

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 -

Van George Gardener
a Director or Officer of Silenus Foods (1994) Ltd
operating as
Pelicanos Cafe & Bakery

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE No: 1999/600

DATE OF DECISION: December 10, 1999

DECISION

OVERVIEW

This is an appeal by Van George Gardener ("Gardener") pursuant to Section 112 of the *Employment Standards Act (the "Act")* from a Determination dated September 15, 1999 (ER# 094449) by the Director of Employment Standards (the "Director").

On March 29, 1999 the Director issued a Determination against Silenus Foods (1994) Ltd operating as Pelicanos Cafe and Bakery (the "Company") in favour of a number of employees in the amount of \$17,241.22 for wages owing to the employees when the business closed its doors.

On September 15, 1999 the Director issued the current Determination against Gardener personally as a director or officer of the Company at the time the wages became due and owing to the employees.

Gardener has appealed on essentially three grounds:

1. that he was not a director of the Company at the time the liability arose;
2. that he was not the manager of the business at the time; and
3. that the business was insolvent and therefore a director is not liable for termination pay or holiday pay pursuant to Section 96(2)(a) of the *Act*.

FACTS AND ANALYSIS

The personal liability for a director of a company arises under Section 96 of the *Act* 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 wages for each employee.
- (2) Despite subsection (1), a person who was a director or officer of a corporation is not personally liable for
- (a) any liability to an employee under section 63, termination pay or money payable under a collective agreement in respect of an individual or group terminations, if the corporation is in receivership or is subject to action under section 427 of the *Bank Act*(Canada) or to a proceeding under an insolvency Act,
 - (b) vacation pay that becomes payable after the director or officer ceases to hold office,

"Wages" are defined in the *Act* as including salary, termination pay under section 63, and any money required to be paid under the *Act*, which would include vacation pay.

In this case the Director's delegate found that Gardener was a director and officer of the Company at the time the wages were earned and that he continued to be a director or officer when vacation pay became payable.

Gardener submits that he had tendered his resignation as a director on January 01, 1999 which pre-dates the liability for the wages found to be owing to the employees. He has submitted a document of that date purporting to be his resignation. There is no other evidence submitted as to whether the document was authored at the time it is dated or whether it was ever delivered to the Company.

A company search conducted on September 07, 1999 still showed Gardener as a director and President/Secretary of the Company. The resignation letter submitted by Gardener indicates his resignation as a director. Even if the letter is valid and effective he did not resign as an officer of the Company. He apparently remains President of the Company. No evidence has been submitted by Gardener to refute his status as an officer of the Company.

The onus on an appeal such as this rests with the appellant, in this case with Gardener, to satisfy the Tribunal that the Determination should be varied or cancelled. On this first issue there is no substantial evidence for me to conclude that Gardener was not an officer of the Company when the liability arose.

The issue of management is only relevant in deciding who is a "director" of the Company. As I am not satisfied that Gardener ceased to be an "officer" I do not have deal with the issue of whether he remained a director despite his resignation.

The issue of insolvency does not help Gardener as there is no evidence before me that the Company was "in receivership" or subject to an action under the *Bank Act* or to a proceeding under an insolvency Act. The business may well have been insolvent as alleged by Gardener but section 96 only relieves from liability when there are some formal proceedings in relation to that lack of solvency. I have no evidence of such proceedings and therefore the appellant has not met the burden of persuasion on this point.

In total the appeal does not satisfy me that the delegate has made any error in law or fact that would warrant cancellation or variation of the determination. I conclude that the determination should be confirmed.

ORDER

I order, under section 115 of the *Act*, that the Determination is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal