

An appeal

- by -

622537 B.C. Ltd. carrying on business as Wharfside Eatery  
(“Wharfside Eatery”)

- 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 (as amended)

**TRIBUNAL MEMBER:** Kenneth Wm. Thornicroft

**FILE No.:** 2009A/153

**DATE OF DECISION:** February 3, 2010

## DECISION

### SUBMISSIONS

Maria-Jose Hernandez on behalf of 622537 B.C. Ltd. carrying on business as Wharfside Eatery

Terry Hughes on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal filed pursuant to section 112(1)(c) of the *Employment Standards Act* (the “*Act*”). I am adjudicating this appeal based solely on the parties’ written submissions and, in that regard, there is very little in the way of submissions before me. The appellant’s submission consists solely of a 1-paragraph assertion contained in a note appended to the appellant’s Appeal Form (reproduced in full, below). The respondent employee (Ashley Schneider) did not file a submission although she was invited to do so. The Director of Employment Standards, through his delegate, filed a 2-page submission that was attached to the section 112(5) “record” filed with the Tribunal.
2. As will be seen, I do not find this appeal to have any merit whatsoever and am dismissing it.

### FACTUAL BACKGROUND

3. On October 16, 2009 a delegate of the Director of Employment Standards (the “delegate”) issued a Determination and accompanying “Reasons for the Determination” (“Reasons”) pursuant to which 622537 B.C. Ltd. carrying on business as Wharfside Eatery (the “Wharfside Eatery”), was ordered to pay its former employee, Ashley Schneider, the sum of \$1,092.22 on account of unpaid wages, vacation pay (section 58) and interest (section 88). In addition, the delegate levied two separate \$500 monetary penalties (see section 98) against Wharfside Eatery for having contravened section 18 of the *Act* (payment of wages) and section 46 of the *Employment Standards Regulation* (failure to produce or deliver employment records). Thus, the total amount payable under the Determination is \$2,092.22.
4. Ms. Schneider, a former manager with Wharfside Eatery (a Victoria restaurant) who was employed during the month of December 2008, filed an unpaid wage complaint on May 15, 2009. This complaint was investigated and, as noted above, a Determination in favour of Ms. Schneider was issued on October 16, 2009.
5. During the course of the investigation, Wharfside Eatery was represented by its sole registered director and officer, Ms. Maria-Jose Hernandez. The delegate, at pages R2 – R3 of his Reasons, details the great lengths he went to in order to have Ms. Hernandez respond in some substantive fashion to the allegations contained in Ms. Schneider’s unpaid wage complaint. Suffice to say, Ms. Hernandez was not the least bit co-operative and apparently followed a deliberate course of essentially delaying and ultimately ignoring the matter altogether. Of course, the delegate did not ignore the matter and, in due course, a Determination was issued that was largely, but not entirely, based on Ms. Schneider’s unchallenged evidence.
6. Ms. Schneider’s evidence was that her employer failed to pay all of her wages otherwise due to her – some paycheques bounced and another was subject of a stop payment order. The record before me includes a copy of a \$500 cheque drawn on the appellant numbered company’s bank account made payable to Ms. Schneider and dated February 13, 2009, that did not clear.

7. As noted above, Wharfside Eatery, through its representative Ms. Hernandez, did not participate in the delegate's investigation. Mr. Hernandez, who filed this appeal in her own name (although presumably on behalf of Wharfside Eatery) now says:

The Wharfside Eatery was owned and operated by Broadway Entertainment Corporation at the time the alleged contraventions occurred. Broadway was the registered employer with CRA and WCB. At no time did 622537 BC Ltd. carry on business as the Wharfside Eatery. It has not ever had a CRA source deductions account nor [sic] an account with WCB. It has never employed anyone. If the contraventions in fact did transpire, then Broadway would be the offending employer.

## FINDINGS

8. I have a number of concerns regarding the position advanced by Ms. Hernandez. First, the suggestion that Ms. Schneider should pursue Broadway Entertainment Corporation is rather disingenuous since the record before me indicates this company is in the process of being dissolved. Second, if Broadway Entertainment Corporation truly was the employer of record, then why did not Ms. Hernandez simply convey that information to the delegate while he was investigating Ms. Schneider's complaint? Had she done so, the delegate would perhaps have considered the possible application of the *Act's* "common employer" provision, namely, section 95. I would parenthetically note that the numbered company was consistently identified by the delegate in his communications to Ms. Hernandez as being the employer in this matter. Frankly, it is now too late in the day for Ms. Hernandez to raise, for the very first time, an issue about the identity of the "true employer" (see, e.g., *Kaiser Stables Ltd.*, BC EST # D058/97 and, for a more recent example, *Blackhawk Custom Motorsports Inc.*, BC EST # D036/09). Third, if Broadway were the true employer, then why was a payroll cheque drawn in favour of Ms. Schneider on Wharfside Eatery's numbered company chequing account maintained at the Bank of Montreal?
9. In sum, I find this appeal to be wholly without merit. Indeed, I would go further and characterize it as an entirely frivolous appeal and an abuse of the *Act* appeal process.

## ORDER

10. Pursuant to sections 114(1)(c), (d) and (f) and 115(1)(a) of the *Act*, I order that the Determination in this matter, dated October 16, 2009, be confirmed as issued in the amount of \$2,092.22 together with whatever additional interest that has accrued pursuant to section 88 since the date of issuance.

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**Kenneth Wm. Thornicroft**  
**Member**  
**Employment Standards Tribunal**