

An appeal

- by -

Fogg N' Suds Restaurant & Taps Mission Ltd.
("Fog N'Suds")

- 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

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2004A/119

DATE OF DECISION: August 23, 2004

After reviewing all the records and information provided by the employees, the delegate determined that wages, overtime wages, statutory holiday pay, and compensation for length of service were owed. The delegate also determined that Fog N'Suds was not in bankruptcy at the time the Determination was issued.

With respect to Ms. Sharp, the delegate determined her wage rate at \$11.00 per hour, and calculated her compensation for length of service (1 weeks pay) at \$3,243.85.

Although the delegate does not expressly state as much in the Determination, because Mr. Myers is the sole director of Fog N'Suds, in the event the corporate entity is unable to satisfy the amounts set out in the Determination, he becomes personally liable for up to two month's wages for each employee, pursuant to section 96 of the *Act*.

ARGUMENT

Fog N'Suds contends that, with respect to one employee, Kim Sharp, the delegate mis-calculated her weekly rate of pay. While acknowledging a typing error in the wage calculation sheet, the delegate states that the amount Ms. Sharp is entitled to for compensation for length of service does not change. He indicates that the amount reflects five weeks pay, rather than one.

Mr. Myers also contends that he intended to file for insolvency under the Insolvency Act, but, because of the amount of money needed to make such a filing, he has not done so. He contends that, once he is able to borrow the money, the necessary steps will be taken to begin the process of insolvency. As I understand it, Mr. Myers suggests that, once he completes the process, he will not be personally liable for unpaid wages pursuant to section 96(2) of the *Act*.

ANALYSIS

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- (a) the director erred in law
- (b) the director failed to observe the principles of natural justice in making the determination; or
- (c) evidence has become available that was not available at the time the determination was being made

The burden of establishing the grounds for an appeal rests with an Appellant. Fog N'Suds must provide persuasive and compelling evidence that there were errors of law in the Determination, as alleged. Further, if there is new and relevant evidence, it must meet the test for the provision of new evidence on appeal.

Having reviewed the submission, I am not persuaded that the Determination should be cancelled. I will address each ground of appeal separately.

Errors of law

I am unable to find that the delegate's typing error constitutes an error of law. While it does appear that there was a calculation error with respect to Ms. Sharp's entitlement for length of service compensation, when it is clarified so that it reflects five week's wages rather than one, the calculation error disappears.

Given that the amount of Ms. Sharp's entitlement does not change, I find no basis to refer this back to the delegate for recalculation.

New Evidence

In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

- the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- the evidence must be relevant to a material issue arising from the complaint;
- the evidence must be credible in the sense that it is reasonably capable of belief; and
- the evidence must have high potential probative value, in the sense that , if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

Although he does not expressly state as much, I infer that the “new evidence” Mr. Myers relies on is his contention that he is in the process of becoming insolvent. He presented no evidence of any steps he had taken in this respect. However, even if Mr. Myers is in the process of becoming insolvent, I am unable to find that this would affect the Determination.

Section 96 of the Act provides as follows:

(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 in respect of an individual or group terminations, if the corporation is in receivership,

(b) any liability to an employee for wages, if the corporation is subject to an action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act,

In *Davies*, the Tribunal held that Determinations against officers and Directors issued at any time prior to the corporate employer making an assignment into bankruptcy are valid. They are invalid if they are issued after the assignment is made.

Because Mr. Myers has neither declared bankruptcy nor undertaken any insolvency proceedings to date, he has demonstrated no basis for which the Determination against him, as the sole director of Fog N'Suds, should be cancelled.

The appeal is dismissed.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated May 31, 2004 be confirmed, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal