

An appeal

- by -

Kevin Jordan a Director or Officer of Star Valet Services Ltd.
("Jordan")

- 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/118 & 2009A/119

DATE OF DECISION: November 23, 2009

DECISION

SUBMISSIONS

Kevin R. Jordan	on his own behalf
Norman Delo	on his own behalf
Megan Roberts	on behalf of the Director of Employment Standards

INTRODUCTION

1. On May 27, 2009 a delegate of the Director of Employment Standards (the “delegate”) issued two determinations under section 79 of the *Employment Standards Act* (the “*Act*”) each accompanied by separate “Reasons for the Determination”. The first determination, which I shall refer to as the “Corporate Determination”, was issued against Star Valet Services Ltd. (“Star Valet”) in the total amount of \$7,029.89. This latter sum represented unpaid wages and section 88 interest owed to four former employees (\$4,529.89) and five separate \$500 monetary penalties levied under section 98 of the *Act*. The second determination, and this is the determination that is now before me in these appeal proceedings, is a determination that was issued against the Appellant, Kevin R. Jordan (“Jordan”), pursuant to the section 96 corporate director/officer liability provision of the *Act*. I shall refer to this determination as the “Section 96 Determination”.
2. The Section 96 Determination is in the amount of \$5,798.45 and includes \$3,298.45 in unpaid wages (based on the 2-months’ unpaid wages per employee liability ceiling set out in section 96(1) of the *Act*) and section 88 interest together with five separate \$500 monetary penalties. The penalties were levied against Mr. Jordan under section 98(2) of the *Act*, a provision that states corporate directors or officers who authorize, permit or acquiesce in a corporate *Act* contravention are subject to penalty along with the corporation.
3. Mr. Jordan has filed an appeal solely in relation to the Section 96 Determination issued against him (Tribunal File Number 2009A/118). He says that he has evidence that was not available at the time the Section 96 Determination was being made (*Act*, section 112(1)(c)) and, accordingly, asks the Tribunal to cancel it. The “new evidence” consists of Mr. Jordan’s assertion that as of April 8, 2006, he ceased to be a director or officer of Star Valet and thus should not have been named in a section 96 determination. Mr. Jordan has also filed an application, pursuant to section 113 of the *Act*, to have the determination suspended pending the outcome of the appeal (Tribunal File Number 2009A/119).
4. The statutory deadline for appealing the Section 96 Determination expired on July 6, 2009 (see *Act*, section 112(3)(a)) and a notice to that effect is set out in the determination itself (at the bottom of page D2). Mr. Jordan filed his appeal on September 9, 2009, some two months after the applicable appeal period expired. Pursuant to section 109(1)(b) of the *Act*, the Tribunal may “extend the time period for requesting an appeal even though the period has expired”.
5. The reasons for my decision only address the question of whether the appeal period should be extended. In my judgment, this is not an appropriate case to extend the appeal period. My reasons for so finding are set out below.

FINDINGS AND ANALYSIS

6. In several decisions, commencing with *Niemisto*, BC EST # D099/96, the Tribunal has identified a number of factors that will guide its discretionary authority to extend appeal periods. In particular, the Tribunal will examine why the appeal was filed late, whether the appellant had (and communicated) an ongoing *bona fide* intention to appeal, potential or actual prejudice to other parties, and the presumptive strength of the appeal grounds (see also *Patara Holdings Ltd.*, BC EST # D010/08, confirmed on reconsideration, BC EST # RD053/08, for a more recent discussion regarding the governing considerations).
7. Mr. Jordan's Appeal Form identifies a particular residential address. The evidence before me is that a Notice of Hearing and a Demand for Employer Records was sent, by registered mail, to Mr. Jordan at this particular address and he acknowledged receipt on April 3, 2009. On May 6, 2009 the delegate forwarded a letter, again by registered mail, to this same address setting out her preliminary findings and requesting a written response by no later than May 21, 2008 (clearly, a typographical error as the date should have been 2009). Mr. Jordan apparently refused to collect and sign for this envelope. On May 27, 2009, both the Corporate Determination and the Section 96 Determination were mailed to the same address and, once again, Mr. Jordan refused to collect the registered mail envelopes; they were held for pick up until June 18, 2009, at which point they were returned to the Employment Standards Branch. I might also add that during this April to May 2009 period Mr. Jordan was identified in the Corporate Registry's records as the sole director and officer (holding offices of president and secretary) of Star Valet with two separate mailing addresses. The record before me indicates that all of the documents noted above that were sent to Star Valet by registered mail were also sent by registered mail to Mr. Jordan (and addressed to him personally) at the two addresses noted in the Corporate Registry as his mailing addresses – none of the envelopes was ever claimed by him.
8. Mr. Jordan's assertion that he did not "appeal this decision within the appropriate period requested as I did not know of any of these events had transpired until the Court Baliff [sic] showed up at my place of work on Friday, September 5th, 2009 with the Writ of Seizure and Sale" is, if not an outright falsehood, at the very least, a most disingenuous assertion. I infer from the documentary evidence before me that Mr. Jordan deliberately attempted to frustrate service of documents on him (that he must have known related to unpaid wage claims filed by former Star Valet employees) by refusing to pick up registered mail addressed to him.
9. I also note that a member of the Director of Employment Standards' collection staff personally spoke with Mr. Jordan on July 7 and again on August 27, 2009, about the Section 96 Determination. Mr. Jordan has not provided any explanation as to why he did not file an appeal shortly after July 7, 2009, and, of course, this evidence (which has not been contradicted by Mr. Jordan) stands in stark contrast to his present assertion that he did not know about the Section 96 Determination until September 5, 2009.
10. On July 13, 2009, a Supreme Court of British Columbia Writ of Seizure and Sale was issued in favour of the Director of Employment Standards against Mr. Jordan and I understand that the Sheriff executed this Writ on September 5, 2009. This appeal was filed a few days later on September 9, 2009 obviously by way of response to the Writ. I am wholly satisfied that these execution proceedings finally motivated Mr. Jordan to file this appeal – during the interim period from April to early September 2009, I find that Mr. Jordan either knew (or, at the very least, strongly suspected) that he was the subject of *Act* proceedings but he simply preferred to avoid them by whatever means he could.
11. The Section 96 Determination was lawfully served on Mr. Jordan under section 112(1) of the *Act* and I agree with the delegate's position that Mr. Jordan has not provided a credible explanation for his failure to file a timely appeal. Mr. Jordan either knew, or should have known, of the fact that the Section 96 Determination

had been issued against him and he also knew, or should have known, of the appeal deadline. Mr. Jordan has only himself to blame for his failure to file his appeal before the deadline expired.

12. I also wish to address another matter, namely, the *prima facie* merits of the appeal. In essence, Mr. Jordan says that the Corporate Registry records are inaccurate and that he ceased to be a Star Valet director and officer as of April 8, 2006. There is a rebuttable presumption that Corporate Registry records are accurate (see *Director of Employment Standards and Michalkovic*, BC EST # RD047/01). A Corporate Registry search conducted on September 23, 2009 (current to August 28, 2009) indicates that Mr. Jordan is recorded as Star Valet's sole director and officer. There is no credible evidence before me confirming that Mr. Jordan formally resigned either his directorship or his office as of April 8, 2006. Further, even if one could accept his assertion that he resigned in early April 2006 (and I do not), there appears to be ample evidence that Mr. Jordan nonetheless carried out the functions of a director and officer during the period when the complainants' wage claims crystallized and thus, in any event, he would be liable under section 96(1) (see *Folino*, BC EST # RD 102/99).
13. It follows from the foregoing that I am not prepared to extend the appeal period in this case and, accordingly, the entire appeal must be dismissed pursuant to section 114(1)(b) of the *Act*.
14. As noted at the outset of these reasons, Mr. Jordan also filed a separate application to have the Section 96 Determination suspended pending the outcome of this appeal. I understand that \$3,000 has been collected toward the total amount payable under the Section 96 Determination and those funds are currently being held in trust. In light of my decision refusing to extend the appeal period and the concomitant dismissal of the appeal, the suspension application is now moot.

ORDER

15. The Appellant's section 109(1)(b) application to extend the appeal period is refused. Pursuant to sections 114(1)(b) and (c) the appeal is dismissed and, accordingly, the Determination stands as issued in the amount of \$5,798.45 together with any further section 88 interest that has accrued since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal