

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 -

Douglas Steven Cunliffe
("Cunliffe")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2000/231

DATE OF DECISION: June 5, 2000

DECISION

OVERVIEW

Douglas Steven Cunliffe (“Cunliffe”) has appealed, pursuant to section 112 of the *Employment Standards Act* (the “Act”), a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 15th, 2000 under file numbers 086934 & 091189 (the “Determination”). Given that this appeal was filed after the statutory appeal period had expired, the appellant seeks, pursuant to section 109(1)(b) of the *Act*, an extension of the appeal period.

ISSUE TO BE DECIDED

The Determination contained a notice (see below), purportedly given in accordance with section 112(2)(a) of the *Act*, stating that an appeal must be filed by no later than March 9th, 2000. This appeal was filed with the Tribunal on March 21st, 2000. Thus, and as previously noted, Cunliffe now seeks an extension of the appeal period--*these reasons address only this latter application*.

THE DETERMINATION

By way of the Determination, Cunliffe was ordered to pay \$21,209.11 on account of unpaid wages owed to eight former employees of one or more of C.T. Properties Ltd., C.T. Construction Ltd., Specialty Homes Inc., Specialty Trading Inc. and 451864 BC Ltd. The amount payable under the Determination also includes a \$500 monetary penalty that was levied against C.T. Construction Ltd. on February 18th, 1999 for failing to produce certain payroll records. In previous determinations, the Director had declared that these latter five corporations were “associated corporations” as defined in section 95 of the *Act* and held the corporations liable for various unpaid wage claims. The present Determination was issued against Cunliffe pursuant to section 96 of the *Act* which states that corporate officers and directors--subject to certain statutory and regulatory exceptions--are personally liable for up to 2 months’ unpaid wages for each corporate employee.

In his appeal documents, Cunliffe does not dispute his status as a director or officer of the corporate entities in question but does question the amounts owed; he says that certain of the employees’ wage claims have now been satisfied. Cunliffe’s position is that the Determination ought to be varied by reducing his liability by some \$15,800. I might add that the appeal documents also raise several other quite irrelevant matters including demands that the *Act* be amended and allegations relating to certain enforcement proceedings that have been taken by the Director with respect to previously issued corporate determinations.

ANALYSIS: TIMELINESS OF THE APPEAL

The following notice appears at the bottom of the third page of the Determination (**boldface** in original):

<p>Appeal Information</p> <p>Any person served with this Determination may appeal it to the Employment Standards Tribunal. The appeal must be delivered to the Tribunal by 9 March, 2000. Complete information on the appeal procedures is attached. Appeal forms are available at Employment Standards Branch.</p>

As noted above, this appeal was not filed until March 21st, 2000. By way of letters dated April 3rd and 13th, 2000, the Tribunal's Vice-Chair wrote to all parties requesting submissions regarding whether the Tribunal should exercise its discretion and extend the appeal period. In response to the Tribunal's request for submissions regarding the timeliness of the appeal, Cunliffe filed a letter with the Tribunal on April 4th, 2000 in which, so far as I can gather, three principal points are advanced:

- first, although dated February 15th, 2000, the Determination was not mailed until March 2nd and was received "during the week of March 6th"--thus, the March 9th deadline noted in the Determination was incorrect given that an appeal of a determination must be filed "within 15 days after the date of service [by registered mail]" [see section 112(2)(a)];
- second, given that the merits of the appeal are so compelling, the Tribunal ought to simply overlook the late filing; and
- third, the appeal was not filed in a timely manner because the appellant was "especially busy during the first part of March dealing with the large debts that we are saddled with since the collapse of our business".

In a submission dated May 3rd and filed on May 4th, 2000, the Director's delegate noted that the Determination was delivered to Cunliffe on March 3rd, 2000 (as evidenced by a Canada Post "Registered Mail Trace Sheet"). Accordingly, the appeal period expired on March 18th but since that day was a Saturday, the appeal period was extended to the next business day, namely, Monday March 20th, 2000 [see *Interpretation Act*, section 25(3)]. Thus, in the actual result, this appeal was filed one day too late.

It is, of course, correct to say that this appeal was not filed within the statutory appeal period. On the other hand, the appeal deadline set out in the Determination itself was incorrect (and potentially, at least, misleading) and it does not appear that any party suffered prejudice as a result of this appeal being filed one day late. Indeed, no party has claimed any prejudice as a result of the late appeal. The appellant appears to have moved with some dispatch to file his appeal and the appeal, on its face (and despite the fact that the appeal raises a number of wholly irrelevant issues relating to, for example, post-Determination enforcement proceedings taken by the Director), is not obviously frivolous.

Finally, with respect to the merits of the appeal, I note that the Determination was specifically issued (as set out in the first sentence thereof) pursuant to section 96 of the *Act*. However, section 96 establishes a personal director/officer liability only for unpaid “wages”. Monetary penalties, by definition (see section 1), do not constitute “wages”; corporate directors, officers, employees and agents may be held personally liable for monetary penalties but only in accordance with section 98(2) of the *Act* which latter subsection does not create, as does section 96, an absolute vicarious liability. The ambit of section 98(2) is wider than section 96 in that employees and agents, as well as officers and directors, may be held personally liable but, at the same time, the former subsection is narrower in that a precondition to liability is the authorizing, permitting, or acquiescing in the contravention by the corporation. Thus, it may be that the Determination is incorrect, at least to the extent that it imposes a personal liability on Cunliffe, pursuant to section 96, for, *inter alia*, a \$500 monetary penalty. I would expect that the parties will address this issue more fully in their respective submissions relating to the merits of the appeal.

ORDER

Pursuant to section 109(1)(b) of the *Act*, I order that the time for filing an appeal of the Determination be extended to March 21st, 2000. Accordingly, Cunliffe’s appeal is properly before the Tribunal and the parties may now make submissions, as directed by the Tribunal, with respect to the merits of this appeal.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal