

An appeal

- by -

Westec Venture Group, Inc.  
("Westac")

- and -

Thomas Michael Cully, a Director or Officer of Westec Venture Group, Inc.  
("Cully")

- of Determinations 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:** Ib S. Petersen

**FILE No.:** 2002/020 and 2002/032

**DATE OF HEARING:** May 21, 2002

**DATE OF DECISION:** June 6, 2002

## DECISION

### APPEARANCES:

Mr. Douglas H. Murray	counsel, on behalf of Appellants
Mr. Jim Robertson	on behalf of himself
Ms. Rob Wood	on behalf of himself

### OVERVIEW

There are two appeals before me pursuant to Section 112 of the *Employment Standards Act* (the “Act”).

One is an appeal by Westec of a Determination of the Director’s Delegate issued on January 2, 2002 in the amount of \$22,590.08 (the “Corporate Determination”). In that Determination, the Delegate found that Westec owed Mr. Robertson and Mr. Wood that amount on account of regular wages and vacation pay (Sections 17, 18, 58). The Delegate based the Corporate Determination on the uncontradicted evidence of the two complainants as Westec failed to participate in the investigation.

The other appeal is brought by Mr. Cully of a Determination of the Director’s Delegate issued on January 7, 2002 in the amount of \$14,416.87 (the “Officer Determination”) (Section 96). In the Officer Determination, the Delegate found that Mr. Cully was a director or officer based on the records available from the Registrar of Companies.

### ISSUES

The Appellants take issue with the Delegate’s conclusions:

1. On the merits of the Corporate Determination, Mr. Robertson and Mr. wood were never employees of Westec. Rather they participated in business ventures that failed to materialize or they were independent contractors. In that regard, Westec seeks to introduce evidence not presented to the Delegate, including viva voce evidence and invoices (said to corroborate is position).
2. As well, on the merits, Westec also disputes the hours of work and wages.
3. Westec did not fail to participate in the investigation and, in any event, ought not to be precluded from a full appeal.
4. Cully says that, while he was registered as an officer, the corporate secretary, he did not perform the functions of an officer. He only signed the 2001 annual return to the Registrar of Companies for Westec for the purposes of filing that return.

## FACTS AND ANALYSIS

The Appellants have the burden to persuade me that the Determinations are wrong. For the reasons set out below, I am of the view that the Appellants have not met that burden and that the appeals, therefore, must be dismissed.

While I am of the view that the evidence presented at the hearing, especially with respect to Mr. Wood's hours or work and hourly rate, at the very least raises some doubt as to the Delegate's conclusions, I am of the view that I do not deal with the issues on the merits of the Determinations.

First, the Determination states:

"The investigating officer left telephone messages for the employer requesting that the employer contact the investigating officer regarding the complaints. There was no response from the employer. The investigating officer sent letters dated September 7, 2001 and October 5, 2001 (attached as Exhibit #1 and #2) outlining the complaints and requesting that the employer respond to the allegations. There was no response from the employer. The investigating officer then sent his preliminary findings to the employer by regular and registered mail on November 20, 2001 (attached as exhibit #3). There was no response from the employer. The registered mail was returned by Canada Post on December 21, 2001 indicating that it was unclaimed (attached as Exhibit #4). The Canada Post "track a package" web site indicates that on December 15, 2001, the employer refused the registered mail (attached as exhibit #5)."

Subsequently, on January 2 and 7, 2002, the Delegate issued the Corporate and Officer Determinations. These came to the attention of the Appellants and they filed the appeals before me.

Considering all of the circumstances of the instant case, I am of the view that Westec failed to cooperate with the delegate's investigation. Requests for a response to the complaints was sent to Westec. The Tribunal will generally not allow an appellant who refuses to participate in the Director's investigation, to file an appeal on the merits of the Determination. There is, in my view, no reasonable explanation for the failure to cooperate with the investigation.

Mr. Kristof, the president of Westec, who testified at the hearing, explained that after mid-May--when Mr. Wood, Mr. Robertson and Mr. Kristof, in the words of the latter, "agreed to call it a day"--there was essentially no-one in the office and he only went there on a few occasions. Undoubtedly this was a stressful time for Mr. Kristof with creditors knocking on the door, problems with the landlord over rent, etc. The owner of one of the offices (the Appellant Mr. Cully) commenced foreclosure proceedings in the fall of 2001. Mr. Kristof also sought and engaged in employment. Mr. Kristof also expressed some doubts as to whether the telephone was, in fact, working from May or June. He was not specific as to when the telephones were shut off. Asked about voice-mail could have been left, he answered "could have, I would have thought the phones would be off." In my view, his evidence in that regard was less than unequivocal.

Mr. Kristof testified that he "saw no need to open the mail" because Westec was incorporated and, it appears from advice he stated he received with respect to bankruptcy, he was of the view that as such there was no personal liability. He explained that he was unaware of any complaint to the Employment Standards Branch. In his view, Mr. Wood and Mr. Robertson had not been employees and he had no reason to suspect a claim from them. He testified that he did not become aware of the complaints until in the course of Mr. Cully's foreclosure proceedings in early January 2002. At that time, he responded

expeditiously. Among others he also went to the office and checked the mail which “was in a box upstairs.” As I understand the evidence, this mail included correspondence from the Delegate. With a minimum of diligence, Mr. Kristof could have either checked the mail periodically or had it forwarded. I do not find this to be a reasonable explanation in the circumstances.

The Delegate sought information and documentation with respect to the issues raised in the complaints. In my view, Westec had ample opportunity to provide information and documentation to support its case. The issues raised by the Westec--employment status versus independent contractor/business venture, and wages and hours of work--could have been addressed during the investigation. In my view, the Employer refused to participate in the investigation and I will not allow the Employer to raise these issues at this stage. As such, and on that ground alone, the appeal brought by Westec must fail.

I now turn to Mr. Cully’s appeal.

The Tribunal’s jurisprudence with respect to director or officer status has recently been summarized in *Re Director of Employment Standards*, (BC EST # D047/01, reconsideration of BC EST #D056/00 (the “*Michalkovich* decision”)):

In our view, in summary, the case law reviewed here and in *Wilnofsky* stands for the following propositions:

1. The corporate records, primarily those available through the Registrar of Companies or available at a corporation’s registered and records office, raise a rebuttable presumption that a person is a director or officer. In other words, the Director of Employment Standards may presumptively rely on those corporate records to establish director or officer status.
2. It is then open to the person, who, according to the corporate records, is a director or officer, to prove on the balance of probabilities that the company records are inaccurate, for example, because the person resigned and the documents were not properly processed, a person is not properly appointed etc.
3. There may well be circumstances where it would be inappropriate to find that a person is a director or officer despite being recorded as such. However, *it will be the rare and exceptional case to be decided on all the circumstances of the particular case and not simply by showing that he or she did not actually perform the functions, duties or tasks of a director or officer.*
4. The determination of director-officer status should be narrowly construed, at least with respect to Section 96.

(Emphasis added)

Mr. Cully testified that he was self-employed, doing accounting and consulting for public companies on corporate structuring and regulatory filings. He stated that he provided a registered and records office for 20 - 30 companies, including Westec. He did lend money to the company and, it appears took a mortgage as security, which he, subsequently, foreclosed on. Otherwise, he was not involved in the operations of Westec. He prepared the incorporation of Westec. From the records of the Registrar of Companies, it would appear that Mr. Cully was initially listed as a director. In August 2001, he filed a notice with the Registrar that he was “not a director--secretary only--from 2001 AR.” On January 31, 2001, he signed the annual return for Westec--in fact, “certified [it] correct”--and signed as “current director, officer or

company solicitor.” According to his evidence, he was never a director and there was no instrument appointing him officer. His testimony at the hearing was that he only signed as an officer for the sole purpose of filing the annual return.

The argument is that Mr. Cully did not perform the duties or the role of an officer, at the material time, is, in my view, without merit. He signed the annual return as an officer and, thus, performed one of the functions of an officer. The *Company Act* also provides the following with respect to the duties of the secretary:

- 138 The secretary of a company must
- (a) keep or cause to be kept the records of the company,
  - (b) make or cause to be made all required filings for the company with the registrar
  - (c) file with the registrar, within 14 days after the resolution is passed, a certified copy of every resolution that by this Act does not take effect until it is filed with the registrar, and
  - (d) perform other duties assigned to the office.

Section 334 of the *Company Act* provides, *inter alia*, that it is an offence to make misleading statements in an annual return. I find it difficult to accept that a person, who purports to provide consulting regarding corporate structuring, who provides registered and records office for some 20-30 companies, and who does regulatory filings for such companies, reasonably believed he could limit his liability by being secretary only for the purposes of filing the annual return. This does not make any sense. There is no dispute that he prepared the return and that he described himself as the corporate secretary.

In the circumstances, I do not accept the defence that Mr. Cully was not properly appointed secretary. Mr. Cully represented himself as a consultant to public companies dealing with corporate structuring and regulatory filings. His office was the registered and records office. As the secretary, it is his responsibility to “keep or cause to be kept” the records of the company. If he failed, for whatever reason, to record his appointment as secretary, I think he cannot now take advantage of that failure. It cannot be seriously argued that this is one of the “rare and exceptional” cases contemplated by the Michalkovich decision. There is no dispute that Mr. Cully was listed as a “secretary” at the relevant times. Despite his protestations, there can be no doubt that a “secretary” is an officer under the *Company Act*. He was, on the available facts, an officer and, thus, liable as such.

Section 96 provides, in part:

- 96.(1) A person who was a director or an 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.

The only serious issue with respect to Mr. Cully was his status. That being resolved, I do not propose to dwell, at any length, on other issues. As I explained at the hearing, in my view, a director or officer is limited to two main grounds of appeal, namely status and calculation of the award. An officer or director is not entitled to question a corporate determination, which, in any case, here, was appealed unsuccessfully.

In my view, the onus is on the Appellants to show on the balance of probabilities that the Determinations were wrong. They have failed to do so.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determinations in this matter, dated January 2 and January 7, 2002 be confirmed.

---

**Ib S. Petersen**  
**Adjudicator**  
**Employment Standards Tribunal**