

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

James Greenough, (“Greenough”)
a Director or Officer of Hunter Financial Group Ltd.

and

John Stewart, (“Stewart”)
a Director or Officer of Hunter Financial Group Ltd.

and

James Edwards, (“Edwards”)
a Director or Officer of Hunter Financial Group Ltd.

and

Gerald Rossiter, (“Rossiter”)
a Director or Officer of Hunter Financial Group Ltd.

and

Barry Fisher, (“Fisher”)
a Director or Officer of Hunter Financial Group Ltd.

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Hans Suhr

FILE No.: 1999/684, 716, 717, 718 & 719

DATE OF DECISION: January 31, 2000

DECISION

OVERVIEW

These are appeals by James Greenough (“Greenough”), John Stewart (“Stewart”), James Edwards (“Edwards”), Gerald Rossiter (“Rossiter”) and Barry Fisher (“Fisher”), all as a Director or Officer of Hunter Financial Group Ltd. under Section 112 of the *Employment Standards Act* (the “Act”), against Directors Determinations (“DDET”) dated October 15, 1999 issued by a delegate of the Director of Employment Standards (the “Director”). The appeals do not dispute that Stewart, Rossiter and Fisher were Directors or Officers of Hunter Financial Group Ltd. (“Hunter”) The appeals do allege that Greenough and Edwards were “outside Directors” of Hunter.

Greenough, Stewart, Edwards, Rossiter and Fisher do however allege that the delegate of the Director erred in the Corporate Determination (“CDET”) by concluding that wages were owed to Anthony Iaizzo. The CDET was not appealed.

These appeals were dealt with by way of written submissions.

ISSUES

The issues to be decided in this appeal are:

1. Are Greenough, Stewart, Edwards, Rossiter and Fisher entitled to argue the merits of the CDET during an appeal of the DDET ?
2. Are Greenough, Stewart, Edwards, Rossiter and Fisher liable as Directors or Officers of Hunter for the amounts as set forth in the Determinations ?

FACTS

A copy of the CDET was mailed to all of the Directors at their home addresses as listed in the Company search of the Registrar of Companies.

The CDET is dated June 2, 1999 and clearly sets out that any appeal must be delivered to the Tribunal by June 28, 1999.

There was no evidence that the CDET was appealed.

The appeals of the DDET by Greenough, Edwards, Stewart, Rossiter and Fisher are identical in style and substance and will be dealt with in that manner.

Greenough, acting as the representative and spokesperson for the other Directors or Officers, argues that *“because of extenuating circumstances, it was not until November 10th that Barry Fisher and I spoke to..... the delegate of the Director. She suggested*

that we appeal through this process to the Tribunal and ask for an extension so that full and complete information can be brought forward in support of the appellants.”

Greenough further makes a number of arguments with respect to the merits of the CDET.

Greenough further argues that the complaint which instigated the CDET would have been dealt with in a more timely fashion except that the situation was exacerbated by the following:

1. The Company (Hunter) went into Receivership.
2. Most communications were sent to the former head office of Hunter. Very few individuals ever received any information.
3. Hunter had been managed by George Edwards principally. He was the sole party involved with the subsidiaries in British Columbia. It is apparent that there are a number of things he had not disclosed to others in the Company. This has not made it easier in getting information. Notwithstanding this, it is still the belief that Mr. Iaizzo was not an employee of Hunter; either in fact, or by determination.
4. Mr. Greenough and Jim Edwards were outside Directors of Hunter for a period of time and were not involved in the operations in any way.
5. It was the understanding of Mr. Rossiter, Mr. Fisher and Mr. Greenough that Mr. Iaizzo was going to request that the entire matter be terminated and the file closed.

Greenough finally argues that copies of e-mails from a Bob King CMA who apparently acted as the CFO for Hunter from January 2, 1999 to March 6, 1999 clearly support their contention that Iaizzo was never employed by Hunter.

The delegate of the Director states that a letter dated April 27, 1999 outlining the basis of Iaizzo's complaint was mailed to the home addresses of each Director or Officer of Hunter as listed by the Registrar of Companies, company search.

The delegate of the Director further states that in a telephone conversation with Greenough on November 10, 1999, he acknowledged receiving the April 27, 1999 letter but did not respond to it as he found the claim to be “laughable” and further that Rossiter, advised that the matter would be taken care of.

The delegate of the Director further states that telephone messages were exchanged with Rossiter in early May 1999.

The delegate of the Director further states that another Director or Officer, Susanne Bulmer (“Bulmer”), telephoned and spoke to the delegate of the Director on May 6, 1999 providing some information with respect to Iaizzo's complaint.

The delegate of the Director further states that copies of the CDET dated June 2, 1999 were mailed to each Director or Officers home address.

The delegate of the Director further states that information was received during the investigation of Iaizzo's complaint from the Receiver, Rossiter and Bulmer. No one else chose to respond to the requests for information.

The delegate of the Director finally states that the Tribunal has consistently refused to allow the submission of evidence at the time of the appeal which should have been produced at the time of the investigation. Furthermore, the delegate of the Director states that the Tribunal has consistently refused to allow appeals of DDET's which argue the merits of the CDET, allowing only information as to whether the party was a corporate officer at the time wages were earned and whether the calculation of the corporate officer's liability was performed accurately.

ANALYSIS

The timelimits for the filing of an appeal with the Tribunal are found in Section 112 and provides:

Section 112, Right to appeal director's determination

(1) Any person served with a determination may appeal the determination to the tribunal by delivering to its office a written request that includes the reasons for the appeal.

(2) The request must be delivered within

(a) 15 days after the date of service, if the person was served by registered mail, and

(b) 8 days after the date of service, if the person was personally served or served under section 122 (3).

(3) The filing of a determination under section 91 does not prevent the determination being appealed.

(4) This section does not apply to a determination made under section 119.

The evidence is that Greenough and the other Directors or Officers of Hunter did not appeal the CDET within the timelimits set forth in Section 112 supra.

The powers of the Tribunal to exercise discretion in regard to timelimits are set forth in Section 109 (1) (b) of the Act which provides:

109.(1) In addition to its powers under section 108 and Part 13, the tribunal may

.....

(b) extend the time period for requesting an appeal even though the period has expired,

The discretion of the Tribunal to extend the timelimits for accepting an appeal should, in my view, be exercised only where extenuating circumstances beyond the control of the appellant prevented the appellant from meeting the timelimits set out in the Determination.

The evidence is that Greenough's reasons for not filing the appeal of the CDET on time is stated in the appeal as "extenuating circumstances". Greenough does not clarify what those extenuating circumstances might have been. Greenough does however acknowledge that the matter would have been dealt with in a more timely fashion except for the matter of the receivership, limited communications to the Directors or Officers, the lack of information provided by the Director or Officer who was in charge of the B.C. subsidiaries, he and Edwards were outside Directors for a period of time and not involved in operations in any way and a belief that the complaint was going to be terminated.

The evidence is very clear, the delegate of the Director mailed a letter dated April 27, 1999 and a copy of the CDET dated June 2, 1999 to the home addresses of all the Directors or Officers of Hunter. For whatever reason, those individuals chose not to appeal the CDET within the time period for filing an appeal (June 28, 1999).

I am not convinced that the reasons being offered by Greenough on behalf of the Directors or Officers of Hunter constitute extenuating circumstances for not being able to meet the timelimits set forth. I therefore decline to exercise the Tribunal's discretion pursuant to Section 109 (1) (b) with respect to the timelimits for filing an appeal of the CDET. It is therefore not necessary to consider the arguments put forward with respect to the merits of the CDET.

Having determined that the CDET as issued stands, I must now consider the merits of the appeals of the DDET's issued October 15, 1999.

With respect to the DDET's dated October 15,1999, the appeals were received by the Tribunal within the timelimits as set out in that DDET's (Nov. 12, 1999).

The *Act* sets forth the liability of a Director or Officer in Section 96 which states:

Section 96, 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.

(2) *Despite subsection (1), a person who was a director or officer of a corporation is not personally liable for*

(a) any liability to an employee under section 63, termination pay or money payable under a collective agreement in respect of individual or group terminations, if the corporation is in receivership or is subject to action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act,

(b) vacation pay that becomes payable after the director or officer ceases to hold office, or

(c) money that remains in an employee's time bank after the director or officer ceases to hold office.

(3) This Act applies to the recovery of the unpaid wages from a person liable for them under subsection (1).

Upon the reading of Section 96 *supra* it is clear that the primary challenge to the application of this section is whether an individual *is or 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*. Once it has been established that an individual was indeed a director or officer of the corporate entity, the exclusions contained in Section 96 (2) *may* be considered as applicable to any calculation of liability.

There is no dispute that Stewart, Rossiter and Fisher were Directors or Officers of Hunter at the time wages of Iaizzo were earned or should have been paid.

Greenough argues that he and Edwards were “outside Directors” of Hunter during a period of time. Greenough has provided no evidence as to what period of time it is alleged that he and Edwards were “outside Directors” nor, does Greenough provide any evidence to indicate that he and Edwards resigned or were removed as Directors or Officers during this period.

For all of the above reasons and based on the balance of probabilities, I conclude that Greenough, Edwards, Stewart, Rossiter and Fisher were Directors or Officers of Hunter at the time wages were earned or should have been paid to Iaizzo and, pursuant to Section 96 of the *Act*, are liable for wages to the extent set forth therein. The exclusions contemplated by Section 96 (2) have no application in the matter before me.

I further conclude that the calculations of liability for each Director or Officer of Hunter as performed by the delegate of the Director are correct in all respects.

The appeals by Greenough, Edwards, Stewart, Rossiter and Fisher are dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determinations dated October 15, 1999 issued to Greenough, Edwards, Stewart, Rossiter and Fisher be confirmed in the amounts of **\$5,497.13** together with whatever interest has accrued pursuant to the provisions of Section 88 of the *Act*.

Hans Suhr
Adjudicator
Employment Standards Tribunal