

Applications for suspension

– by –

0388025 B.C. Ltd. carrying on business as Edgewater Inn  
 (“Edgewater”)

– and –

Dadmar Giroday a Director or Officer of 0388025 B.C. Ltd. carrying on  
 business as Edgewater Inn

– of Determinations issued by –

The Director of Employment Standards  
 (the “Director”)

Pursuant to section 113 of the  
 *Employment Standards Act* R.S.B.C. 1996, C. 113 (as amended)

**TRIBUNAL MEMBER:** Carol L. Roberts

**FILE No.:** 2011A/175 and 2011A/176

**DATE OF DECISION:** January 10, 2012

## DECISION

### SUBMISSIONS

Dagmar Giroday	on her own behalf, a Director or Officer of 0388025 B.C. Ltd. carrying on business as Edgewater Inn and on behalf of 0388025 BC Ltd. carrying on business as Edgewater Inn
Amanda Clark Welder	on behalf of the Director of Employment Standards
Stephen Brechin	on his own behalf

### OVERVIEW

1. 0388025 BC Ltd., carrying on business as Edgewater Inn (“Edgewater”), has appealed a Determination of the Director of Employment Standards (the “Director”) issued October 12, 2011, ordering it to pay a total of \$7,253.40, representing wages, unauthorized deductions and accrued interest owed to Stephen Brechin; and four administrative penalties totalling \$2,000 for contraventions of sections 16, 21, 40 and 46 of the *Employment Standards Act* (the “*Act*”). Ms. Giroday, the sole director/officer of Edgewater, also appealed a companion Director Determination issued the same day, ordering her to pay \$9,253.40.
2. Both appeals were filed November 22, 2011, one day after the statutory deadline for filing the appeals. Ms. Giroday attached a letter to the appeal form stating that she did not know what her grounds of appeal were, but asserted that inadequate and or false evidence was used in making the Determination. She contends that she has evidence that was not considered by the Director’s delegate. Ms. Giroday and Edgewater sought an extension of time in which to file the appeals.
3. Ms. Giroday and Edgewater also sought a suspension of the Determinations pursuant to Section 113 of the *Act* pending the outcome of their appeals. Ms. Giroday says that she will pay money into trust if she is given the opportunity to respond to the allegations.
4. This decision addresses only the suspension requests.

### FACTS AND ARGUMENT

5. Stephen Brechin filed a complaint alleging that Edgewater had contravened the *Act* in failing to pay him wages for work performed between March and August 2010. Although Edgewater participated in the early stages of the investigation by providing evidence and argument in response to Mr. Brechin’s claim, Edgewater subsequently failed to respond to the Director’s attempts to solicit its participation. On September 16, 2011, a delegate of the Director sent the parties her preliminary findings and provided them with the opportunity to make a final response. No response was received from Edgewater even though the correspondence was sent to the business address by both regular and registered mail, as well as to the registered and records office. The correspondence was also sent to two different addresses for Ms. Giroday. The delegate received no response from Edgewater.
6. The issues before the delegate were whether or not Mr. Brechin was a manager and thus not entitled to overtime pay; the amount of wages he was entitled to, if any; and whether the deductions from his pay for rent constituted an unauthorized deduction. The delegate concluded that Mr. Brechin was not a manager,

that he was entitled to wages set out above, and that Edgewater had deducted accommodation costs from wages, contrary to section 21 of the *Act*.

7. The delegate also issued a Director Determination against Ms. Giroday. The Director determined that, as the director and officer of Edgewater at the time the wages owed to Mr. Brechin were earned or should have been earned, Ms. Giroday was personally responsible for two months unpaid wages, plus interest and penalties in the total amount of \$9,253.40.
8. Ms. Giroday claims that she moved and that all her mail and company mail was supposed to be forwarded to her new address. She states that she did not respond to the Director's correspondence because she did not receive it. Ms. Giroday also asserts that most of her communication with the delegate initially responsible for investigating the complaint was by telephone and that her telephone number was not unlisted. She says that she has significant information to present in response to Mr. Brechin's claims.
9. The Director opposes the suspension request. The delegate contends that Edgewater and Ms. Giroday have had sufficient opportunity to address and resolve the issues in dispute. The delegate also submits that in light of the fact that the business is no longer being operated by Edgewater and Ms. Giroday appears to have financial difficulties, delaying collection activities will jeopardize the Director's ability to ensure collection of Mr. Brechin's wages. The Director confirmed that any money collected or paid voluntarily would be held in trust pending the outcome of the appeals.
10. Mr. Brechin also opposes the suspension application, asserting that Ms. Giroday failed to participate in the investigation in any substantive way and is merely attempting to avoid or delay paying the wages he is entitled to. He also contends that her appeal is frivolous and has been made in bad faith.

## ANALYSIS

11. Section 113 of the *Act* provides as follows:
  - (1) A person who appeals a determination may request the Tribunal to suspend the effect of the determination.
  - (2) The tribunal may suspend the determination for the period and subject to the conditions it thinks appropriate, but only if the person who requests the suspension deposits with the director either
    - a) the total amount, if any, required to be paid under the determination or,
    - b) a smaller amount that the tribunal considers adequate in the circumstances of the appeal.
12. The Tribunal will not suspend the effect of a Determination in circumstances where the grounds of appeal are frivolous or have no apparent merit; however it may suspend where the appeal may have some merit. (*Tricom Services Inc.* BC EST # D420/97; *TNL Paving Ltd.* BC EST # D397/99)
13. I am not persuaded that the appeal has merit. The fact is that Ms. Giroday had knowledge of the Director's investigation into Mr. Brechin's complaint and was given the opportunity to provide the delegate with the information she now claims she wishes to submit on appeal. Although she has not set out the grounds of appeal, she asserts that the Determination was made on false or inadequate information. The record demonstrates that she was given the opportunity to provide that information during the investigation, and indeed, on December 18, 2010, provided a seven page written response to the delegate. The record shows that while Ms. Giroday's initial communications with the delegate were by telephone, she changed her telephone number when she moved and did not provide the Branch with updated contact information. The

records also show that the correspondence was sent to Ms. Giroday's new address. Given that Ms. Giroday was aware the Director was conducting an investigation, it was incumbent on her to stay in touch with the Branch. Ms. Giroday now says that she has "new information". This information does not meet the Tribunal's test for new evidence as it was clearly available at the time the delegate was conducting the investigation.

14. In addition, neither Ms. Giroday nor Edgewater has deposited any funds with the suspension request. Although Ms. Giroday submits that she would do so if she was granted time in which to submit the "new information", the fact she has not deposited the funds and no longer operates the business suggests that there is a risk that the employee will never fully recover his wages. I am unable to conclude that a suspension order should be granted.

### **ORDER**

15. Pursuant to section 113 of the *Act*, I deny the application to suspend the Determination.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**