

An appeal

- by -

Tsunehisa (aka Rocky) Iida,
Director/Officer of Nagano Trading Inc. operating as Ohtako
("Iida")

- 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.: 2003A/313

DATE OF DECISION: February 17, 2004

DECISION

OVERVIEW

This is an appeal filed by Tsunehisa Iida (“Iida”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”). Mr. Iida appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on September 26th, 2003 (the “Determination”).

By way of the Determination, Mr. Iida was ordered to pay Ms. Jackie F. Chow (“Chow”) the sum of \$848.67 on account of unpaid wages and accrued section 88 interest. The Determination was issued against Mr. Iida pursuant to section 96 of the *Act* which is a provision that creates a limited personal unpaid wage liability for corporate officers and directors.

Mr. Iida filed an appeal with the Tribunal on December 15th, 2003--a date after the relevant appeal period had expired. Mr. Iida thus seeks an extension of the appeal period pursuant to section 109(1)(b) of the *Act*. On December 15th, 2003, the Tribunal’s vice-chair wrote to the parties and requested their written submissions, to be filed by no later than January 5th, 2004, with respect to this latter application. On February 2nd, 2004, the Tribunal’s vice-chair advised the parties that the appellant’s application for an extension of the appeal period would be addressed based on the parties’ written submissions.

These reasons for decision address the timeliness of the appeal, the matter to which I now turn.

TIMELINESS OF THE APPEAL

As the *Act* now stands, appellants must file their appeal with the Tribunal within “30 days after the date of service of the determination, if the person was served by registered mail” [see section 112(3)(a) of the *Act*]. As noted above, the Determination was issued on September 26th, 2003 and was, apparently, served on the appellant by registered mail.

In his December 17th, 2003 submission, the Director’s delegate does not indicate when the registered envelope containing the Determination was actually received by Mr. Iida. Mr. Iida, for his part, does acknowledge having been served with the Determination but, again, the actual date of receipt is not indicated.

Section 122(2) of the *Act* states that a determination served by registered mail “is deemed to be served 8 days after the determination...is deposited in a Canada Post Office”. The Determination itself contains information, in a box at the bottom of the fourth page, indicating how and when an appeal to the Tribunal can be filed. The appeal deadline set out in **boldface** type at page 4 of the Determination is November 3rd, 2003. I will accept, for purposes of this application, that the appeal period expired no later than November 3rd, 2003.

Mr. Iida’s appeal was actually filed by fax after the close of business on December 12th, 2003. Since December 12th was a Friday, the appeal was deemed to have been filed on the next business day, namely, Monday, December 15th, 2003. Accordingly, Mr. Iida’s appeal was filed approximately 6 weeks after the applicable appeal period expired.

Both Ms. Chow and the Director’s delegate oppose the application for an extension of the appeal period.

FINDINGS AND ANALYSIS

Previous proceedings

Ms. Chow was apparently employed as a cashier at a restaurant known as “Ohtako” from April 25th to June 1st, 2002 (the latter date being when the restaurant ceased operations). On November 22nd, 2002, a determination was issued against Mr. Iida, Ms. Francine Melger (Mr. Iida’s common law spouse) and Nagano Trading Inc. all operating as “Ohtako”. This latter determination did *not* find that all three persons were “associated” under section 95 of the *Act*.

Mr. Iida, Ms. Melger and Nagano Trading Inc. all appealed the determination. In a decision issued on March 11th, 2003 (following an oral hearing), Adjudicator Petersen ruled that although Ms. Chow’s unpaid wage claim was correctly determined, the delegate erred in finding that all three persons were Ms. Chow’s “employer” (see B.C.E.S.T. Decision No. D078/03) since this latter finding was not supported by the evidence before him. Adjudicator Petersen ordered that the question of Ms. Chow’s “true employer” be referred back to the Director for further investigation. The determination was cancelled as it related to Ms. Melger (who was characterized by Adjudicator Petersen as someone who merely prepared certain payroll records and otherwise served as a “contact person” for her common law spouse who had limited english and computer skills).

The matter came back before Adjudicator Petersen and in a decision issued on June 19th, 2003 (B.C.E.S.T. Decision No. D201/03) the matter of the “true employer” was yet again referred back to the Director since, in the Adjudicator’s view, “the delegate has not done what he was ordered to do, namely determine the true employer” (see page 3).

The matter of the “true employer” was finally determined by Adjudicator Petersen in a decision issued on December 2nd, 2003 (B.C.E.S.T. Decision No. D321/03). By way of this latter decision, the Determination was varied to indicate that Ms. Chow’s employer was Nagano Trading Inc. The Determination was cancelled as against Mr. Iida and Ms. Melger since neither party was an “employer” of Ms. Chow.

The Determination under appeal

On September 26th, 2003 the Director’s delegate issued the Determination now under appeal. This Determination orders Mr. Iida to pay Ms. Chow’s unpaid wages pursuant to section 96 of the *Act*. The key portions of the Determination are set out below:

FINDINGS AND FACTS

The BC On-line: Registrar of Companies - “Corporation Search”, indicates as at September 5, 2003, Nagano Trading Inc. was incorporated on June 21, 2000. Information provided by [Mr. Iida] is that Rocky Iida was listed as a Director until he declared bankruptcy (February 22, 2002). Rocky Iida continued functioning as a director/officer until June 1, 2002 when he closed the business.

[Ms. Chow’s] unpaid wages were earned between May 16, 2002 and June 1, 2002. [Mr. Iida] was a Director/Officer of Nagano Trading Inc., and was so functioning at the time [Ms. Chow’s] wages were earned and payable.

As a Director or Officer, you are personally liable for up to two (2) months’ unpaid wages for each employee...

Among other grounds, Mr. Iida appeals the Determination on the basis that he never was a director or officer of Nagano Trading Inc. (he says he was only an employee) and that whatever his liability might otherwise have been, it was discharged as a result of his personal bankruptcy. While I do not intend to review the merits of this appeal in these reasons, I would observe that the appeal is not obviously lacking merit.

The application to extend the appeal period

The material before me indicates that Mr. Iida has limited fluency in the English language. Mr. Iida also says that he did not file a timely appeal because he was confused about the nature of the Determination now under appeal—he seemingly thought it was issued in error since the matter of his liability had earlier been determined in his favour by way of Adjudicator Petersen’s December 2nd, 2003 decision. Mr. Iida says that when he learned that the Determination was issued against him on the basis of his potential liability under section 96, he immediately appealed even though the appeal period had expired.

The delay in this case is not unduly lengthy. I am satisfied that Mr. Iida may well have been confused by the various prior proceedings and may not have appreciated that the section 96 Determination represented a fresh attempt to fix him with liability. I accept that his limited English skills may have been a contributing factor to his confusion. I have no evidence before me of any prejudice that would be visited on any party if the appeal period were to be extended. Accordingly, I propose to extend the appeal period.

However, the matter does not end there. On February 5th, 2004 the Director advised the Tribunal that Ms. Chow’s unpaid wage claim was fully satisfied as a result of a seizure and subsequent sale of certain Nagano Trading Inc. assets. The Director’s delegate advised the Tribunal that he will now be closing his file.

As matters presently stand, Ms. Chow’s unpaid wage claim has been fully satisfied and thus there are no “unpaid wages” for which Mr. Iida could be held responsible. In light of the section 2 purposes of the *Act*, in particular, the need for fair treatment and efficient resolution of disputes, I see no reason to allow this appeal to go forward when, in effect, the matter of Mr. Iida’s unpaid wage liability has been rendered moot. In my view, the fairest disposition of this appeal would be a cancellation of the Determination.

ORDER

Pursuant to section 109(1)(b) of the *Act*, I order that the appeal period governing the filing of an appeal of the Determination be extended to December 16th, 2003. Accordingly, this appeal is now properly before the Tribunal.

Pursuant to section 115(1)(a) of the *Act*, I order that the Determination be cancelled.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal