

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 -

Glen Fyfe (as agent for Canadian Neon Ltd.)
(" Fyfe ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No: 1999/782

DATE OF DECISION: February 28, 2000

DECISION

OVERVIEW

This is an appeal filed Glen Fyfe (“Fyfe”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on December 7th, 1999 under file number ER 081-037 (the “Determination”).

According to the information set out in the Determination, Canadian Neon Ltd. (“Canadian Neon”) went into bankruptcy on April 30th, 1997--it appears from the material before me that Canadian Neon made a voluntary assignment into bankruptcy. When Canadian Neon went bankrupt, there was some \$27,433.36 in unpaid wages (including, in some case, compensation for length of service) owed to 8 Canadian Neon employees; accordingly, the Determination now before me was issued against Canadian Neon for that latter amount.

ISSUES ON APPEAL

As noted above, the appeal was filed by, and in the name of, Glen Fyfe, who is a Director and Officer of Canadian Neon. However, Fyfe is not entitled to file an appeal of the Determination in his own right since he is neither a complainant employee nor is he personally liable, under the Determination, for the payment of the complainant employees’ wages. It may be that at some point the Director will issue a determination against Fyfe pursuant to section 96 of the *Act* (which provides for corporate officers’ and directors’ personal liability for unpaid wages). If and when a section 96 determination is issued against Fyfe personally, he will have a right to appeal such a determination but, as matters now stand, Fyfe, in his personal capacity, cannot appeal the Determination now before me.

On the assumption that Fyfe’s intention was to file this appeal as an agent of Canadian Neon--and this appears to be the case from my reading of the appellant’s reasons for appeal--it is appropriate to order that the Notice of Appeal be amended so that Canadian Neon is formally noted as the appellant. I so order.

However, there is still another matter to be addressed regarding whether or not this appeal is properly before the Tribunal. In her submission dated January 5th, 2000, the Director’s delegate takes the position that:

“It is the submission of the Director of Employment Standards, firstly, that the appeal filed by Mr. Glen Fyfe was not validly commenced, as the director of a corporation in bankruptcy does not have the right to appeal a corporate determination. The trustee in bankruptcy is the only person able to commence an appeal on behalf of Canadian Neon Ltd., (see BIA, Sec.30[1]).

The Director further submits that the Trustee, KPMG Inc., was served with a Proof of Claim and the Determination dated December 7, 1999 and has not appealed...

For the above reasons, the Director submits that this appeal should be dismissed.”

ANALYSIS

In my view, the Director’s delegate is correct in her assertion that this appeal is not properly before the Tribunal.

Section 71(2) of the federal *Bankruptcy and Insolvency Act* states that “on an assignment [into bankruptcy], a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the...assignment...”. The trustee, in turn, is given wide authority to deal with the bankrupt’s property. For example, the trustee may, with the permission of the inspectors, “bring, institute or defend any action or other legal proceedings relating to the property of the bankrupt” [see section 30(1)(d)]. Thus, on bankruptcy, the bankrupt’s property (subject to certain exceptions that have no application in this case) vests in the trustee who is given, for the most part, exclusive authority to deal with that property.

Accordingly, Canadian Neon does not have the legal authority to appeal the Determination as that right lies solely with Canadian Neon’s licensed trustee--in this case, KPMG Inc. Whether this appeal was filed by Fyfe in his personal capacity, or as an agent of Canadian Neon, the same result holds: the appeal is simply not properly before the Tribunal and thus this appeal must be dismissed. The matter of the complainant employees’ wage entitlements will have to be addressed in the course of the bankruptcy proceeding itself. In that latter regard, I understand each of the employees has now filed a “proof of claim” with the trustee.

ORDER

Pursuant to section 114(1)(b) and (c) of the *Act*, I order that this appeal be dismissed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal