

## EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

*Employment Standards Act*

-by-

Perfekto Mondo Bistro Corporation  
("Perfekto")

and

Barry Jung  
("Jung")

and

Lam Heung Ng  
("Ng")

-of Determinations issued by-

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No:** File No. 96/163

**DATE OF HEARING:** July 29th, 1996

**DATE OF DECISION:** July 31st, 1996

## DECISION

### APPEARANCES

Barry Jung	on his own behalf
Tony Minichiello	on his own behalf
Victor Lee	for the Director of Employment Standards

### OVERVIEW

This is an appeal brought by Perfekto Mondo Bistro Corporation (“Perfekto”), Barry Jung (“Jung”) and Lam Heung Ng (“Ng”) pursuant to section 112 of the Employment Standards Act (the “Act”) from the following Determinations:

<u>Party</u>	<u>Determination No.</u>	<u>Date of Determination</u>	<u>Amount</u>
Perfekto	CDET 000348	December 7th, 1995	\$2,341.37
Jung	CDET 000097	February 9th, 1996	\$2,373.34
Ng	CDET 000098	February 9th, 1996	\$2,373.34

The Director determined that Perfekto was obliged to pay overtime pay (section 40 of the Act) and interest (section 88 of the Act) to a former employee, Tony Minichiello (“Minichiello”). Further Determinations were issued against Jung and Ng, in their capacity as officers and directors of Perfekto, pursuant to section 96 of the Act. The higher monetary amounts on the latter two Determinations represent additional interest that accrued as and from the date of the initial Determination against Perfekto.

### PRELIMINARY ISSUES

An appeal was filed with respect to all three above-noted Determinations by the appellant’s legal counsel on March 4th, 1996. While Jung’s and Ng’s appeals were filed within the statutory time limit set out in section 112 of the Act, Perfekto’s appeal was filed more than two months beyond the statutory time limit. Accordingly, I must first turn to the issue of whether or not a time extension ought to be granted to Perfekto pursuant to section 109(1)(b) of the Act. In the event that a time extension is not granted to Perfekto, I must then consider whether or not

Jung's and Ng's appeal rights are limited by the principle of issue estoppel. I will now address these issues.

*Timeliness of Perfekto's Appeal*

In *Niemisto* (EST Decision No. 99/96) I suggested that the statutory time limits set out in section 1112 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.

In the case at hand, the Determination was sent, by double registered mail, to the registered and records office of Perfekto (coincidentally, the address of the solicitors who filed the appeal) and was received on December 14th, 1995. Neither the solicitors for Perfekto, or anyone else purporting to act on behalf of Perfekto, contacted the Employment Standards Branch or the Employment Standards Tribunal with respect to that particular Determination until such time as new Determinations were issued against Perfekto's two corporate directors, Jung and Ng. I understand that these latter two Determinations were served on the appellants Jung and Ng around mid-February, 1996.

Perfekto ceased regular business operations (as a restaurant) sometime in December 1995 and, apparently, though still in good standing with the Registrar of Companies is, for all practical purposes, broke and defunct. A cynic might suggest that if the Determinations had not been issued against the Directors, an appeal would never have been filed. A more charitable explanation is that advanced by Jung, namely, that after the company ceased operations, its affairs were not being given the kind of attention that might have otherwise been the case. This situation was exacerbated by the marital breakdown between Jung and his wife, Cynthia Jung (who had been primarily responsible for the day-to-day operations of the restaurant).

Nevertheless, with respect to Perfekto's appeal it would appear that:

- Perfekto was properly served with the Determination;
- service was effected at the company's solicitor's office; and
- no steps were taken with respect to the Determination until such time as the corporate Directors were personally named in separate Determinations.

In these circumstances, I am not satisfied that a time extension ought to be granted to Perfekto under section 109(1)(b) of the Act. I might also add that on the basis of the material filed in support of the appeal, there does not appear to be a strong *prima facie* case in favour of Perfekto's appeal. In other words, the file material does not support Perfekto's position that Minichiello was not entitled to overtime pay because he was a "manager" and, therefore, excluded from the hours of work and overtime provisions of the Act [*cf.* section 34(1)(f) of the Regulations to the Act (B.C. Reg. 396/95)]. Accordingly, Perfekto's appeal with respect to Determination No. CDET 000348 is dismissed.

#### *Issue Estoppel*

The Determinations against Jung and Ng were issued pursuant to section 96(1) of the Act which 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.

Jung testified that both he and Ng were directors and officers (Jung the president; Ng the secretary) of Perfekto during Minichiello's period of employment. Mr. Lee,

on behalf of the Director of Employment Standards, also produced evidence at the hearing, in the form of a company search record, that confirmed Jung's and Ng's status as officers and directors of Perfekto. There are a limited number of exceptions to the statutory vicarious liability imposed on directors and officers [*cf.* s. 96(2) and s. 45 of the Regulations), none of which applies here. I might also add that the total liability sought to be imposed on Jung and Ng falls well short of the "two months' wages" threshold.

Accordingly, given that Perfekto's liability has now been confirmed, that both Jung and Ng were directors and officers during the time when Minichiello's overtime pay should have been paid, and that there is no statutory or regulatory defence open to Jung and Ng, does it not follow that the Determinations against Jung and Ng should be confirmed as a matter of course?

This issue, namely whether or not a director's liability is *res judicata* once a final Determination has been made against the corporate body, was addressed by the Tribunal in *Steinemann* (EST Decision No. 180/96, July 16th, 1996) by Registrar Edelman. Ms. Edelman, in a carefully reasoned decision, held that once a final Determination has been issued against a corporate body, its directors or officers cannot challenge subsequent Determinations issued against them personally pursuant to section 96 of the Act so long as the following three criteria apply:

- i) the identical issue had been previously decided;
- ii) the previous decision was final; and
- iii) the previous decision involved the same parties, or their privies.

In such circumstances, the principle of issue estoppel would apply and the directors or officers would not be permitted, by appealing the Determinations issued against them in their personal capacity, to, in effect, re-litigate the issues that had already been resolved in the earlier Determination issued against the corporation. Only two exceptions are permitted: first, where there has been fraud in the issuance of the initial Determination against the corporation, or second, where the directors or officers have new and cogent evidence that was not previously available.

In the present case, the challenge to the Determinations issued against the corporation and against the two directors/officers is identical, namely, whether or not Minichiello was a "manager" and, therefore, not entitled to overtime pay. The Determination against the corporation was not appealed in a timely manner and a request for a time extension has now been refused. Thus, the corporate Determination now represents a final order. As for the third criterion, I agree with

Registrar Edelman that directors/officers can be considered to be the privies of the corporate body [*cf. also Stelmaschuk v. Dean* (1995) 13 C.C.E.L. (2d) 220; [1995] 9 W.W.R. 131 (N.W.T. S.C.)]. There is no new evidence to be advanced that was not otherwise available at the time the “Perfekto” Determination was issued, nor is there any allegation or evidence of fraud.

Accordingly, I am of the opinion that Jung and Ng are only entitled to argue, in their appeals, that they were not directors or officers at the material time or that the Determinations issued against them exceeded the two-month wage limit set out in section 96(1) of the Act. As I indicated earlier, neither argument applies in this case. It would follow that the appeals of both Jung and Ng must be dismissed.

Notwithstanding the foregoing, I did conduct a full appeal hearing and, even if I have erred in my analysis of what I have termed the “preliminary issues”, I would nonetheless, on the merits, dismiss all three appellants’ appeals. My reasons for doing so are set out below.

## **FACTS**

Perfekto was incorporated in early 1993 and carried on business as a restaurant on Denman Street in Vancouver. The restaurant closed in December 1995 although the company apparently remains in good standing. I am advised that there are few, if any, remaining assets in the company.

Minichiello was hired as a chef by Perfekto in late May 1995 after first being interviewed by a consultant and Ms. Cynthia Jung (Jung’s then spouse) and was terminated, not quite three months later, on August 14th, 1995. At the time Minichiello was hired, there were five or six “front-end” staff (hostesses and servers) and an equal number of staff who worked in the kitchen (two cooks and two or three dishwashers). Minichiello was the “head chef” and did have some supervisory responsibility over the kitchen staff; he reported to Ms. Jung who was “in charge” of the restaurant. Shortly after Minichiello was hired, Perfekto hired a gentleman by the name of Steven Case to serve as the “Assistant General Manager” for the restaurant.

The appellants do not “...dispute the hours [Minichiello] has submitted to [the Tribunal] (*cf.* Perfekto’s letter dated April 3rd, 1996 to the Tribunal under Jung’s signature). At the hearing, Minichiello testified that, on most days, he reported for work around 10:00 A.M. and finished work somewhere between 10:00 and 11:00 P.M.--this evidence was not challenged at the appeal hearing. Indeed, Jung (the

only witness for the appellants) was not in a position to challenge this evidence as Jung stated he was at the restaurant for only three or four hours every week or second week. Thus, the appellants do not challenge Minichiello regarding the amount of overtime hours claimed; rather, the appellants say that Minichiello was a “manager” and therefore not entitled to claim overtime [*cf.* section 34(1)(f) of the ESA Regulations].

### **ISSUE TO BE DECIDED**

Was Minichiello a “manager” as defined in the ESA Regulations?

### **ANALYSIS**

Part 4 of the Act governs “Hours of Work and Overtime”. The basic entitlement to overtime pay is set out in section 40. However, section 34(1)(f) of the ESA Regulations states that Part 4 of the Act does not apply to “a manager”; “manager” is defined in section 1 of the Regulations as “a person whose primary employment duties consist of supervising and directing other employees” or “a person employed in an executive capacity” (emphasis added).

I am not satisfied that Minichiello was a “manager” as defined under either branch of the above definition. While Minichiello did have some supervisory responsibilities (such as scheduling for the kitchen staff), these responsibilities were incidental to, rather than being the primary focus, of his job as chef. Minichiello’s main responsibility was meal preparation. I would note, among other things, that Minichiello did not have the power to hire or fire; he did not have independent authority to suspend or otherwise discipline staff; he did not carry out any performance appraisal activities; he did not set staff compensation levels; he did not have access to budgetary or other financial information; he did not do any banking on behalf of Perfekto; he did not have independent purchasing authority; and he did not have access to Perfekto’s computer system.

In my opinion, Minichiello did not fall within the regulatory managerial exclusion and, therefore, he was entitled to overtime pay under the Act. I find no error, nor was any error alleged by the appellants, regarding the Director’s calculation of Minichiello’s overtime entitlement.

### **ORDER**

Pursuant to section 115 of the *Act*, I order that Determination Nos. CDET 000348 (Perfekto), CDET 000097 (Jung) and CDET 000098 (Ng) be confirmed together with interest to be calculated by the Director in accordance with section 88 of the *Act*.

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**Kenneth Wm. Thornicroft, *Adjudicator***  
**Employment Standards Tribunal**