

An appeal

- by -

Asif Jetha, a Director or Officer of
544302 B.C. Ltd. operating as Coquitlam Gas Bar
("Jetha")

- 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: Norma Edelman

FILE No.: 2001/806

DATE OF DECISION: January 8, 2002

DECISION

OVERVIEW

This is an appeal by Asif Jetha ("Jetha") under Section 112 of the Employment Standards Act (the "Act") against a Determination which was issued against him as a director or officer of 544302 B.C. Ltd. operating as the Coquitlam Gas Bar ("Coquitlam Gas Bar") by a delegate of the Director of Employment Standards (the "Director") on October 29, 2001. The Determination requires Jetha to pay \$6,939.95 as a result of a finding that he is personally liable for wages owing to 5 employees. That liability arises from Section 96 of the Act.

ISSUE TO BE DECIDED

Did the Director err in determining that Jetha is liable under Section 96 of the Act to pay wages to the 5 employees in the amount of \$6,939.95?

FACTS

On July 5, 2001, the Director issued a Determination against the Coquitlam Gas Bar, which found that it owed five former employees a total of \$6,844.01. I shall refer to this Determination as the corporate Determination.

The Coquitlam Gas Bar appealed the corporate Determination. On October 2, 2001, following an oral hearing, the Tribunal issued a decision (BC EST #D526/01) which confirmed the Determination.

On October 29, 2001, the Director issued the Determination, which is the subject of this appeal. In it, Jetha is found liable as a director or officer of the Coquitlam Gas Bar for up to 2 months unpaid wages for the 5 employees amounting in total to \$6,939.95, including interest accrued to date of the Determination.

On November 20, 2001, Jetha filed an appeal of the Determination. Karim Chandani ("Chandani") wrote the reasons for the appeal. Chandani and Jetha do not dispute that Jetha is an officer/director of the Coquitlam Gas Bar, nor do they dispute that the Director has erred with respect to the calculation of Jetha's personal liability. The reasons for the appeal are as follows:

At the appeal, the person basically told me that I should have opened Asif's mail as I was at one time involved in the business. We have never been given the opportunity to give our side. Two of the employees have said they are owed x and you have taken their word. We have no issue with payment to Richard

\$790.64, Eric Mantele \$329.00. Mohammed wages are off by 20 hrs. Jaswinder are off by almost 42 hrs and Amandef wages are off with overtime 68 hrs.

(reproduced as written)

The other parties were invited to reply to the appeal. The Director says the appeal should be dismissed as the Appellant is making the same arguments put forth at the time the corporate Determination was appealed. The Tribunal upheld the corporate Determination because the employer failed to participate in the investigation. The Director further says that Jetha cannot now still argue the merits of the corporate Determination when he is appealing a Determination issued against him as an officer/director of the Coquitlam Gas Bar. Two of the 5 employees, Jas Winder and Amandeep Grewal, replied to the appeal. They confirm they are owed the amounts set out in the Determination.

ANALYSIS

Section 96(1) of the Act creates a personal liability for corporate officers and directors, as follows:

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.

The Tribunal has consistently held that an appeal by an officer or director must be limited to the issues that arise under Section 96 of the Act - whether she/he is or was a director or officer of a certain corporation and/or whether the calculation of her/his personal liability is correct. A director or officer is estopped from arguing the merits of the corporate determination, except where there has been fraud in the issuance of the corporate determination or where she/he has cogent new evidence not previously available: (Steinemann, BC ESTD180/96, Perfecto Mondo Bistro BC EST D205/96, and Seacorp Properties Inc. BC EST D440/97).

Neither Jetha nor Chandani claim that Jetha was not a director or officer of the Coquitlam Gas Bar at the time wages were earned or should have been paid to the five employees and they do not claim that the calculation of Jetha's personal liability is in error. Further, they did not provide any allegation or evidence of fraud in the issuance of the corporate Determination nor do they claim they have new evidence not previously available. Rather, they argue the merits of the liability of the corporation and revisit their position put forward during the appeal of the corporate Determination. That matter, however, has been decided. The Tribunal upheld the Determination issued against the corporation on the basis it had not participated during the investigation process. Jetha and Chandani are estopped from rearguing their position concerning the liability of the Coquitlam Gas Bar and given they have raised no arguments regarding the issues that directly arise under Section 96 of the Act their appeal of this Determination must fail.

ORDER

I order, under Section 115 of the Act, that the Determination dated October 29, 2001 be confirmed together with any further interest calculated pursuant to Section 88 of the Act.

Norma Edelman
Adjudicator
Employment Standards Tribunal