

An appeal

- by -

James Kyle, a Director or Officer of B.C. Bumper Exchange ltd.
("Kyle")

- 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.: 2002/308

DATE OF DECISION: August 12, 2002

DECISION

OVERVIEW

This is an appeal filed by James Kyle (“Kyle”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”). Mr. Kyle appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on May 14th, 2002 pursuant to which he was ordered to pay the sum of \$20,615.43 on account of unpaid wages and interest (the “Determination”). The Determination was issued pursuant to section 96(1) of the *Act*:

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 July 23rd, 2002 the parties were advised by the Tribunal’s Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). Although the Director’s delegate filed a written submission with respect to the merits of this appeal, Mr. Kyle did not nor did any of the seven respondent employees.

THE DETERMINATION

A determination was issued against a company known as B.C. Bumper Exchange Ltd. (“Bumper Exchange”) on April 4th, 2002 ordering that company to pay the sum of \$20,587.03 in unpaid wages and interest to seven former employees, namely, William Scott, Marion Dalisay, Stuart Kyle, Ferdinand Lardizabel, Katherine Lesperance, Alexander Taleon and Ben Taleon. I shall refer to this latter determination as the “Corporate Determination”.

The appeal period governing an appeal of the Corporate Determination expired on April 29th, 2002 without an appeal having been filed. As set out in the Determination now under appeal, Mr. Kyle was a director and officer (president) of Bumper Exchange when the seven employees’ unpaid wage claims crystallized. The seven former employees’ unpaid wage claims span the period from June 27th, 1999 to June 27th, 2001.

Further, the delegate held, at page 2 of the Determination, that Mr. Kyle “participated in the activities of the company [Bumper Exchange] during the time the wages were earned”. I presume this latter finding was set out in the Determination in order to bring Mr. Kyle within the “functional test” in which case he could be held liable as a director and officer even if he was not formally recorded as such in the company’s internal corporate records (see *Penner and Hauff*, B.C.E.S.T. Decision No. D371/96).

At the time the Corporate Determination was issued, Bumper Exchange was not apparently in good standing with the Registrar of Companies because it had not filed an Annual Report since October 1999. Since the Director was unable to recover any of the seven employees’ unpaid wages from Bumper Exchange, a section 96 determination was issued against Mr. Kyle.

REASONS FOR APPEAL

Mr. Kyle has appended a number of documents to his appeal form:

- a letter dated May 11th, 2002 from Kyle to the Director's delegate taking issue with the delegate's calculations with respect to four of the seven employees;
- a memorandum dated June 1st, 2002 also taking issue with the amounts awarded to certain employees;
- a letter dated June 1st, 2002 stating that Alexander Taleon was not employed by Bumper Exchange during the period from September 16th, 2000 to January 31st, 2001; and
- a one-sentence letter dated May 8th, 2001 signed by "J. Kyle" which reads as follows: "This is to state that as from today I resign as a Director of BC Bumper Exchange Ltd."

Mr. Kyle has not provided the Tribunal with an actual detailed "submission" in which he sets out, in some sort of narrative form, his reasons for challenging the Determination. However, it would appear that he is advancing two broad grounds of appeal; first, the unpaid wages awarded to some of the employees have been incorrectly calculated and, second, Mr. Kyle ceased to be a director as of May 8th, 2001 and thus cannot be held personally liable under section 96(1) of the *Act*.

I shall address each of these reasons in turn.

FINDINGS

With respect to the matter of the individual employees' respective entitlements, that matter is not properly before the Tribunal in this appeal.

The proper mechanism to challenge the findings set out in the Corporate Determination is an appeal of that latter determination. If Bumper Exchange believes that the Corporate Determination is incorrect, its remedy lies in an appeal of the Corporate Determination filed in accordance with the provisions of section 112 of the *Act*. As noted above, the applicable appeal period expired on April 29th, 2002, some three months ago. Thus, if Bumper Exchange wishes to appeal the Corporate Determination, it will have to apply for an extension of the appeal period under section 109(1)(b) of the *Act*. Since that issue is not presently before me, I pass no comment whatsoever with respect to whether such an application might succeed. However, as matters now stand, the employees' respective entitlements have been finally determined and cannot be reviewed by way of the instant appeal proceedings--see *e.g. Perfekto Mondo Bistro Corp.*, B.C.E.S.T. Decision No. D205/96.

I have several concerns about Mr. Kyle's assertion that he resigned his directorship as of May 8th, 2001.

First, Mr. Kyle is recorded in the records maintained by the Registrar of Companies as being both a director and an officer (president) of Bumper Exchange. Even if his purported resignation as a director is valid, Mr. Kyle remains liable under section 96(1) as an officer of the the company. There is nothing in the material before me to indicate that Mr. Kyle ever resigned his office.

Second, the resignation letter is not addressed to the company (it is addressed to Mr. Kyle himself) and there is no evidence before me that it was ever delivered to the company's board of directors. Records maintained by the Registrar of Companies are rebuttably presumed to be accurate (*Wilinofsky*, B.C.E.S.T. Decision No. D106/99). The Director may issue a section 96 determination relying on the corporate records filed with the Registrar of Companies; the person challenging those records must prove, by credible and cogent evidence, that the records are inaccurate. In my view, Mr. Kyle has fallen well short of proving by "credible and cogent evidence" that the Registrar's records are inaccurate.

If Mr. Kyle did indeed cease to be a Bumper Exchange principal (the Registrar's records indicate that he was one of only two Bumper Exchange principals) as of May 8th, 2001, one has to wonder why he was corresponding with the Director's delegate on May 11th, 2002 and again on June 1st, 2002 with respect to Bumper Exchange's liability as set out in the Corporate Determination.

Finally, even if Mr. Kyle's resignation was valid (and it could only be valid with respect to his directorship), the resignation purports to take effect as of May 8th, 2001. The employees' unpaid wage claims span the period from June 27th, 1999 to June 27th, 2001 and thus the vast bulk of the employees' wage claims would have crystallized prior to the resignation in any event. However, since I am satisfied that Mr. Kyle is personally liable for the entire amount due under the Determination, I need not address this latter question any further.

This appeal is dismissed.

ORDER

Pursuant to subsections 114(1)(c) and 115(1)(a) of the *Act*, I order that this appeal be dismissed and that the Determination be confirmed as issued in the amount of **\$20,615.43** 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