

An appeal

- by -

Peter Buckley, a Director or Officer of
496284 B.C. Ltd. operating as Design Works

- 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: John M. Orr

FILE No.: 2001/187

DATE OF DECISION: May 23, 2001

DECISION

OVERVIEW

This is an appeal by Peter Buckley (“Buckley”) pursuant to Section 112 of the Employment Standards Act (the “Act”) from a Penalty Determination (File No.100-170) dated February 8, 2001 by the Director of Employment Standards (the “Director”). The Penalty Determination is made against Buckley personally as if he were a director or officer of 496284 B.C. Ltd. (the “company”) operating as Design Works. Buckley submits that he never acted as an officer of the company, had no control over it, and was only a nominee director as his company had lent money to Design Works.

FACTS AND ANALYSIS

The Director issued a Determination against the company on December 20, 2000 in relation to unpaid wages. The determination also imposed a penalty against the corporation for failing to produce records during the investigation. The corporate Determination was not appealed and remains unpaid. On January 22, 2001 the Director issued a Determination against Buckley alleging that as a director or officer he was personally liable for up to two months unpaid wages for each employee. The amount personally assessed under the director’s determination was \$1,668.55.

On February 8, 2001 the Director issued a further determination against Buckley as a person liable to pay the penalty under section 98 of the Act. It is this determination that is the subject of this appeal.

The evidentiary basis for the finding that Buckley was a director or officer of the company is that a search from BC Online Corporate Registry showed that Buckley was registered as a director of the company at the time the wages were earned or should have been paid. The Director’s delegate refers throughout the determination to director and officer but does not clearly distinguish between these two positions.

Section 96 provides in part:

96. (1) a person who was a director or officer of Corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to two months unpaid wages for each employee.

In a previous decision I concluded that Buckley was a director of the company at the material time and confirmed the determination against him personally for the wages owing. I will not reiterate those reasons here as they can be found in: Re: Peter Buckley, BCEST #D258/01.

Section 98 provides further that:

98. (1) If the director is satisfied that a person has contravened a requirement of this Act or the regulations or a requirement imposed under section 100, the director may impose a penalty on the person in accordance with the prescribed schedule of penalties.
- (2) If a corporation contravenes a requirement of this Act or the regulations, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the contravention is also liable to the penalty.

In this case Buckley has produced substantial evidence and documentation to show that he resigned as a director and officer of the company on March 29 and March 30, 2000. The wages were earned between July 1999 and February 2000. Therefore, Buckley was registered as an officer and director of the company at the time that the wages were earned. However the demand for records upon which the penalty is based was not send until August 2000, some 5 months after Buckley resigned.

Buckley submits that he has never participated in any of the activities of the company. He has not had any signing authority for the company's bank account, he has never worked for the company, he has had no involvement in day-to-day activities, nor in planning or long-term strategic activities. Buckley submits that he has never had access to, nor control over, the business records of the company and that he was simply a "nominee director". He says that he was nominated as a director by his company and his relatives who had lent significant amounts of money to Design Works. He points out that he and his family have lost approximately \$70,000.00 from the failure of the company.

While I concluded that the Buckley was a director of the company at the time the wages were earned I cannot concluded that he was a director at the time of the contravention that led to the imposition of the penalty.

In any case, in accordance with section 98 (2), simply being a director, officer, employee or agent does not render the person liable to pay the penalty. That person must also be found to be a person who "authorizes, permits or acquiesces" in the contravention.

In this case, the only reference in the determination to any functions, duties or tasks that may have been performed by Buckley to indicate that he may be liable under subsection (2) is a bare statement that "The evidence confirmed that you participated in the activities of the company during the time wages were earned." There is no indication that Buckley authorised, permitted or acquiesced in the contravention that gave rise to the penalty in this case.

In my opinion the onus is on the Director to show that the person being penalised was a person who authorised, permitted or acquiesced in the contravention that gave rise to the penalty. In the absence of such cogent evidence the penalty is not appropriate and must be cancelled.

ORDER

I order, under Section 115 of the *Act*, that the penalty Determination is cancelled.

John M. Orr
Adjudicator
Employment Standards Tribunal