

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

-by-

Lisa Ann Kelly, a Director or Officer of ABSM Advantage
Building Systems Mfg. Ltd.
(the Appellant)

-of a Determination issued by-

The Director of Employment Standards
(the Director)

Adjudicator: Hugh R. Jamieson

File No.: 99/433

Date of Decision: September 27, 1999

DECISION

OVERVIEW

This appeal was brought by the Appellant on July 11, 1999, against a Determination issued by the Director on June 17, 1999, wherein the Appellant was found to be liable, as a Director or Officer of ABSM Advantage Building Systems Ltd., (the Employer), to an amount of \$7,288.94 being wages owing to several employees of the Employer. The basis for the appeal is the claim by the Appellant that having resigned her position as an Officer of the Employer on March 15, 1998, she was not a Director or an Officer of the Employer during September 1998, when the wages in question were earned. In this regard, the Appellant submitted a letter along with the appeal purporting to be her resignation dated March 15, 1998. This resignation was not presented to the Director during the investigation.

ISSUES TO BE DECIDED

The issue is whether this evidence of the Appellant's resignation as an Officer of the Employer should be accepted by the Tribunal.

FACTS

The Employer ceased operating on or about September 25, 1998. Following an investigation in response to complaints from several employees, namely Ron Goll, Andrew Kline, Steve Kline, Shane Petry, Charlie Watson and Gord Wray (the Employees), the Director issued a Determination on February 19, 1999, finding that there was a total of \$7,141.24 being wages, vacation wages and interest owing to the Employees.

This Determination was not appealed. In fact, the Employer did not dispute the claims by the Employees, indicating that it was no longer operating and that there were no assets.

Based on information obtained from the Registrar of Companies, the Director concluded that the Appellant was a Director or an Officer of the Employer at the time the wages owing to the Employees were earned. Accordingly, pursuant to Section 96 (1) of the *Employment Standards Act (the Act)*, the Determination under review here was issued by the Director on June 17, 1999, finding the Appellant liable for the outstanding wages as a Director or an Officer of the Employer.

As indicated, the Appellant produced a copy of a letter dated March 15, 1998 with her appeal, purporting to be her resignation as an Officer of the Employer. Based on that evidence, the Appellant alleges that the Director erred in finding that she was a Director or an Officer of the Employer when the wages in question were earned.

BC EST #D411/99

In her submission accompanying the appeal, the Appellant indicates that the Employer was in financial difficulties in January 1998, and that she had arranged a personal loan of \$8,000.00 to help meet the payroll. As the Employer continued struggling to meet its financial obligations during the following couple of months, she realized that she was not capable of any further financial obligations and resigned her position as an Officer of the Employer. According to the Appellant, the Employer owed no wages to any employee at the time of her resignation.

The Employer responded to the appeal by letter dated September 3, 1999, basically corroborating the Appellant's claim to having resigned her Officer status in March 1998. The Employer added that although she had resigned from her official capacity Secretary of the Employer, the Appellant continued to do secretarial and accounting work for the Employer.

The Director's reply to the appeal dated August 9, 1999, indicates that when the search was done of the Employer's corporate records in November 1998, it revealed that there were three people named as Directors or Officers. The Appellant as an Officer in the position of Secretary, a Mr. Bruce Stapleton a Director and Officer as President and, a Mr. Dwayne Paquette as a Director. The Director also submits that a personal visit was made by the Director's Delegate to the premises of the Employer shortly after this search and the Appellant and Mr. Bruce Stapleton were interviewed about the complaints from the Employees. When the topic of Directors or Officers was raised at that time by the Delegate, he was informed that Mr. Paquette was no longer involved with the Employer. Consequently, Mr. Paquette's name was struck from the list of Directors or Officers. According to the Delegate, there was no mention made by the Employer or the Appellant during that interview about the Appellant having resigned her Officer status.

ANALYSIS

This is clearly a situation where new evidence is being presented in an appeal. In this context, new evidence means something that was not raised with the Director during the investigation stage of the process. In this regard, the Tribunal's policies are quite clear. The general rule is that no one will be permitted to rely on evidence at an appeal that was available and could have been presented to the investigating officer, see - *Tri-West Tractor Ltd.*, BC EST# D268/96; *Kaiser Stables Ltd.*, BC EST# D58/97; *Specialty Motor Cars (1970) Ltd.*, BC EST# D570/98; and, *Falcon Overhead Doors Ltd.*, BC EST# D405/99.

There are of course exceptions to that rule, one being that the Tribunal may consider such evidence where there is a reasonable explanation from the party presenting the new evidence as to why it was not available or why it was not produced earlier. Here, there is no explanation in the appeal as to why the information regarding the Appellant's purported resignation from her position as Secretary of the Employer was not provided during the investigation.

It is not uncommon in these director or officer liability situations under Section 96 of the *Act*, that the first opportunity to challenge director or officer status is when a liability determination is first received. In those circumstances, for natural justice considerations, the Tribunal will usually accept evidence challenging director or officer status - for example, see *Carrie Sindia*, BC EST #D131/99. Here though, there was ample opportunity for the Appellant or the Employer to raise the question of the Appellant's resignation and provide the resignation letter to the Director's Delegate before the issuance of the Determination on June 17, 1999.

If the copy of this letter of resignation presented with the appeal is authentic, it was certainly available in November 1998, when the Delegate attended at the Employer's premises and specifically asked about the directors and officers of the Employer. However, the resignation was not even mentioned back then, which is particularly strange considering that the information concerning Mr. Paquette ceasing to be a Director was given to the Delegate during this same interview.

Moreover, according to the submissions in the appeal, the Appellant's main concern at the time she resigned was the possibility of future personal financial obligations to the Employer. These concerns arose from the Employer's inability to meet its payroll obligations in January 1998, when she loaned the Employer \$8,000.00. In those circumstances, one would think that the Appellant's resignation as Secretary of the Employer would have been foremost in her mind when the Director's Delegate showed up in November 1998, with complaints of unpaid wages.

In any event, I need not deal with the authenticity of the letter of resignation as it is clearly evidence that was available and should have been provided to the Director during the investigation stages of the process. In the absence of any reasonable explanation as to why it was not produced earlier, there is no alternative in the circumstances but to rule that this evidence is inadmissible. Consequently, the Determination assigning personal liability to the Appellant for the wages owing to the Employees must stand.

ORDER

Pursuant to Section 115 of the *Act*, the Determination dated June 17, 1999, is hereby confirmed.

Hugh R. Jamieson
Adjudicator
Employment Standards Tribunal