

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 -

Peter Todoruk, a director or officer of Leon Hotel Ltd., operating as
Quincy's Pub

("Peter Todoruk")

and

Garry Todoruk, a director or officer of Leon Hotel Ltd., operating as
Quincy's Pub

("Garry Todoruk")

and

Leon Hotel Ltd., operating as Quincy's Pub

("Leon Hotel")

- of Determinations issued by -

The Director Of Employment Standards

(the "Director")

ADJUDICATOR: John McConchie

FILE NO.: 98/675, 98/676 & 98/792

DATE OF DECISION: May 20, 1999

DECISION

OVERVIEW

This decision addresses three appeals to the Employment Standards Tribunal from decisions issued by a delegate of the Director of Employment Standards (the "Director's Delegate"). As there is considerable overlap in the facts and issues arising in the three appeals, it is appropriate to deal with all three of the appeals within this one decision. The appeals are:

1. An appeal brought by Leon Hotel Ltd., doing business as Quincy's Pub (the "Leon Hotel"), pursuant to section 112 of the *Employment Standards Act* (the "Act") of a Determination of the Director's Delegate dated April 25, 1997 (the "Corporate Determination"), which found that the Leon Hotel was required to pay to Bruce G. Evans ("Evans") the amount of \$808.75 for vacation pay and interest.
2. An appeal brought by Peter Todoruk pursuant to section 112 of the Employment Standards Act of a Determination of the Director's Delegate dated October 19, 1998 (one of the "DDET's"), which found that Peter Todoruk was a director or officer of the Leon Hotel, and personally liable to pay Evans the amount of \$876.68 for vacation pay and interest.
3. An appeal brought by Garry Todoruk pursuant to section 112 of the Employment Standards Act of a Determination of the Director's Delegate dated October 19, 1998 (one of the "DDET's"), which found that Garry Todoruk was a director or officer of the Leon Hotel, and personally liable to pay Evans the amount of \$876.68 for vacation pay and interest.

This decision was rendered on the basis of the written submissions on file, and no oral hearing was required.

FACTS

The background to the current appeals is very important to a resolution of the central issues in these appeals. The Corporate Determination was issued on April 25, 1997. On the same day, the Director's Delegate issued a Penalty Determination finding the Leon Hotel liable to pay \$500.00 for its failure to respond to the delegate's Demand for Employer Records. Both Determinations were served on the Leon Hotel by registered mail, as provided for under Section 122(1) of the Act. Both Determinations also included notice of the appeal provisions and procedures under the Act.

On April 30 and May 1st, 1998, legal counsel for the Leon Hotel sent a letter dated April 14, 1998, by fax to the Director's Delegate. The body of the letter is reproduced below:

We acknowledge receipt of your letters to Leon Hotel Ltd., both dated April 25, 1997, concerning Bruce Evans and the Demand for Employer Records, which were received by us on April 28, 1997 and April 29, 1997, respectively.

We are advised by Mr. Todoruk that your Demand for Employer Records, described in your letter of April 25, 1997, was not received by Leon Hotel Ltd. Please advise if you wish to re-issue your Demand for Employer Records, sending it to Leon Hotel Ltd. c/o our address, and reconsider your determination, or if we are to proceed with an appeal forthwith.

Thank you for your attention to this matter.

On May 1, 1997, legal counsel sent a further fax letter to the Director's Delegate, attaching Evans' Record of Employment, and setting out in brief the employer's argument as to why vacation pay was not payable. From the contents of the Corporate Determination, it appears that Garry Todoruk had made similar arguments during the course of the investigation. The Corporate Determination notes that no supporting documentation had been produced to support these arguments.

The Director's Delegate did not respond to the correspondence from legal counsel and legal counsel did not follow up the letters. No appeal was filed within the required time period, and there is no evidence of any further communications between the parties until September of 1998, some 17 months later. On September 2, 1998, the Director's Delegate wrote to legal counsel requesting payment of the amounts found payable under the Corporate Determination and the Penalty Determination, plus interest on the Corporate Determination. On September 15, 1998, legal counsel replied by referring to his letters of April 30 and May 1, 1997, and stated that:

We did not receive any response to any of those letters, and it was our clear understanding that the information provided to you dealt with both of these matters and no payments were required to be made by our client.

On September 24, 1998 the Director's Delegate advised legal counsel that the Determinations had not been appealed and therefore remained unchanged. Legal counsel replied further on October 2, 1998 submitting that if his earlier correspondence had not resulted in the quashing of the Determinations, it nevertheless constituted Notices of Appeal. Legal counsel also asked to be advised when the appeals would be heard, in the event his earlier correspondence had not resolved the matters without payment being required.

On October 8, 1998, the Director's Delegate served Demand Notices for the amounts in the Corporate Determination and the Penalty Determination on the Hong Kong Bank of Canada.

On October 19, 1998, the Director's Delegate issued Determinations ("DDET's") against Peter and Garry Todoruk, as Directors or Officers of the Leon Hotel, for payment of the amount payable under the Corporate Determination.

On October 26, 1998 appeals in the required form were filed by legal counsel on behalf of Leon Hotel Ltd., Peter Todoruk and Garry Todoruk. In their submission regarding the grounds of appeal, the appellants argued that Evans was not due any vacation pay because the period of time between the date he received notice of termination, and the date on which his notice took effect and for which he was last paid, included 3 days of vacation. This particular argument had been rejected in the Corporate Determination on the basis of a lack of supporting documentary evidence and in light of the provisions regarding notice in Section 67 of the Act. The appellants' submission also added that Evans had been paid for 4 earlier days on which he had been absent, resulting in full payment of his vacation entitlement. No documents were filed in support of this position.

The appeal did not refer to the Penalty Determination.

On October 29, 1998, the Director's Delegate replied to a request for submissions on the appeal from the Registrar of the Employment Standards Tribunal. In her submission, the Director's Delegate argued that, as the Corporate Determination had not been appealed within the appropriate time period, the only avenue for appeal open to Peter and Garry Todoruk was to dispute that they were Directors or Officers of the Leon Hotel.

On the same day, the Director finally received payment on the Demand Notices of both the Corporate Determination and the Penalty Determination from the Leon Hotel's business account with the Hong Kong Bank of Canada. The funds obtained under the Corporate Determination were subsequently disbursed to Evans.

On November 2, 1998, the Director's Delegate advised the Tribunal that she had collected the amounts outstanding under the Corporate and Penalty Determinations, and therefore wished to withdraw the Determinations against Peter and Garry Todoruk. The Registrar of the Tribunal responded by advising the appellants that the DDET's had been withdrawn and consequently the files would be closed. In later correspondence the Registrar wrote to request reasons from the appellants why the appeal period should be extended, if the appellants wished to pursue the appeal of the Corporate Determination.

The appellants filed further submissions with respect to the appeals on November 26 and December 10, 1998.

The appellants argue that the Corporate Determination was "incorporated by reference and by enclosure" in the DDET's against Peter and Garry Todoruk of October 19, 1998. The appellants further argue that the Director's Delegate cannot purport to unilaterally withdraw the DDET's against Peter and Garry Todoruk and thereby defeat their right to a review of the substantive issues in the appeal. The substantive issues in the appeal, the appellants submit, relate to the errors of fact and law which the appellants allege were made in the April, 1997 Corporate Determination. They also argue that it is untenable

that the Director's failure to reply to their correspondence of April 30 and May 1, 1997, following the issuing of the Corporate Determination, would result in the loss of their right to appeal. In the alternative, they seek an extension of the time for the filing of an appeal of the Corporate Determination.

Counsel for the Director filed a submission on January 7, 1999, with respect to the request to allow an appeal of the Corporate Determination to proceed even though the time period for requesting an appeal had expired. The Director submits that the appellants have failed to show that they meet the criteria established by the Tribunal for granting an extension. The Director argues that it is the responsibility of the appellants to ensure that they comply with the required appeal procedures, and that the appellants "should not be permitted to rely on correspondence sent to the investigating officer followed by an extended period of inaction to initiate a legal proceeding". In support, the Director refers to Seacorp Properties Inc., (BC EST D440/97).

With respect to the withdrawal of the DDET's, the Director argues that it was valid because these Determinations had become irrelevant once collection had been effected on the Corporate Determination. The Director argues that the DDET's were not withdrawn pursuant to the Director's discretion under Section 86, but simply because the Corporate Determination had been satisfied.

ISSUES TO BE DECIDED

The issues for resolution are the following:

1. May the Director of Employment Standards unilaterally withdraw a Determination after an appeal has been made to the Tribunal under Section 112 of the Act?
2. Does the appeal by the appellants of the DDET's within the time established for appeal include, within its scope, an appeal of the Corporate Determination?
3. If the answer to (2) above is "no", should the Tribunal extend time for the filing of an appeal of the Corporate Determination so that it may be reviewed on its merits?

ANALYSIS

Jurisdiction to withdraw DDET's after appeal had been filed

Section 86 of the Act provides the Director the power to "vary or cancel a determination." The question of the Director's right to vary a determination after an appeal has been filed was the crucial issue in the Tribunal's Decision in Devonshire Cream Ltd. (BC EST D122/97). In that case, following the reasoning in *A.G. of Canada v. Von Findenigg*, (1983) 46 N.R. 549 (F.C.A.), it was held that:

...the Legislature could not have intended Section 86 of this Act to be used as a mechanism by the Director to interfere with Devonshire Cream's appeal rights or with the exercise by this Tribunal of its appellate functions under Section 108(2) of the Act. Once an appeal is filed, it is too late for the Director to exercise her jurisdiction under Section 86; such a limitation is implied by the presence of other provisions of the Act, including the right to appeal under Section 112 and the appeal powers of this Tribunal under Section 108(2) to "decide all questions of fact or law arising in the course of an appeal or review". Counsel impugned the motives of the Director in the decision to alter the earlier Determination but I find that the timing, alone, regardless of the motivation, invalidated the Director's actions. Only with the approval of the appellant to withdraw the appeal could the Director then proceed with the exercise of her powers under Section 86 once an appeal was filed. Counsel says that the Director could make minor changes to a Determination such as a correction of a clerical error, but I disagree. Once the appeal is filed, all jurisdiction ceases under Section 86.

In the current case, the Director has purported to "withdraw" the Determinations after an appeal had been filed. This amounts to a cancellation of the Determinations after the filing of an appeal. Following the reasoning in *Devonshire Cream Ltd.*, once an appeal has been filed, "all jurisdiction ceases under Section 86".

It is quite true, as the Director argued, that there was no longer any need to pursue action under the DDET's once collection had been made under the Corporate Determination. In fact, the Director at that point presumably no longer had the right to collect under the DDET's, as Section 96 only provides for liability for "unpaid wages", and that liability had been extinguished by the collection under the Corporate Determination. Notwithstanding this, there is no provision for the Director to unilaterally withdraw a Determination because the amount outstanding has been paid under another Determination. Normally, it might be expected that the Director would receive the ready consent to the withdrawal of the parties affected. That is not so in this case because the appellants have argued that their appeals of the DDET's have, in effect, given them a right to attack the original Determinations issued in April, 1997. As I will say further below, this is simply not so.

Scope of appeal of the DDET's

The DDET's were issued under Section 96 against Peter and Garry Todoruk as Directors or Officers of Leon Hotel Ltd. Section 96(1) of the Act provides that:

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.

The appellants have not disputed that they were directors or officers of Leon Hotel Ltd. at the relevant times. Instead, they have challenged the validity of the Corporate Determination made on April 25, 1997. They assert a right to do so on the basis of an argument that the Corporate Determination was "incorporated by reference" into the DDET's issued subsequently, and is subject to review on its merits on that basis.

The Tribunal has addressed the specific question of the scope of an appeal of a determination made under Section 96 of the Act in several previous decisions. In *Seacorp Properties Inc.*, supra, the Tribunal said the following:

In *Steineman*, supra, the Tribunal decided that once a final determination is issued against a Corporation, the principle of issue estoppel prevents the Corporation's directors or officers from challenging subsequent determinations which are issued against them personally under Section 96 of the Act, provided that three criteria are met:

- the identical issue has been decided previously,
- the previous decision was final; and
- the previous decision involved the same parties, or their privies.

There are two exceptions to that principle – there was a fraud in issuing the Corporate Determination or the directors/officers have new and cogent evidence that was not available previously.

In the case at hand, the sole focus of the appeals of the DDET's is the validity of the prior Corporate Determination. The dispute is therefore about the identical issue which was determined in the Corporate Determination. In the absence of a decision granting an extension of time within which to file their appeal against the original Determinations, they are final decisions. Finally, the parties involved are the same, as the directors and officers have been found by the Tribunal to be privies to the Corporation (see *Seacorp Properties Inc.*).

As to the exceptions to the principles set out above, the appellants' submissions have disclosed no new evidence which was not previously available. Finally, while the appellants have argued that the Director's Delegate should not have continued to act on the Corporate Determination after the appellants had advised her that they disputed the validity of the findings in that Determination, this does not amount to an allegation of fraud. There is in fact no evidence of fraud in any of the circumstances surrounding the issuance of the Corporate Determination.

The appellants argument that the Corporate Determination was "incorporated by reference" into the DDET's runs counter to the established case law of the Tribunal and is not supported by law. Accordingly, I find that the scope of the appeal of the DDET's is

limited to those issues which arise specifically under Section 96, that is, arguments concerning the accuracy of the findings regarding the status of the individuals as directors or officers of the Corporation, and the accuracy of the calculations of the personal liability of the individuals. The appellants cannot use their appeal of the DDET's in order to challenge the validity of the Corporate Determination.

The individual appellants have not argued that they are not directors or officers of the corporate appellant, nor is there an argument that the amounts under the DDET's exceed the permissible maximum set out in Section 96(1) of the Act. However, given that collection has been made pursuant to the Corporate Determination, there is now no liability outstanding under the DDET's.

Timeliness of appeal against the Corporate Determination

The only way in which the appellants will become entitled to attack the Corporate Determination is if the corporate appellant, the Leon Hotel, is granted an extension of time within which to appeal that Determination. While it is not entirely clear from the correspondence whether the Leon Hotel seeks to appeal the Penalty Determination as well, the following reasons address the situation as it pertains to either or both of the Determinations.

The Tribunal has established guiding principles for consideration of an application to extend time in these circumstances. They are first summarized in the Tribunal's decision in Niemisto (BC EST 99/96):

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 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.

The appellants suggest the failure of the Director's Delegate to respond to their correspondence of April 30 and May 1, 1997, provides an explanation of their failure to appeal within the required time. In the alternative, the appellants suggest that this correspondence effectively gave notice of appeal to the Tribunal.

A similar circumstance arose in *Seacorp Properties Inc.* (supra). In that case, after the Corporate Determination had been issued, the employer wrote to the Director's Delegate requesting him "...to arrange another review of the case". The Director's Delegate did not reply and no further action was taken in the case until Determinations were rendered against the directors of the corporation some months later. At that point, the directors of the corporation attempted to challenge the merits of the Corporate Determination through their appeal of the Determinations against them as directors of the corporation.

With respect to the delegate's failure to reply, the Adjudicator held as follows:

Section 112(1) of the Act gives a right of appeal to any person served with a determination provided that right is exercised within the time limits in Section 112(2) and the appeal is delivered to the Tribunal's offices. As noted in the appeal procedures which were attached to the Corporate Determination, the Tribunal is an independent body which is established under Part 12 of the Act to hear and decide appeals from determinations. It is the only body with the legal authority to conduct an appeal of a determination. For that reason, I do not accept SPI's submission that the Director's Delegate or some other representative of the Director of Employment Standards had a responsibility to inform Mr. Yong that his letter of November 23, 1996 was insufficient to commence an appeal. Nor should the Director's Delegate be held responsible to forward Mr. Yong's letter to the Tribunal. In my view, any prospective appellant bears the full responsibility for ensuring that an appeal is delivered to the Tribunal within the statutory time limit set out in section 112 of the Act.

The circumstances here are similar. When the Director's Delegate issued her Determinations, she gave notice of the appeal procedures of the Tribunal. The appellants were represented by legal counsel and must be taken to have been aware of them. Certainly, they were responsible to ensure that their appeal was filed with the proper body, the Tribunal, in the proper form and within the time-limits required for appeal. They could not deflect this responsibility by unilaterally imposing it on the Director's Delegate. While it would have been preferable had the Director's Delegate replied to the legal counsel's correspondence, the correspondence did not have the effect of either appealing the Corporate Determination or freezing the time within which the appeal could be brought. Appeals and applications for extension of time are brought to the Tribunal, not the Director's Delegate. Moreover, when the Director's Delegate did not

reply to legal counsel's letter, the appellants did not follow this up. Almost seventeen months passed before the appellants' attention was drawn once again to the issues. It may be that in the absence of any effective collection of the monies, the appellants lost interest in the matter. Nevertheless, it was their responsibility in the first instance to ensure that, if they did not accept the findings in the Corporate Determination, and were not advised of a cancellation or variance of the Corporate Determination, the appeal was filed in the time and manner required by the Tribunal.

For these reasons, it is my decision that there is no reasonable and credible explanation for the failure to request an appeal within the statutory time limit. While it is not strictly necessary to carry on to a review of the other facts, and without reviewing all of the factors mentioned in the Niemisto case, I will say that the application for an extension of time would also have foundered on the final ground mentioned in the Niemisto case. The materials and submissions on the file do not disclose that the appellants have a strong prima facie case. The arguments made in their submissions closely resemble their original position as reflected in the Corporate Determination. Although the letter of April 30, 1997 from appellants counsel to the Director's Delegate states that the Leon Hotel did not receive the Demand for Documents, no additional documentation or cogent explanation was filed with the letter (or at any later time) except for Evans' Record of Employment, and there is no suggestion that any relevant further documentation is in fact available.

For these reasons, I do not find that this is an appropriate circumstance in which to grant an extension of the time to appeal the Corporate Determination.

I therefore dismiss the appeal of the corporate appellant, Leon Hotel Ltd.

ORDER

The Director's Delegate's purported withdrawal of the DDET's is declared to be void. The DDET's are valid and subsisting and the appellants are entitled to pursue their appeal of those Determinations. The appeal of the DDET's does not include an appeal of the Corporate Determination or the Penalty Determination.

The appellant Leon Hotel's request to extend the time period for requesting an appeal of either or both of the Corporate Determination or the Penalty Determination. is denied.

John L. McConchie
Adjudicator
Employment Standards Tribunal