

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 -

Raymond Joseph Cunliffe
("Cunliffe")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2000/232

DATE OF DECISION: June 5, 2000

DECISION

OVERVIEW

Raymond Joseph 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, 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*.

ANALYSIS

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., and Specialty Trading Inc. 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 four 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.

The Determination is essentially identical to another determination issued on the same day, and under the same file number, against Douglas Steven Cunliffe (see B.C.E.S.T. Decision No. D212/00, issued concurrently) except that the latter determination refers to a further corporate entity, 451864 BC Ltd. The appeal filed with respect to both determinations is identical. The relevant facts, arguments and documents relating to both appeals are identical.

The Determination contained a notice, set out at the bottom of page 3 of the Determination, indicating that an appeal must be filed with the Tribunal by no later than March 9th, 2000. However, the Determination was not actually delivered to Cunliffe until 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 late.

Although this appeal was not filed within the statutory appeal period, 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.

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.

In my view, it is appropriate to grant an extension of the appeal period to March 21st, 2000 and I hereby do so.

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, Raymond Joseph 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