

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-

Norene Ciura
("Ciura" or the "appellant")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 99/193

DATE OF DECISION: June 16, 1999

DECISION

OVERVIEW

This is an appeal brought by Norene Ciura (“Ciura” or the “appellant”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 10th, 1999 under file number 083-994 (the “Determination”).

The Director’s delegate determined that Ciura was the president and director of a corporation known as Bistro! Bistro! Restaurants Ltd. (“Bistro!” or the “employer”) during the time when nearly \$20,000 in unpaid wages was earned by 20 former employees of that firm. A determination was issued against Bistro! on June 15th, 1998 in the amount of \$19,555.39—I shall refer to this determination as the “Corporate Determination”.

The delegate, relying on section 96 of the *Act*, which provides that a corporate officer or director may be held personally liable for up to 2 month’s unpaid wages for each employee, issued the Determination that is now under appeal.

The employer appealed the Corporate Determination to the Tribunal and, in turn, the Tribunal, on September 1st, 1998, referred the matter back to the Director for further investigation (see B.C.E.S.T. Decision No. 386/98). Following further investigation, the Director’s delegate submitted revised calculations to the Tribunal as to the employer’s unpaid wage liability. These calculations were disputed by the employer with respect to 4 of the 20 employees in question. That matter was then addressed in an oral appeal hearing, held on March 3rd, 1999, and resulted in B.C.E.S.T. Decision No. 110/99 being issued on March 12th, 1999. By way of this latter decision, the delegate’s calculations with respect to the 4 employees in question were adjusted downwards; the calculations as to the other 16 employees were confirmed. As matters now stand, the employer’s unpaid wage liability to its former employees has been finally determined.

As a result of the above-noted adjustments, the appellant’s unpaid wage liability pursuant to section 96 of the *Act* has now been recalculated by the delegate to be \$12,946.75. This latter *calculation* is not in dispute although the appellant, of course, challenges her personal liability for that amount on several grounds which are set out, below.

ISSUES TO BE DECIDED

In her appeal documents and subsequent written submissions, the appellant advanced the following grounds of appeal:

- the Determination is based on an incorrect figure as to the actual amount of the complainant employees’ unpaid wages;

- the appellant was neither an officer nor a director when the complainant employees' wages were earned or should have been paid;
- "The amount claimed by the Director of Employment Standards includes severance pay for which a director or officer is not liable in the event that a Bank calls its loan. Evidence of the formal demand by the Royal Bank of Canada is attached hereto."; and
- "The amount claimed by the Director of Employment Standards includes vacation pay which was payable after February 16th, 1997...In accordance with 96(2b) [sic], [the appellant is] not liable for any vacation pay since [she] ceased to hold office prior to the date that the vacation pay became payable."

FACTS

Bistro! formerly operated a restaurant in the 'Gastown' area of Vancouver; this restaurant ceased operations on October 4th, 1997. Several former Bistro! employees filed unpaid wage complaints with the Employment Standards Branch and thereafter, following an investigation by the delegate, both the Corporate Determination and, sometime later, the Determination now before me, were issued.

A "BC Online" search of the B.C. Companies registry, conducted on December 8th, 1998, shows that Bistro! was incorporated as a numbered company on February 15th, 1994; the current corporate name was adopted on May 6th, 1994. Bistro! has 2 principals, one of whom is the appellant who is denoted as both a director and an officer (president) of the company. The BC Online search report shows that the company is neither in liquidation nor receivership.

The appellant filed with the Tribunal a document, purportedly dated February 16th, 1997, which sets out her resignation as both an officer and director of Bistro! as well as an accompanying "Director's Resolution", also dated February 16th, 1997, which records that the resignation has been accepted by the company. The appellant also filed with the Tribunal a letter, dated October 8th, 1997, from the Royal Bank of Canada addressed to Bistro! and demanding repayment of a "small business loan" in the amount of approximately \$54,000 as well as another letter from the Bank, dated the same day, to the appellant making demand for repayment of some \$30,000 pursuant to the appellant's written guarantee of Bistro's indebtedness. There is nothing in the evidentiary record before me to show that the employer has been petitioned into bankruptcy or that any sort of receivership or other liquidation proceedings have ever been commenced against the company.

ANALYSIS

Given the Tribunal's March 12th, 1999 order varying the Corporate Determination, the appellant's first ground clearly has merit.

As for the second ground, it is clear that even if the appellant submitted a letter of resignation, which in turn was accepted by the company, the company failed to file the appropriate notice with the Registrar

of Companies (see section 132 of the *Company Act*). Further, once the appellant (as well as her spouse) resigned—the company’s *only* officers and directors—it would appear that no one else was appointed in their stead, contrary to section 133 of the *Company Act*. Who was managing the company in the period from February 16th, 1997 until the restaurant closed in early October 1997? I draw an adverse inference from the appellant’s failure to lead any evidence on this point. Still further, despite the formal resignation letter, the appellant may well have continued as an officer and/or director by reason of the “functional test” first set out by the Tribunal in *Penner and Hauff*, B.C.E.S.T. Decision No. 371/96). The appellant has not met her burden of showing that she was not acting as a director or officer of the employer when the complainants’ wages were earned or otherwise should have been paid.

The appellant’s third and fourth grounds of appeal flow from subsection 96(2) of the *Act*. I have reproduced section 96, in its entirety, below:

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.

(2) Despite subsection (1), a person who was a director or officer of a corporation is not personally liable for

(a) 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,

(b) vacation pay that becomes payable after the director or officer ceases to hold office, or

(c) money that remains in an employee's time bank after the director or officer ceases to hold office.

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

The personal corporate director/officer liability established by section 96(1) is limited by the provisions of section 96(2). A director or officer is not personally liable for termination pay, otherwise payable to an employee under section 63, if the corporate employer “is in receivership or is subject to action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act”. A simple demand for repayment of a loan—and that is the sum total of the evidence before me—falls well short of proof of a receivership or any other form of action set out in section 96(2)(a). Very simply, the appellant has manifestly failed to prove that section 96(2)(a) has any application here.

The appellant's submission with respect to liability for vacation pay is predicated on my accepting that the appellant did, in fact and in law, cease to hold office after February 16th, 1997, an assertion that I cannot accept for the reasons set out above.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be varied and that the appellant's liability under section 96 of the *Act* be fixed in the amount of **\$12,946.75** together with interest to be calculated by the Director in accordance with section 88 of the *Act*.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal