

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-

Valerie Ann Pfenniger

(“Pfenniger”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 99/206

DATE OF DECISION: May 19th, 1999

DECISION

OVERVIEW

On April 12th, 1999 Valerie Ann Pfenniger (“Pfenniger”) filed an appeal, pursuant to section 112 of the *Employment Standards Act* (the “Act”), with respect to a determination issued by a delegate of the Director of Employment Standards on March 15th, 1999 under file number ER#071-443. These Reasons for Decision primarily address the timeliness of this appeal, however, before turning to that question, it is necessary to set out some background information.

FACTUAL BACKGROUND

On March 17th, 1997, Karen Culley, Kelly Deschambault-Wills and Lyn Savage (to whom I shall collectively refer to as the “complainants”) all filed complaints with the Employment Standards Branch alleging that their former employer, Valco Discount Club Inc. (“Valco”), owed them unpaid wages. A delegate of the Director of Employment Standards (the “Director”), in a determination issued on April 28th, 1997, dismissed all three complaints. The complainants then appealed to the Tribunal who referred the complaints back to the Director’s delegate so that proper reasons for dismissing the complaints could be issued (see B.C.E.S.T. Decision No. 323/97). The delegate, in turn, on August 26th, 1997 issued an amended determination confirming the original dismissal of the three complaints. In dismissing all three complaints, the delegate was primarily influenced by his conclusion that the time sheets submitted to him by the complainants were fabricated.

The complainants once again appealed to the Tribunal. Those appeals were heard, in a protracted and apparently disputatious hearing, by a Tribunal adjudicator on October 30th and December 23rd, 1997 and February 19th and March 27th, 1998. In a written decision issued July 8th, 1998 (see B.C.E.S.T. Decision No. D319/98), the adjudicator concluded that the complainants’ time sheets were genuine and he also made certain findings of fact regarding the complainants’ terms and conditions of employment. The adjudicator ordered “that the Determinations issued on August 26, 1997, be referred back to the Director of Employment

Standards for further investigation and, if necessary, the issuance of varied Determinations”.

Following further investigation another delegate (not the same delegate who issued the original determinations) determined that Valco owed Ms. Culley \$1,278.65 in unpaid wages, Mr. Deschambault-Wills \$6,898.49 in unpaid wages and Ms. Savage \$10,207.12 in unpaid wages--these amounts included interest calculated to September 24th, 1998. These amounts were confirmed by the Tribunal Registrar is a written decision and order issued under EST File Nos. 97/400 to 97/402, inclusive, on October 22nd, 1998.

Valco never appealed the Tribunal’s October 22nd, 1998 monetary orders issued in favour of the complainants and, indeed, did not--despite being specifically asked to do so in a letter from the Registrar dated September 29th, 1998--make any submissions to the Tribunal regarding the delegate’s findings with respect to the complainants’ wage entitlements. I should note that Valco, in early 1998, closed down its operations and may be, for all practical purposes, insolvent although I have not been apprised of any formal insolvency or bankruptcy proceedings.

VALERIE PFENNIGER’S APPEAL

Undoubtedly, Valco’s *de facto* insolvency was a factor giving rise to the issuance of the determination that is now before me. On March 15th, 1999 (*i.e.*, nearly five months after the complainants’ wage claims were confirmed by the Tribunal), a delegate of the Director issued a determination, under file number 071-443, for \$19,066.58 against Valerie Pfenniger pursuant to section 96 of the *Employment Standards Act* (the “Act”). Section 96(1) provides as follows:

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.

At the bottom of page 2 of the Pfenniger determination, in an outlined paragraph headed “Appeal Information”, was the following notice:

Appeal Information

Any person served with this Determination may appeal it to the Employment Standards Tribunal. The appeal must be delivered to the Tribunal by **7 April, 1999**. Complete information on the appeal procedures is attached. Appeal forms are available at any office of the Employment Standards Branch.

On April 12th, 1999 Valerie Pfenniger filed an appeal with the Tribunal consisting of three appeal forms (in which each of the three complainants was separately named) and an 11-page handwritten letter addressed to the Tribunal.

Although the appellant's 11-page letter contains an number of extraneous and irrelevant details, Ms. Pfenniger does not dispute that she was, at all material times, an officer and director of Valco. Ms. Pfenniger also disputes the unpaid wage claims of the complainants on various grounds. However, the matter of Valco's liability for the complainants' unpaid wages has now been finally determined--in law, that issue is *res judicata*--and, thus, cannot be reopened via the present appeal of the March 15th, 1999 determination issued against Ms. Pfenniger under section 96 of the *Act*.

The only issues that can be legitimately raised in the present appeal concern whether or not Pfenniger was a director or officer at the material time (a matter clearly *not* in issue given Pfenniger's admission regarding her status), whether or not the 2-month wage ceiling was properly calculated, or whether one or more of the section 96(2) exceptions applies (see *Perfekto Mondo Bistro Corporation*, B.C.E.S.T. Decision No. 205/96). I should note that none of the section 96(2) defences has any application here.

While the present appeal was filed only a few days after the governing time limitation for filing such an appeal had expired, nonetheless, this appeal cannot be adjudicated on its merits without first granting an extension of the appeal period under section 109(1)(b) of the *Act*. In *Niemisto* (B.C.E.S.T. Decision No. 99/96) I suggested that the section 112 time limits governing appeals to the Tribunal ought not to be lightly overridden by an adjudicator. I then made the following comments in regard to section 109(1)(b) applications:

Certain common principles have been established by various courts and tribunals governing when, and under what circumstances, appeal periods should be extended. Taking into account the various decisions from both courts and tribunals with respect to this question, I am of the view that appellants seeking

time extensions for requesting an appeal from a Determination issued under the Act should satisfy the Tribunal that:

- i) there is a reasonable and credible explanation for the the failure to request an appeal within the statutory time limit;
- ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
- iii) the respondent party (*i.e.*, the employer or employee), as well the Director, must have been made aware of this intention;
- iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
- v) there is a strong *prima facie* case in favour of the appellant.

The above criteria are not intended to constitute an exhaustive list. Adjudicators may find that in particular cases, certain other, perhaps unique, factors ought to be considered.

Taking into account the above criteria, I would not ordinarily find that this is an appropriate case to extend the time limit particularly given that Ms. Pfenniger's status as a Valco director is admitted. However, given that the Director's delegate has acknowledged, in a written submission filed with the Tribunal on May 5th, 1999, that there is a error in the March 15th determination regarding the calculation of the 2-month wage "ceiling", I am granting a time extension, to April 12th, 1999, solely for the purpose of permitting me to vary the determination under section 115 of the *Act* so that the March 15th, 1999 determination will reflect the correct 2-month wage liability.

I should add, for the sake of completeness, that the appellant never challenged the determination on the basis that the 2-month wage ceiling had been incorrectly calculated; rather, the Director's delegate provided the correct calculation after the calculation was queried by this adjudicator. Had this appeal been simply dismissed as untimely, undoubtedly, the delegate would have, in any event, amended the determination pursuant to section 86 of the *Act*. I have simply chosen to proceed to vary the determination on my own motion so that this matter can be more efficiently and expeditiously dealt with [see section 2(d) of the *Act*].

ORDERS

Pursuant to section 109(1)(b) of the *Act*, the time for appealing the March 15th, 1999 Determination issued against Valerie Pfenniger is extended to April 12th, 1999.

Pursuant to section 115 of the *Act*, I order that the March 15th, 1999 Determination issued against Valerie Pfenniger be varied to show a total liability of **\$18,118.45** plus interest to be calculated in accordance with section 88 of the *Act*. As amended, the "Calculation Sheet" appended to the March 15th Determination should now provide as follows:

- Director's liability for 2 months' wages due to Karen L. Culley = \$1,278.25;
- Director's liability for 2 months' wages due to Kelly D. Deschambault = \$6,898.49;
- Director's liability for 2 months' wages due to Sherry Ann Savage = \$9,941.71

In all other respects, the March 15th, 1999 Determination is confirmed.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal