

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.:** 2002/236

**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 \$32,633.38 on account of unpaid wages and interest owed to eight former employees of a company known as Fairwinds National Boating Inc. (“Fairwinds”). The employees are: Kimberly Fuson, Tristan Gallaway, Bella Greene, Helen Hopkins, Amanda Hunter, Paul Sievwright, Greg Warawa and Heather Weir.

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. 2002/234 and 2002/235). These latter appeals are addressed in separate decisions that are being issued concurrently with these reasons.

A separate determination with respect to the eight employees’ unpaid wage claims was issued against Fairwinds on April 4th, 2002. So far as I am aware, this latter determination was never appealed to the Tribunal. I should note, at the outset, that there is no dispute before me regarding the calculation of the employees’ unpaid wage claims; the only issue before me is Mr. Hodgkin’s liability for the employees’ claims as determined by the Director’s delegate.

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). The parties were advised of this decision in a letter dated July 23rd, 2002 from the Tribunal’s vice-chair.

I have before me submissions from Mr. Hodgkin’s legal counsel and a very brief submission from the Director’s delegate. I also have before me brief submissions from the following former employees: Bella Greene and Greg Warawa. None of the other employees filed any submission with respect to this appeal. Mr. Warawa’s submission does not address the issue that is properly before me and only one of Ms. Greene’s two submissions raises factual matters that are potentially relevant.

### THE DETERMINATION

The employees’ unpaid wage claims span the period from November 2001 to March 2002 (the Determination incorrectly states that the period runs from November 2001 to March 2001). In any event, throughout the relevant time frame, Mr. Hodgkin was recorded in both internal corporate records and those maintained by the Registrar of Companies as 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 the eight employees’ unpaid wage claims.

## REASON FOR APPEAL

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

“Mr. Hodgkin resigned as a director and officer on October 30, 2001 and therefor 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 the employees’ unpaid wage claims. 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 the employees’ unpaid wage claims span 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 the employees’ unpaid wage claims 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. I might add, simply for the sake of completeness, that Ms. Greene’s May 15th, 2002 submission to the Tribunal (which is not controverted) suggests that Mr. Hodgkin was actively involved as a principal in Fairwinds after his purported resignation on October 30th, 2001. However, as indicated above, I am not resting my decision on a finding that Mr. Hodgkin is liable as a result of the application of the so-called “functional test”.

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 **\$32,633.38** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

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**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**