

An appeal

- by -

Richard Gush, a Director or Officer of Glocon Traffic Control
(“Gush” or the “appellant”)

- 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: Kenneth Wm. Thornicroft

FILE No.: 2001/278

DATE OF DECISION: June 13, 2001

DECISION

OVERVIEW

This is an appeal filed by Richard Gush (“Gush” or the “appellant”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Mr. Gush appeals a Determination that was issued against him, pursuant to section 96(1) of the *Act*, by a delegate of the Director of Employment Standards (the “Director”) on March 29th, 2001 under file number ER025-316 (the “Determination”).

The Director’s delegate determined that Mr. Gush owed a total sum of \$27,069.39 on account of unpaid wages payable to 17 former employees of Glocon Traffic Control Ltd. (“Glocon”). As previously noted, the Determination was issued in accordance with the provisions of section 96(1) of the *Act* which reads as follows:

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.

By way of a letter dated June 1st, 2001 the parties were advised by the Tribunal’s Vice-Chair that this appeal would be adjudicated based on the parties’ written submissions and that an oral hearing would not be held (see section 107 of the *Act*). In addition to the appellant’s initial submission attached to his notice of appeal, I also have before me written submissions filed by some of the respondent employees (Michelle Etchart, Karen Davenport and Tammy Purcha) and by the Director’s delegate. It should be noted that, although specifically invited to do so, the appellant did not file a reply to any of the respondents’ various submissions.

ISSUES ON APPEAL

Mr. Gush’s reasons for appeal are set out in a memorandum (identified as “Schedule A”) prepared by his legal counsel and appended to his appeal form. This latter memorandum also addresses an appeal of a separate section 96 determination issued against his wife and fellow director, Gloria Gush (see BC EST # D311/01). Mr. Gush’s reasons for appeal are as follows:

- “The Director erred in determining that Richard Gush is a Director of the corporate employer for the purposes of the *Employment Standards Act*. The Director erred in holding that registration of Richard Gush with the Registrar of Companies was sufficient to hold Richard Gush liable for unpaid wages of the corporate employer and failed to consider or take account of Richard Gush’s role, or lack thereof, in the business affairs of the corporate employer.”

- “The Director erred in refusing to consider payroll information requested of the corporate employer in connection with the determination of the amounts for which a director may be held liable under the *Employment Standards Act*”.
- “The Director made a determination concerning the amount of director’s liability on a basis which is unknown to the Directors, which is not clear on the face of the record, and which appears to hold the Directors liable for two years worth of overtime wages for all Complainants save one.”
- “The Director failed to employ procedural fairness *vis a vis* [sic] the Directors of the corporate employer in refusing to consider the very information requested by the Director but delivered to the wrong office.”

FINDINGS AND ANALYSIS

Records obtained from the Registrar of Companies indicate that Glocon has two principals, namely Richard Gush and Gloria Gush. Mr. and Ms. Gush are both identified as officers and directors; Mr. Gush is the corporate secretary.

Mr. Gush’s counsel asserts that Mr. Gush agreed to act as a corporate officer and director merely “in order to meet the requirement of having two authorized signatories”. I am not aware of any such legal requirement in the *Company Act*. The *Company Act* permits a nonreporting company to have a single director (section 108). Although the *Company Act* does require that a company have at least two officers, namely, president and secretary, a single individual may fulfill both offices in the case of a nonreporting company with a single shareholder (such as Glocon--see section 133).

Mr. Gush’s counsel asserts that Gush “was a mere token director” who “exercised no control or authority over the affairs of [Glocon]” and that he did not “take any part, directly or indirectly, in the business affairs of [Glocon]”. Mr. Gush’s counsel states that “Richard Gush was a mere nominee who acted strictly on the instructions of Gloria Gush and signed such cheques and such Resolutions as he was directed to sign from time to time by Gloria Gush”.

Despite the foregoing assertions, it is clear that Richard Gush was, and consented to be, a corporate officer and director during the time when the various respondent employees’ unpaid wage claims crystallized. Counsel’s assertions, if taken at face value, only suggest that Gush failed to live up to his statutory and fiduciary obligations as a corporate director/officer rather than suggesting that he was neither an officer or director. Corporate records create a rebuttable presumption that a person named therein as a director or officer actually holds such a status (*Wilnofsky*, BC EST # D106/99). As observed by the reconsideration panel in *Director of Employment Standards and Michalkovic* (BC EST Reconsideration No. RD047/01):

“...the Director of Employment Standards may presumptively rely on those corporate records to establish director or officer status...”

[and then] it is open to the person...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.

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.”

(my underlining)

In addition to the foregoing principles (which effectively negate the first ground of appeal), and notwithstanding counsel’s assertions that Mr. Gush had little, if any, active involvement in Glocon’s business affairs, the uncontradicted (recall that Mr. Gush did not file any reply submission) assertions of some of the respondent employees suggest that Mr. Gush was more involved in Glocon’s business affairs than he is prepared to admit. Ms. Purcha and Ms. Davenport both state that Mr. Gush performed services for Glocon on several occasions including supervisory activities that indicate an element of direction and control over Glocon’s employees.

As noted in the section 96 Determination now under appeal, a separate determination was also issued against the corporate employer, Glocon Traffic Control Ltd., on March 29th, 2001 in the total amount of \$29,616.02. This latter corporate determination was never appealed; indeed, Mr. Gush’s solicitors state, in the submission filed on his behalf, that:

1. The Director of Employment Standards made determinations in respect of Glocon Traffic Control Ltd. (the “Employer”), Gloria Gush (a Director of the Employer) and Richard Gush (a Director of the Employer) on March 29, 2001 and all under ER File No. 025-316.

2. 17 Complainants alleged that they were employed by the Employer at various times between February 7, 1999 and February 7, 2001, and the Director determined that the Complainants were owed in total the sum of \$29,616.02. *The Employer does not take issue with nor appeal from that determination.*

(my *italics*)

In light of the above admission, the various amounts determined to be owed to the 17 former employees is now a matter of *res judicata*; in other words, that issue has been finally determined. The only issues that could now be properly before me relate to Mr. Gush’s status (which I have already addressed), the 2-month “wage liability ceiling”, or any of the statutory defences set out in subsection 96(2).

Mr. Gush does not deny that he was recorded in Glocon's corporate records as a an officer and director when the wage claims of the 17 respondent employees crystallized. Mr. Gush has not presented sufficient evidence to rebut the presumption arising from those records that he was (and continues to be) a Glocon director and officer. None of the defences set out in subsection 96(2) is in issue here. Mr. Gush suggests that the delegate did not properly consider certain payroll information but I fail to see the relevance of that assertion in light of the fact that the employees' various unpaid wage claims have now been finally determined--apparently, since no appeal was filed, to the satisfaction of Glocon (a company of which Mr. Gush is a director and officer).

I might add, in any event, that the material before me discloses that the delegate *did*, in fact, have all relevant payroll information in hand prior to issuing the Determination. The delegate met with Glocon representatives on four separate occasions for the purposes of reviewing and auditing its payroll records and, as a result of these meetings, Glocon amended its records to bring them into compliance with the *Act*. In light of the foregoing, it seems to me to be quite wrong to suggest that any of Mr. Gush, Ms. Gush or Glocon was denied "procedural fairness".

Finally, I simply cannot accept the assertion that the basis for issuing the Determination is "not clear on the face of the record". The Determination sets out the respective wage claims of the 17 employees in some detail, the background facts relating to the issuance of the corporate determination are incorporated by reference. Section 96 is stated, in the body of the Determination, as being the legal foundation for Mr. Gush's personal liability and a copy of section 96 is appended to the Determination. Although the various employees' unpaid wage claims *do* span a period greater than 2 months, the total amount of each individual employee's claim does not, so far as I can gather based on the material before me, exceed the 2-month wage liability threshold set out in section 96(1) of the *Act*.

The appeal is dismissed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$27,069.39** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal