

An appeal

- by -

Albert Truss, 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.: 2001/139

DATE OF DECISION: May 23, 2001

DECISION

OVERVIEW

This is an appeal by Albert Truss (“Truss”) pursuant to Section 112 of the Employment Standards Act (the “Act”) from a Determination (File No.100-170) dated January 22, 2001 by the Director of Employment Standards (the “Director”). The Determination is made against Truss personally as if he were a director or officer of 496284 B.C. Ltd. (the “company”) operating as Design Works. Truss submits that he declared personal bankruptcy in 1998 and was, therefore, not qualified to be a director of the company during the time that the liability was incurred.

FACTS AND ANALYSIS

The Director issued a Determination against the company on December 20, 2000 in relation to unpaid wages. The corporate Determination was not appealed and remains unpaid. On January 22, 2001 the Director issued a Determination against Truss alleging that as a director or officer he was personally liable for up to two months unpaid wages for each employee. The amount personally owing under the director’s determination is \$1,668.55.

The evidentiary basis for the finding that Truss was a director or officer of the company is that a search from BC Online Corporate Registry showed that Truss was registered as a director and Secretary 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.

It is not always self-evident who is a director or officer of a company. In the reconsideration decision *Re: Director of Employment Standards - (Michalkovic)*, BCEST #RD047/01 the Tribunal analysed the issues surrounding director/officer status and summarised their findings as follows:

In our view, in summary, the case law reviewed here and in *Wilnofsky* (BCEST #D106/99) 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 the circumstances where it would be inappropriate to find 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 performed 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.

In this case Truss has produced substantial evidence and documentation to show that he made an assignment in bankruptcy on November 25, 1998. The documents indicate that he would have been discharged on the 26th of August 1999. In his appeal Truss states "personal bankruptcy precludes one from being a director of a company for six years. Even though the records may still indicate I am a director, the law precludes me from being so". The wages were earned between July 1999 and February 2000.

The appeal goes on to acknowledge that Truss made some payments to the employee but that there is a dispute over the actual amount owing. On this issue the onus is on the appellant to satisfy the Tribunal that the determination is wrong. Truss has not provided me with any substantial evidence to support his allegations that payments were made or that the calculations were incorrect. I am not satisfied that he has met the onus in regard to the quantum owing under the determination.

While Truss may well be correct in regard to the effect of his personal bankruptcy upon his ability to be a director of a company he has not addressed the finding that he was an "officer" of the company. He is recorded in the records maintained by the registrar as the "Secretary" of the company. He has not denied this in his appeal.

In *Wilinofsky*, supra, the adjudicator adopted the following:

"... where an individual is recorded as officer or director of a company in the records maintained by the Registrar, a rebuttable presumption arises that the individual actually is a director or officer... of the company... This presumption, however, may be rebutted by credible and cogent evidence that the Registrar's records are inaccurate ... the burden of proving that one is not a corporate director or officer rests with the individual who denies such status"

In this case Truss has not provided any credible or cogent evidence to rebut the presumption that he continued to function as an officer of the company despite his bankruptcy. In fact, his appeal documents indicate that he was directly and personally involved in payroll matters. As an officer of the company he is open to the same liability as a director for unpaid wages.

I must conclude that Truss has not persuaded me on a balance of probabilities that the determination is wrong and therefore it will be confirmed.

ORDER

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

John M. Orr
Adjudicator
Employment Standards Tribunal