

An appeal

- by -

Cheryl Hughes, a Director or Officer of Westminster Manufacturing &  
Jewelry Repairs Ltd., In Bankruptcy  
("Hughes")

- 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.:** 2001/615

**DATE OF HEARING:** November 9, 2001

**DATE OF DECISION:** November 27, 2001

## DECISION

### APPEARANCES:

David H. Goodwin, Barrister & Solicitor	for Cheryl Dawn Hughes
Karen Essak	on her own behalf
Jacob Yuen	on his own behalf
Shelley Hughes	on her own behalf (via teleconference)
Lesley A. Christensen, I.R.O.	for the Director of Employment Standards

### OVERVIEW

This is an appeal filed by Cheryl Dawn Hughes (“Hughes” or the “appellant”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Ms. Hughes appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on August 3rd, 2001 pursuant to which Hughes was ordered to pay a total of \$6,504.03 to Karen Essak (\$848.41), Jacob Yuen (\$1,246.02) and Shelley Hughes (\$4,409.60) on account of unpaid wages and section 88 interest. Shelley Hughes is the appellant’s daughter; Shelley Hughes and the other two respondents were employed by a firm known as Westminster Manufacturing & Jewelry Repairs Ltd. (“Westminster Manufacturing”).

The Determination was issued against Ms. Cheryl Hughes in her capacity as a director or officer of Westminster Manufacturing in accordance with the provisions of section 96(1) of the *Act* which reads 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.

Westminster Manufacturing entered into bankruptcy on or shortly after July 31st, 2001; the firm “Barnes, Kissak, Henfry & George” is the licenced trustee in bankruptcy for Westminster Manufacturing. A separate determination was issued against Westminster Manufacturing on August 2nd, 2001 in favour of the three respondent employees in the amount of \$14,350.08 and, so far as I am aware, the trustee does not take issue with the amounts of the three respondent employees’ wage claims nor is the employees’ respective entitlements an issue before me in this appeal.

## THE DETERMINATION

The three respondent employees, as well as the appellant, Ms. Cheryl Hughes, all filed unpaid wage complaints with the Employment Standards Branch.

Although the appellant “was not listed as a director or officer either with the Registrar of Companies or the register at the corporation’s [Westminster Manufacturing] record office” (Determination, page 3), Ms. Hughes was determined to be a director or officer of Westminster Manufacturing through the application of the “functional test” (see *e.g.*, *Penner and Hauff*, B.C.E.S.T. Decision No. D371/96):

Although it is C. Hughes’ position that she is not an officer or director of [Westminster Manufacturing], she provided information that she was a signing officer for the employer at the bank, and owned 50% of the business. The other employees, Yuen, Essak, and S. Hughes, confirmed that C. Hughes owned part of the business and represented to them that she was an owner. In addition, Essak and S. Hughes stated that C. Hughes loaned money to the business, and this information appears to be confirmed by the documents supplied by the trustee in bankruptcy...

It appears that C. Hughes exercised the typical functions of an officer or director in that she regularly attended at the place of business (six days a week, according to C. Hughes), owned 50% of the business, and represented to the employees and others that she was an owner of the business. On a balance of probabilities, I accept the evidence provided by C. Hughes and the former employees, and find that C. Hughes was a director or in the alternative, an officer of [Westminster Manufacturing]. Based on this finding, C. Hughes is not entitled to use the wage recovery mechanisms of the *Employment Standards Act*.

Thus, the Director’s delegate made two adverse findings against Hughes.

First, the delegate determined that Hughes was an officer and/or director of Westminster Manufacturing and, accordingly, personally liable (subject to certain statutory limitations) for the latter’s employees’ unpaid wages.

Second, because Hughes was an officer or director, she “would not be able to use the wage recovery mechanisms of the *Employment Standards Act*, in accordance with the Director of Employment Standards Interpretation of the definition of ‘employee’ in the *Act*; that employees do not include directors or officers of the employer” (see Determination at page 3).

## ISSUES ON APPEAL

Legal counsel for Ms. Hughes submits that Mr. Ken Hughes (the appellant's spouse from whom she is now legally separated) was the sole principal of Westminster Manufacturing and that, at all relevant times, Ms. Hughes was a "mere employee" who was properly entitled to file a complaint for unpaid wages.

The appellant also raised an argument with respect to section 77 of the *Act*; this ground was not seriously pursued at the appeal hearing and, in any event, I find that the dictates of section 77 were fully satisfied in this case.

## BACKGROUND FACTS

Westminster Manufacturing was a family firm founded by Ken Hughes' father; Ken Hughes took over the sole management of the firm when his father died in 1995.

Throughout most of her marriage to Ken Hughes, the appellant worked either part- or full-time in the business primarily as a sales clerk although she also did some buying and merchandising. During the last few years of her employment (which ended when the landlord distrained for rent arrears in late June 2001), the appellant worked full-time and earned between \$8,400 and \$13,475 annually. Ms. Hughes says that she did not receive *any* pay for the calendar year 2001.

In 1995, after his father died, Ken Hughes became the sole officer, director and shareholder in Westminster Manufacturing. By 1997, allegedly due to Ken Hughes' poor management skills and personal problems, the business was experiencing serious financial difficulties. In or about May 1999, Ken Hughes asked his wife, the appellant, to agree to place a mortgage on the matrimonial home so that certain business and other debts could be paid off using the mortgage proceeds. Although her then legal counsel advised Ms. Hughes to refuse her husband's request, the appellant nonetheless agreed. A first mortgage, in the principal amount of \$138,000 was placed against the matrimonial home and, in turn, the legal title to the matrimonial home was registered in the appellant's sole name.

In addition, Ken Hughes transferred 50% of his shares in Westminster Manufacturing to the appellant and a "Shareholders Loan Agreement" was entered into on November 22nd, 1999 pursuant to which all mortgage proceeds advanced to Westminster Manufacturing (or to two related companies) "shall be recorded as a shareholders loan account in the name of Cheryl Dawn Hughes" (Shareholders Loan Agreement, paragraph 4). Paragraph 5 of the Shareholders Loan Agreement states that the appellant "may elect at any time to be a director of any or all of the corporate parties, namely, [Westminster Manufacturing and the two related companies]...".

By way of a separate "General Security Agreement", also dated November 22nd, 1999, Westminster Manufacturing, the two related companies and Ken Hughes all granted a general and continuing security interest to the appellant over, *inter alia*, all of Westminster

Manufacturing's unsecured assets including inventory, equipment, accounts receivable and other choses in action. Article 5.01(i) of the this agreement states that in order to further protect Ms. Hughes' secured position:

...[*inter alia*, Westminster Manufacturing] hereby constitutes and appoints [Cheryl Dawn Hughes]...the true and lawful attorney of [Westminster Manufacturing] irrevocably with full power of substitution to do, make and execute all such assignments, documents, act, matters or things with the right to use the name of [Westminster Manufacturing] whenever and wherever it may be deemed necessary or expedient.

In early January 2000, Ms. Hughes became one of two authorized signatories on Westminster Manufacturing's bank account. By the terms of the agreement with Westminster Manufacturing's bankers, both of Ms. Hughes' and Ken Hughes' signatures were required on any company cheques. Ms. Hughes testified that she demanded to become a signatory on Westminster Manufacturing's bank account so that "I would have a better picture of the money in the business so I could control and protect my investment in the business". Ms. Hughes testified that she was concerned that company funds "go to the right spots" and that she intended to ensure that "money did not go to places other than the business".

Ms. Hughes stated that on several occasions she refused to sign cheques presented to her by her husband, particularly when there was not sufficient funds in the company account. Ms. Hughes says that she stopped signing company cheques sometime in May 2001 but, so far as I can gather, she never revoked her signing authority lodged with the bank.

From time to time Ms. Hughes deposited and withdrew funds from the company bank account using a debit card (only she and Ken Hughes knew the secret code or "P.I.N."). With the exception of the last pay period, Ms. Hughes ensured that the employees were regularly paid (for example, she would obtain certified cheques or money orders for them); Ms. Hughes herself did not draw any salary for some six months prior to the bankruptcy.

Ms. Hughes testified that she did not hire or fire company employees and did not supervise the employees' daily work. On the other hand, it appears clear that the employees were very competent and knowledgeable and worked largely without the need of any close supervision. She described herself to the employees and to third parties as a 50% owner, and had personal dealings with some creditors and suppliers and with the bankruptcy trustee.

## **FINDINGS**

Although Ms. Hughes was never formally elected as a company director nor formally appointed to be a company officer, it is my view that the delegate did not err in concluding that Ms. Hughes carried out the functions of one or both positions as and from late November 1999 or, at the very latest, early January 2000.

Counsel for Ms. Hughes attempted to characterize the latter's involvement in the affairs of Westminster Manufacturing as nothing more than a shareholder and investor. I accept that a "mere" shareholder or investor is not, by reason of such status alone, liable under section 96(1) of the *Act* for employees' unpaid wages. Nevertheless, in my view, Ms. Hughes' role in the business affairs of Westminster Manufacturing cannot be so circumscribed.

It must be remembered that Westminster Manufacturing was a "family" business and, at all relevant times, Ms. Hughes was a family member who owned one-half of Westminster Manufacturing's issued capital. Nor was she a mere "silent" investor. Indeed, her status as a *bona fide* third party investor must be questioned since her own legal counsel advised her *not* to invest funds in the business. Thus, her infusion of funds must be viewed in light of the fact that this was not a normal investment where one expected to earn a reasonable rate of return commensurate with the risk undertaken. Ms. Hughes' investment appears to me to be more akin to a principal injecting funds in an effort to save that principal's business.

Ms. Hughes played an active role in the company, not only in terms of ordering and selling merchandise (which functions would not distinguish her from a "mere employee"), but also as a signing officer who had access to, and control over, the company bank account via a debit card and by signing (or refusing to sign) company cheques. Ms. Hughes, by her own admission, exercised a degree of control over the expenditure of company funds through her signing authority. She dealt with suppliers and creditors. She was consulted prior to the firm entering bankruptcy. Unlike the other employees, Ms. Hughes did not draw any wages from the business during the last six months of the firm's operations. Under the Shareholders Loan Agreement, she had the right to formalize her status as a company director at any time and, in view of her 50% shareholding, this latter provision was probably superfluous in any event. Ms. Hughes' authority under the General Security Agreement gave her wide powers with respect to the direction and control of Westminster Manufacturing's business affairs.

Ms. Hughes would have me accept that her husband was the one and only principal of Westminster Manufacturing, however, she was no mere "nominee" who simply did her husband's bidding. She sought, and obtained, some control over the business affairs of the company when she agreed to infuse funds into the business. She controlled, at least to some degree, the expenditure of company funds and was consulted on many important business decisions.

As noted above, the delegate concluded that because Ms. Hughes was an officer or director of Westminster Manufacturing, she was not entitled "to use the wage recovery mechanisms of the *Employment Standards Act*, in accordance with the Director of Employment Standards Interpretation of the definition of "employee" in the *Act*; that employees do not include directors or officers of the employer" (see Determination at page 3). I consider the delegate's approach to be inconsistent with the Tribunal's jurisprudence (see *e.g.*, *McPhee*, B.C.E.S.T. Decision No. D183/97; *Annable*, B.C.E.S.T. Decision No. D559/98; *Austin*, B.C.E.S.T. Decision No. D560/98). Persons, who are otherwise *bona fide* employees, are not disentitled from claiming

unpaid wages under the *Act* merely because they are also officers or directors. However, in this case, I am satisfied that Ms. Hughes was, at all relevant times, a “controlling mind” of Westminster Manufacturing and, as such, was not entitled to file an unpaid wage claim under the *Act*.

The appeal is dismissed.

### **ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$6,504.03** 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**