

An appeal

- by -

Peter Stursberg, a Director or Officer of Cypress Park Auto Services Ltd.
(“Stursberg”)

- 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: Ib S. Petersen

FILE No.: 2001/409

DATE OF DECISION: July 12, 2001

DECISION

SUBMISSIONS:

Mr. Peter Stursberg	on behalf of himself
Mr. Mike Doak	on behalf of himself
Mr. Victor Lee	on behalf of the Director

OVERVIEW

This matter arises out of an appeal by Stursberg pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination of the Director issued on May 2, 2001. The Determination concluded that Stursberg, according to the Registrar of Companies, was a director or officer of Cypress Park Auto Services Ltd. (the “Company”) at the time wages were earned or should have been paid, between August 1, 1999 and June 2, 2000. A corporate determination was issued and not appealed (the “Corporate Determination”). The Determination concluded, further, that Stursberg was liable for an amount of \$4,681.37 by the Employer.

FACTS AND ANALYSIS

Stursberg appeals the determination. As the appellant, he has the burden to persuade me that the Determination is wrong.

Stursberg says, in his appeal, that he was not a *de facto* director or officer, was denied an active role in the Company, engaged in litigation to gain access to the Company’s records and books, denies that money is owed to certain employees of the Company, and did everything he could to secure payment of outstanding wages—including what appears to court action against the Company and other director/officers. The remedy sought by the appellant is that I cancel the Determination against him.

The appeal is opposed by the Director. I have considerable sympathy for Stursberg. It is clear that at least one of the former employees of the Company, Mike Doak, also has sympathy for Stursberg and says that he is not willing to take money from him.

The delegate cites the Tribunal’s decision in *The Director of Employment Standards*, BCEST #D047/01, reconsideration of #D056/00:

“In our view, in summary, the case law reviewed here and in *Wilnofsky* stands for the following propositions:

1. The available corporate records, primarily available through the Registrar of Companies or available at a corporation’s registered and records office, raise a

rebuttable presumption that a person is a director or officer. In other words, the Director of Employment Standards may presumptively rely on those corporate records to establish director or officer status.

2. It is then open to the person, who, according to the corporate records, is a director or officer, 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 was not appointed etc.
3. 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.
4. The determination of director-officer status should be narrowly construed, at least with respect to Section 96.”

It appears that Stursberg became involved in the Company, which operated a gas station, in October 1998 when he bought a half share and became a director. There were disputes over allegations of financial mismanagement and misappropriation between Stursberg and the other director, a Sean Kostrewski. These disputes resulted in an action by Stursberg in the Supreme Court of B.C. and the appointment of an interim receiver in August 1999. According to an order submitted with the appeal, on September 17, 1999, the interim receiver was discharged “without hearing, and by consent.” This order permitted the Company to carry on its business, subject to certain restrictions, which, if the appellant is to be believed (and there is nothing to suggest that he should not) were largely ignored by Kostrewski. In any event, the business continued to operate until May 2000 when it closed.

Three of four complainants were gas station attendants and one mechanics’ helper. The latter was paid at the rate of \$8.00 per hour, the former were paid \$7.15. They were employed at the time the business was closed and the delegate awarded regular wages and vacation pay, largely amounts earned between March and May 2000.

As stated above, I have considerable sympathy for Stursberg. In the circumstances, regrettably, however, I am of the view that the appeal cannot succeed. I accept the facts asserted by Stursberg. It appears that he was an honest person who got involved in business with a rogue, Kostrewski, who, he says, misappropriated funds and equipment from the business, including upon the closing of the business in May 2000. From Stursberg’s submission, it appears that, between February 1999 and May 2000, he was denied involvement in--and, indeed, physical access to--the Company’s business. During that time, he took legal action against Kostrewski and the Company. Kostrewski, apparently, acted in disregard of the orders of the court. As well, Stursberg sought the assistance of the West Vancouver Police Department, which refused to lay charges in a “civil matter.” He also took steps to seize and sell an expensive vehicle owned by the Company to pay money owed to the government.

However from the submission, there is nothing to indicate that Stursberg was not actually a director or officer according to the corporate records, it appears that he was still a director or officer in May 2000 (and, for all I know, may still be). He took steps to take control over the Company through court action. However, it is also clear, from the order quoted above, that he consented to the discharge of the interim receiver and remained as a director or officer. Consent to being a director or officer, thus, would not appear to be an issue. There is nothing to indicate that the corporate records are not accurate. When it appeared to him that Kostrewski did not comply with the orders of the court, he could have resigned as a director or officer. He could have acted under the shareholder agreement (referred to in the submissions). He could have taken steps to wind-up the company. The fact is that he, unfortunately from his standpoint, was not successful in his efforts to bring Kostrewski, his “partner,” under control and, obviously, the Company and its business suffered. If, as he asserts, he was denied his rights as a director or officer, he has certain remedies available to him under the *Company Act* and, I assume, under the shareholder agreement. While I appreciate Stursberg’s efforts--and by all accounts they were honest efforts--they do not excuse him from liability under Section 96.

Stursberg also questions the amount claimed. He suggests that the hours of work claimed by the complainants are high. He disagrees with the hourly rate claimed by one employee, but he is not certain what the rate was. He understands that one employee was paid off “under the table.” In the circumstances, Stursberg’s assertions lack merit. First, there is no appeal of the Corporate Determination and his issues go more to the merits of that determination. Second, and in any event, his argument lacks any detail and particularity and is largely of a speculative nature. It is clear from his submission that he does not actually have any personal knowledge of the matters argued by him. In the result, this aspect of the appeal is dismissed as well.

In the circumstances, I recommend and strongly urge that Director proceeds against both Directors.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated May 2, 2001, be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal