

An appeal

- by -

Barry Hodgkin, a Director or Officer of Fairwinds National Boating Inc.
("Hodgkin")

- 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.: 2002/234

DATE OF DECISION: August 12, 2002

DECISION

OVERVIEW

This is an appeal filed by Barry Hodgkin (“Hodgkin”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”). Mr. Hodgkin appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on April 10th, 2002 (the “Determination”) in accordance with the provisions of section 96(1) of the *Act* which provide 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 the Determination, Mr. Hodgkin was ordered to pay the sum of \$4,213.04 on account of unpaid wages and interest owed to Ms. Birgit LeBlanc, a former employee of a company known as Fairwinds National Boating Inc. (“Fairwinds”).

Mr. Hodgkin has also appealed two other section 96 determinations, on the identical ground, that were issued against him in favour of other former Fairwinds employees (see E.S.T. File Nos. 2002/235 and 2002/236). These latter appeals are addressed in separate decisions that are being issued concurrently with these reasons.

A separate determination regarding Ms. LeBlanc’s unpaid wage claim was issued against Fairwinds on February 12th, 2002. This latter determination was appealed to the Tribunal, however, that appeal was dismissed and the determination confirmed--see B.C.E.S.T. Decision No. D209/02. I should note, at the outset, that there is no dispute before me regarding the calculation of Ms. LeBlanc’s unpaid wage claim as that matter has now been finally determined.

This appeal is being adjudicated based on the parties’ written submissions (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). I have before me submissions from Mr. Hodgkin’s legal counsel and a very brief submission from the Director’s delegate. Ms. LeBlanc did not file any submission with the Tribunal.

THE DETERMINATION

According to the information set out in the Determination, Ms. LeBlanc’s unpaid wage claim spans the period from May 14th to December 5th, 2001. During this time frame, Mr. Hodgkin was recorded in records held by the Registrar of Companies as both an officer and director of Fairwinds. In addition, the delegate stated, at page 2 of the Determination, that Mr. Hodgkin “participated in the activities of [Fairwinds] during the time the wages were earned”. I presume this latter finding was set out in the Determination in order to bring Mr. Hodgkin 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 Fairwinds’ corporate records (see *Penner and Hauff*, B.C.E.S.T. Decision No. D371/96).

In my view, I need not address this latter issue since Mr. Hodgkin was, at all material times, formally recorded in Fairwinds’ records as an officer and director. Mr. Hodgkin’s liability turns on whether or not

he lawfully resigned his office and directorship during the period spanned by Ms. LeBlanc's unpaid wage claim.

REASON FOR APPEAL

In his appeal form, counsel for Mr. Hodgkin asserts:

“Mr. Hodgkin resigned as a director and officer on October 30, 2001 and therefore he should not be held liable. This resignation was given verbally to the president of the company.”

FINDINGS

The 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. Thus, I must consider whether Mr. Hodgkin has met his evidentiary burden; in my view, he has not.

In his submission dated June 26th, 2002, legal counsel for Mr. Hodgkin states that Mr. Hodgkin has submitted an affidavit in which he avers that he (Hodgkin) “tendered his resignation on October 30, 2001 to the president of [Fairwinds], David Pratt”. Counsel says that Mr. Pratt, due to his “inattention or negligence” failed to amend and file the necessary corporate records in order to properly document Mr. Hodgkin's resignation.

There are at least three problems with the foregoing submission. First, I do not have any affidavit from Mr. Hodgkin (or even a signed unsworn statement) stating that he resigned his office and directorship on October 30th, 2001. Second, there is nothing in the material before me from Mr. Pratt to corroborate this latter assertion. In the absence of such corroboration (and, as well, in the absence of an explanation for that glaring omission), I draw an adverse inference. Third, even if I was persuaded that Hodgkin tendered a valid resignation (and I am not), as indicated in his appeal form, Mr. Hodgkin asserts that his “resignation was given *verbally* to the president of the company” (my *italics*). However, section 130(2) of the *Company Act* states that a director's resignation does not become effective until “a *written* resignation is delivered to the registered office of the company”.

Counsel for Mr. Hodgkin also submits, in his June 26th letter, that “Mr. Shannon states that he was informed by Mr. Pratt on or about November 4, 2001 that Barry Hodgkin was no longer a director of [Fairwinds]. In fact, Mr. Shannon says no such thing. I have before me an unsworn and undated letter from a Mr. Gary Shannon who says that he became Fairwinds' “general manager” on January 3rd, 2002--a date, I note, that is subsequent to the period spanned by Ms. LeBlanc's unpaid wage claim. In any event, in this letter Mr. Shannon states that “on or about November 4, 2001, in a conversation with David Pratt, I was informed, by David Pratt, of Mr. Hodgkin's *desire to cease being a director of [Fairwinds]*” (my *italics*). Thus, Mr. Shannon's evidence is quite inconsistent with Mr. Hodgkin's evidence in that, as of November 4th, 2001--according to Mr. Shannon--Mr. Hodgkin had only expressed a *desire* to resign but had not yet resigned. Mr. Hodgkin says that he tendered his resignation on October 30th, 2001, a position that is not in accord with Mr. Shannon's evidence. Further, Mr. Shannon's evidence is entirely hearsay and therefore of limited, if any, probative value in any event.

Finally, counsel refers to an affidavit of Mr. Gordon W. Mains, “wherein he [Mains] discloses that he was informed in conversations with Mr. Hodgkin, that Mr. Hodgkin had in fact already resigned as a director of [Fairwinds]”. I have no such affidavit before me. However, such a statement by Mains does not independently corroborate Mr. Hodgkin’s assertion that he (Hodgkin) resigned his directorship and office on October 30th, 2001. At best, this statement only proves that Hodgkin stated to Mains that Hodgkin resigned; it is not evidence of the resignation itself.

Finally, it should perhaps be observed that Ms. LeBlanc’s unpaid wage claim spans the period from May 14th to December 5th, 2001. Even if I was satisfied that Mr. Hodgkin resigned both his office and directorship on October 30th, 2001 (and the evidence does not satisfy me on that score), Hodgkin would nonetheless remain liable for that portion of Ms. LeBlanc’s unpaid wage claim that crystallized prior to October 30th, 2001.

In my view, the material before me falls well short of establishing that Mr. Hodgkin lawfully resigned his office and directorship in Fairwinds on October 30th, 2001.

The 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 **\$4,213.04** 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