

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 -

Christine Iles

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Paul E. Love

FILE NO.: 98/136

DATE OF HEARING: May 29, 1998

DATE OF DECISION: June 18, 1998

DECISION

APPEARANCES

B.C. Interiors and Custom Design Inc.
Peter Premont
Christine Iles, and her counsel S. Mansfield, Esq.
Ray Skakum
Louis Parata
Parm Hothi
Randy Hartley
Alex Hannig
Director's Delegate, H. Beauchesne

OVERVIEW

This is an appeal by Christine Iles of a Determination that she was liable, as a director of B.C. Interiors and Custom Design Inc. (the "company") for payment of wages. Ms. Iles argued at this hearing that while she was a director at the time of company formation, she resigned on or about May 20, 1997, and therefore was not liable for wages owing to employees of the company after that time. At all times material to this matter Ms. Iles remained a director of the company.

ISSUE TO BE DECIDED

Was Ms. Iles a director of the company at the relevant time?

FACTS

As a procedural point there were three separate tribunal files that were set for hearing on the hearing date involving the company (Tribunal File # 98/127), Ms. Iles a director of the company (Tribunal File # 98/136) and Mr. Premont, also a director of the company (Tribunal File # 98/128). All parties appearing agreed that I could conduct one hearing, and use the evidence adduced in making decisions on the three separate tribunal files. The decisions on each of the files were issued concurrently for the appellants: the company (D# 264/98) for Ms. Iles (D# 265/98) and for Mr. Premont (D# 263/98).

In B.C. Interiors and Custom Design Inc., BC EST D264/98, which was issued concurrently with this Decision, I confirmed a Determination dated February 10, 1998. This Decision confirmed that wages, overtime pay and vacation pay, and a truck rental debt incurred in the total amount of \$28,582.19 had not been paid to 16 former employees of

B.C. Interiors and Custom Design Inc.. Ms. Iles was a director of the company at the time it was incorporated in February of 1997. She was in a relationship with the President of the company, Peter Premont. She was the sole signatory for the company's bank accounts. She was involved with the company as Peter Premont was unable to obtain credit. It is alleged that on or about May 3 of 1997, Mr. Premont discharged Ms. Iles from her book keeping responsibilities as she created " a cash flow problem" by paying the required statutory deductions for the employees to Revenue Canada.

It is alleged that Ms. Iles delivered to Mr. Premont an undated document that read in part:

As of May 3, 1997 I will no longer act as director of B.C. Interiors and Custom Design Inc. I will only sign cheques for the company. Peter Premont is responsible for all debts inquired (sic) by BC Interiors and Custom Design including GST, PST, Income Tax, CPP, UIC benefits outstanding and agreed by Peter Premont.

Both Ms. Iles and Mr. Premont signed this document. It was filed as exhibit "3" in these proceedings.

The evidence of Ms. Iles was that Mr. Premont undertook to take this document to the corporate solicitor, David Guy for "registration". The evidence of Mr. Premont was that he did not take the document to the solicitors because of financial reasons. He also testified that it was Ms. Iles, who in the first instance was to take the resignation to the company solicitor. Mr. Premont testified that he understood that Ms. Iles did contact the company solicitor, David Guy, but "nothing was done".

Both Mr. Premont and Ms. Iles were cross-examined, in particular by Alex Hannig, an employee. The tenor of Ms. Iles's responses to the questions indicated that she was not aware that a resignation by a director must be made in writing and filed in the minute book until this was pointed out by Alex Hannig in about July of 1997. She took no steps to have the resignation delivered to the registered and records office of the company.

I note that Exhibit "3" is undated. It is an important document and I expect that it would have been dated if it were created on May 3, 1997. It is my finding that this document was created sometime after May 3, 1997. I am not satisfied that this document was created for the purpose of effecting a resignation before the Determination of the Director's delegate was made. I do not accept the evidence of Mr. Premont or Ms. Iles on this point.

There is another document that was filed as Exhibit "2" in these proceedings signed by Mr. Premont. This document reads in part:

As of May 3, 1997 Peter Premont will assume all responsibly (sic) and debts acquired by BC Interiors and Custom Design Inc. Christine Iles will not be held responsible for any and all debts accumulated by B.C. Interiors and Custom Design Inc as of the start of business February 11, 1997.

Ms. Iles was in a relationship with Mr. Premont. This relationship is now over. It is unclear and there is no clear proof as to when the relationship ceased. It seems to have continued on an off and on basis, but she was living with Mr. Premont in September of 1997. Mr. Premont testified that he was not living with Ms. Iles in August, but that on September 1 “we moved to Coquitlam”.

There was no significant challenge to the finding by the Director’s delegate that the amount due and owing to the employees is \$25,787.99 in wages, plus \$857.50 in interest for a total of \$26,645.49.

It is clear that the employees have not been paid wages owing to them by the company. I heard the evidence of Mr. Premont on behalf of the company, and I am not satisfied that company has the inclination, or the resources to pay the employees. It appears that Mr. Premont was less than ethical about the conduct of his business affairs. He repeatedly gave NSF cheques to employees. There was also proof that he defrauded one of the employees in particular, Alex Hannig of a sum of money by failing to pay for the use of a truck. In particular he had an employee Alex Hannig rent a truck for a period of time. He advised Mr. Hannig that he would return the truck. Mr. Premont advised Mr. Hannig that he returned the truck and then rented the truck under his name. In fact what happened is Premont, without authorization from Hannig, used Hannig’s visa number to authorize 4 weekly extensions. Mr. Hannig’s evidence was not challenged by any party.

Mr. Premont was a most unsatisfactory witness. In particular he appears to have attempted to mislead this adjudicator in an application for an adjournment, stating that his lawyer was not available for the hearing, when in fact it appears his lawyer was not retained for the hearing, and his lawyer had written to the Tribunal indicating that he would not be appearing.

Further, in written submissions dated April 16, 1998 through counsel, Mr. Premont made a very serious and unproven allegation that the Director’s delegate had possession of the hard drive of his computer.

... This process was rendered more difficult due to the lack of the computer’s hard drive. In this regard, Ms. Beauchesne confirmed that she had possession of the company’s computer’s hard drive and received same from Alexander Hannig. This hard drive belongs to the company, continues to be the property of the company, and was removed from the company’s premises without the consent of either the company or any of its directors. This hard drive should forthwith be returned to the company.

6. I must stress this point. The investigating officer improperly and unreasonably possessed an asset of the company that would have facilitated the production of records the investigating officer criticizes the company for failing to produce. This conduct is improper and contravenes the principal of neutrality required by the investigating officers under the Employment Standards Act and the rules of natural justice.

Mr. Premont backed away from these allegations at the hearing of this matter. I accept the evidence of both Ms. Beauchesne and Mr. Hannig that no such event ever occurred. At one point in the hearing Mr. Premont said that an accountant had all his business records. He later said that Mr. Covell (his former solicitor) had all his evidence. For the above reasons I do not accept any of the testimony that he has given as credible.

Ms. Iles testified that she had always been employed as a bar tender, working 40 hours per week. She set up the payroll for the company. After the May 3 event Ms. Iles and Premont testified that the company accounts at Van City Credit Union were closed. Mr. Premont attempted to open accounts at the Scotia Bank on West Boulevard, but was refused. Ms. Iles said that she knew that he needed her help. She went down with him to Van City to re-open the accounts. There were some banking records filed as Exhibit #1. These records show an account was opened on March 13, 1997 in the name of B.C. Interiors and Custom Design (#300129) and an account was opened on July 9 1997 in the name of the company (#303388). The negative balance was transferred to the new account on July 9, 1997. Ms. Iles had the sole signing authority over the new account so he wouldn't be writing any more NSF cheques.

Ms. Iles testified that she did not take any steps to notify or delivery her resignation to the company's registered or records office. She indicates that she does not dispute her involvement with the company between Feb 11 and May 3, 1997. She indicates that she got one cheque from the company in the amount of \$500.00 that she spent on a staff party. She indicates that she advanced money to Mr. Premont in the amount of \$4,000 and has not been repaid in full.

She advanced Mr. Premont the sum of \$325.00 to assist with issuing T4's to employees in March of 1998. She indicated that she was not aware that a decision had been made by the Director concerning the liability of the company until she was notified in May of 1998. She indicated that with regard to book keeping Mr. Premont was not capable of doing the deductions and she was given permission by Mr. Premont to sign cheques.

ANALYSIS

In section 96, the *Act* imposes liability on a person who was a director or officer of a corporation at the time wages of an employee were earned or should have been paid. A director or officer of a corporation is personally liable for up to 2 months unpaid wages for each employee. I note that generally directors are not responsible for the actions of a corporate entity, unless common or statute law imposes liability. A corporation has a

separate legal identity. The clear statutory purpose, however, of s. 96 is to ensure that employees get paid for some of their efforts, in the event that the company is unable to pay.

In certain cases this Tribunal has undertaken a “functional analysis” to determine if an individual was a director. The lack of legal registration of a person as a director is not determinative: Adrenalin III Sports Ltd., BC EST D#110/97. Largely, this analysis appears to be undertaken when the person was not recorded as a director of a corporation, yet carried on the functions of a director. In this particular case, such an analysis is unnecessary as Ms. Iles was registered as a director of the company at the relevant time.

The central issue in this case is whether Ms. Iles had made an effective resignation of her directorship in the company by delivering her resignation to the President, Mr. Premont. In the course of submissions I was referred to section 130(1) and (2) of the *Company Act, R.S.B.C. 1996, c. 62*. The relevant sections read as follows:

130(1) A director ceases to hold office when his or her term expires in accordance with the articles or when he or she

(c) dies or resigns

(2) Every resignation of a director becomes effective at a time a written resignation is delivered to the registered office of the company or at a time specified in the resignation whatever is later.

Here the later event is the delivery to the registered office of the company. There was no evidence that this occurred until a time after the Director’s Delegate made her Determination. At all material times while the company carried on business, Ms. Iles had not delivered an effective resignation under s. 130(2) of the *Company Act*.

I have reviewed the documents filed in this proceeding and in particular Exhibits 2 and 3. These documents appear to be in the nature of agreements by Mr. Premont to indemnify Ms. Iles with regard to company liabilities. These documents, do not, however, alter her liability with regard to the employees.

Mr. Mansfield, counsel for Ms. Iles suggested that while in a technical sense Ms. Iles did not comply with the provisions of the *Company Act* with regard to her resignation, there are equities in her favour because:

- a) there was no personal benefit to her from the operation of the company;
- b) she was not being paid by the company;
- c) it was her belief that she was not a director;
- d) she had no ability to be involved in the company.

She did, however, feel that she was personally obliged to assist Mr. Premont in this business venture. She did assist him by signing cheques, and was the sole signatory.

While she did not apparently select the projects the company undertook, or hired or supervised any employees, she was signing cheques which facilitated the business of the company. She figured that he would take care of the resignation, and in the meantime she was going to help him.

The mere signing of a cheque would not cause Ms. Iles to be characterized as a director. The carrying out of book keeping functions alone would not be sufficient to attract liability.

I am satisfied that without Ms. Iles involvement as signing authority on the bank accounts, the Credit Union or bank would not have granted the company banking privileges. It appears that the Credit Union or bank must have relied on her credit and her status as a director of the company. In order to be a director of a company under the Company Act, it is not necessary that a person be involved in the day to day business affairs of the Company. It is clear, however, that Ms. Iles was involved in the payroll of the Company.

Mr. Mansfield provided me with the case of Cybulski v. Minister of National Revenue, (1988) 88 DTC 1531 (Tax Court of Canada). Cybulski dealt with an interpretation of s. 227.1(3) of the Income Tax Act, which provided that a director is not liable for a failure under subsection (1) where he exercised the degree of care, diligence and skill to prevent the failure that a reasonable person would have exercised in the circumstances. In that case a resigning director delivered a resignation to the company. The Ontario Business Corporations Act that was in force at the relevant time, did not require delivery to the registered or records office of the company but just to the company. The tax court found that there was due diligence and therefore it did not need to consider whether the resignation was effective.

There appear to be no “equitable exceptions” to statutory liability under s. 96 of the *Act*. There is no discretion given to an adjudicator to “relax” the meaning of the words based on equitable considerations. It is my view that the words in s. 130 (2) of the Company Act impose an absolute liability on a director. I am not satisfied that it would be appropriate to water down the words to provide to the director who is contemplating resigning, a due diligence defence. The proper place to file proof of a change of directors is with the registered and records office of the company. General members of the public are entitled to know the identity of directors of a company. It would be contrary to the purposes of the *Act*, to permit a director to resign without clear proof of that resignation. This would permit abuse and an easy end run around s. 96 of the *Act*.

In any event I find that Ms. Iles did not take all reasonable steps, in that she failed to deliver her resignation or follow up on the delivery of her resignation. It should have been apparent to her that Mr. Premont was unreliable in his business dealings and could not be trusted to file the document with the company solicitor. I am not satisfied that Ms. Iles delivered her resignation to Mr. Premont before the Director’s delegate issued the Determination.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated February 10, 1998 be confirmed and that further interest be calculated in accordance with s. 88 of the *Act*.

.....
Paul E. Love
Adjudicator
Employment Standards Tribunal