit would be provided, but that has not been done.

The Tribunal has reviewed the appeal and the materials and has decided an oral hearing is not necessary in order to decide this appeal.

### ISSUE

The issue in this appeal is whether Pooni has shown the Director erred in finding she was a director or officer of Securcom Security & Communication Systems Ltd. and liable under Section 96 of the *Act*.

### THE FACTS

The Determination set out the following facts and findings:

- A Determination was issued on October 31, 2004 against Securcom Security & Communication Systems Ltd. in the amount of \$4873.67, an amount which included wages found owing to Therese Kitney (“Kitney”) and interest on the wages found owing.
- The Determination related to wages earned by Kitney between July 1, 2002 and July 28, 2002.
- Securcom Security & Communication Systems Ltd. was incorporated on September 6, 2000.

- As of October 2, 2003 and April 7, 2004, Pooni was listed as a director/officer of Securcom Security & Communication Systems Ltd. in a BC Online search of the Registrar of Companies.
- Pooni was a director/officer of Securcom Security & Communication Systems Ltd. at the time Kitney's wages were earned.

## ARGUMENT AND ANALYSIS

The burden is on Pooni 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 complaint process.

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.*

Counsel for Pooni says the Director erred in law and failed to observe principles of natural justice in making the Determination and has provided submissions and evidence in support of the appeal.

The first ground of appeal is based on the position that Pooni was a director/officer of Securcom Security & Communication Systems Ltd. in name only, as a favour to Mr. Peter Simon, who Pooni says was at all relevant times the owner and *de facto* director of the company. Pooni says she did not participate in any activity related to the operational aspects of the business; that Mr. Simon made all operational decisions for the company.

Counsel for Pooni says the Director failed to observe principles of natural justice in several respects:

- (a) by limiting the investigation of whether Pooni was a director/officer of Securcom Security & Communication Systems Ltd. to a BC Online search of the corporate registry;
- (b) failed to give Pooni an opportunity to state her case; and
- (c) made no attempt to contact or interview Pooni even though Kitney was found to be in the same position as Pooni – a director in name only.

The Director and Kitney have filed replies to the appeal.

The Director says, correctly in my view, that Pooni has not shown the corporate records relied on by the Director when making the Determination are wrong. The Director also notes that Pooni appealed the corporate Determination and was well informed of the basis for the director/officer Determination. The

submission of the Director specifically refers to a letter dated February 20, 2003, signed by Pooni as Director of Securcom Security & Communication Systems Ltd., authorizing Karen R. Nicolai to act on behalf of the Company.

Kitney has provided an extensive submission. Suffice to say she opposes the appeal and makes some compelling arguments in support of her opposition.

In the appeal, counsel for Pooni sought to reserve the right to provide written argument on the appeal once the adjudicator was appointed. No such concession has been granted by the Tribunal. Correspondence from the Tribunal has clearly indicated the Tribunal may decide the appeal on the basis of the material filed and in correspondence dated September 9, 2004 provided the submissions of the Director and Kitney to both Pooni and counsel for Pooni and provided an opportunity for a final reply. No reply was provided by counsel for Pooni, but a reply from Pooni directly was delivered to the Tribunal on September 28, 2004. The reply re-states the assertion that Pooni became a director of the Company as a favour to Mr. Simon, that she resigned as director in December 2001 and was replaced by Kitney and she does not know why Kitney or the Company failed to file the proper documents with the corporate registry. Some of these assertions appear to be inconsistent with previous assertions of fact, but the inconsistencies are not relevant to the issues raised by this appeal as they go to matters of fact.

This appeal must be dismissed.

No error of law is shown. It is well established that liability under Section 96 of the *Act* is not decided on a functional analysis. Accordingly, it is largely irrelevant whether Pooni was a director/officer in name only and did not participate in the operational aspects of the business. The Director found, as a matter of fact, that Pooni was recorded in the corporate registry as a director/officer of the Company. That finding is not challenged, nor could it be. I refer to the following comments from *Lucille M. Pacey, a Director or Officer of Mosaic Technologies Corporation*, BC EST #D21/04, which I find applicable to this aspect of the appeal:

Counsel for Pacey refers to and relies on several decisions of the Tribunal in support of his argument for a functional test, including the reconsideration decision in *Director of Employment Standards (Re Michalkovic)*, BC EST #RD047/01. In that decision, however, the Tribunal specifically rejected a functional approach to liability under Section 96 of the *Act*, in cases where, as here, the person seeking relief from liability is listed as a director or officer of the corporation in their corporate records. Rather, the Tribunal endorsed the approach described in *Wilnofsky*, BC EST #D106/99, that accepted the presumptive reliability of the company's corporate records. Based on those decisions, I am unable to accept that the question of Pacey's status for the purposes of Section 96 should be decided on a functional analysis of her duties and responsibilities with the corporation.

The presumptive reliability of the corporate records can be rebutted. Referring once again to the *Pacey* decision, *supra*, the Tribunal said:

That does not necessarily end the matter. In *Michalkovic*, the Tribunal set out, and confirmed, the following propositions arising from the *Wilnofsky* decision: that the presumption can be rebutted by the putative director or officer showing the corporate records are inaccurate or by showing circumstances exist which would make it inappropriate to find that person is a director or officer for the purposes of the *Act*; and that a determination on director/officer status under section 96 should be narrowly construed. The burden is on the person recorded as a director or officer to rebut the presumption raised in the corporate records.

On the question of the accuracy of the records, the burden requires fairly clear and cogent evidence. Particularly, I am not compelled, as apparently the Director was not compelled, by the assertion from Pooni that she had resigned as a Director of the Company in December 2001. That assertion must be read against all of the other material on file, against the requirements of Part 4 of the *Company Act*, RSBC 1996, ch. 62 and, in particular, against the letter provided to the Director in February 2003 on company letterhead on which she signed as Director of Securcom Security & Communication Systems Ltd. Pooni has not met the burden of providing fairly clear and cogent evidence that the Company's corporate records are not accurate and reliable.

The reliability of the corporate records may also be rebutted by showing circumstances which would make it inappropriate to find a person recorded as a director/officer should be found liable as such under the *Act*. In that regard, I refer to, and adopt, the following statement from the decision *Dyan Judith Van Dam, a Director or Officer of Van Four Enterprises Ltd. operating as De Dutch Pannekoek House*, BC EST #D088/04:

As the Tribunal stated in *Director of Employment Standards (Re Michalkovic)*, BC EST #RD047/01, it will be the rare and exceptional case where an individual who is recorded as a director/officer with the Registrar of Companies will be found not to be a director/officer for the purposes of Section 96 of the *Act* and such a finding will not be decided simply on whether the individual actually performs the duties, functions or tasks of a director/officer.

I do not, however, find anything in the material which would indicate "rare and exceptional" circumstances exist in this case that could have provided the basis for concluding Pooni should not have been found to be a director/officer of Securcom Security & Communication Systems Ltd. for the purposes of Section 96 of the *Act*. The best Pooni has done on this point is to say she became a director/officer as a favour to Mr. Simon and was not actively involved in the operational aspects of the business. At the same time, she was the only director/officer of the Company. It would be a dangerous precedent, and quite inconsistent with the purposes and objectives of the *Act*, generally, and Section 96, specifically, to allow her to avoid liability on that basis.

On the natural justice ground, there is nothing in the appeal which shows there has been a failure by the Director to observe principles of natural justice in making the Determination.

Pooni was well aware of the case she had to address and had ample opportunity to respond. In fact, she has stated her position in two appeal processes. As I noted in my decision on the corporate appeal, *Securcom Security & Communication Systems Ltd.*, BC EST #D017/04:

The appeal only inferentially addresses the findings and conclusions made in the Determination. Primarily, it seeks to have the Tribunal review Pooni's "involvement" in Securcom and find she would not be personally liable as a director or officer of Securcom for any of the wages that might be owed to Kitney.

All of the same arguments raised by Pooni in the corporate appeal have been made in this appeal. None of her submissions in either appeal indicate any confusion about the issue of her potential liability under the *Act* as a director/officer of the Company.

In respect of the argument concerning the extent of the Director's investigation on the liability of Pooni as a director/officer of the Company, I can find no basis for finding a BC Online search of the corporate registry was the full extent of the Director's investigation in that regard. Even if it were, as indicated

above, the Director is entitled to rely on the information contained in the corporate registry as being presumptively reliable subject to the right of the putative director/officer to show the records are inaccurate. If that presumption is incorrect, Pooni had the burden to show it was incorrect and did not do so.

Finally, Pooni has not shown there was a requirement on the Director to contact or interview her in order to ensure principles of natural justice were observed in making the Determination. More particularly, Kitney was not “in the same position” as Pooni as she was not recorded as a director/officer of the Company in the corporate registry.

## **ORDER**

Pursuant to Section 116 of the *Act*, I order the Determination date July 14, 2004, be confirmed in the amount of \$5018.50, together with any interest that has accrued under Section 88 of the *Act*.

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