

EMPLOYMENT STANDARDS TRIBUNAL

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

Employment Standards Act

-by-

Lynn Swetnam

(“Swetnam”)

-of a Determination issued by-

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/430

DATE OF DECISION: September 5, 1996

DECISION

OVERVIEW

This is an appeal brought by Lynn Swetnam (“Swetnam”) pursuant to section 112 of the Employment Standards Act (the “Act”) from Determination No. CDET 003059 issued by the Director of Employment Standards (the “Director”) on June 27, 1996. The Director determined that Swetnam, carrying on business as the “Cordova Cafe”, owed Judy Polukoshko (“Polukoshko”) the sum of \$105.93 on account of severance pay, vacation pay and interest.

FACTS

Ms. Polukoshko worked as a manager/server at the Cordova Cafe, located at 307 West Cordova Street, Vancouver, B.C., from April 1995 until her employment was terminated on January 12, 1996. The Director determined that Ms. Swetnam was the employer of Ms. Polukoshko and therefore liable to pay Polukoshko severance pay under the Act.

The cafe was operated by a corporate entity, Cordova Cafe Ltd. According to the Reasons Schedule attached to the Determination, Mr. Andrew Jordan was the sole director of this corporation. The investigating employment standards officer was of the view that a “contractual relationship” was reached between Mr. Jordan and Ms. Swetnam whereby Ms. Swetnam would acquire the cafe. Based on the documentation that has been submitted to me, it is not clear whether or not the acquisition was to be by way of an asset sale or a share sale.

This latter point is not without legal significance. If Swetnam was to acquire the shares of Cordova Cafe Ltd., then she, in her personal capacity would not be the employer, the employer would continue to be Cordova Cafe Ltd. In such a case, only the underlying shareholders of the corporate entity would change. On the other hand, if the acquisition was to be by way of an asset sale then Swetnam, or whatever corporate vehicle she used to acquire the assets, would be the employer.

The matter is further complicated by the fact that the “purchase agreement” was never consummated and both parties are now, apparently, saying that the other has in one way or another breached the agreement.

ISSUES TO BE DECIDED

Two issues need to be addressed: First, what was the nature and effect of the “purchase agreement” between Swetnam and Jordan?; second, who was the employer of Polukoshko at the point of her termination?

ANALYSIS

It is not clear, based on the documents before me, that a purchase agreement was ever consummated between Ms. Swetnam and Mr. Jordan. Jordan’s solicitors, in a letter to Ms. Polukoshko dated January 19, 1996, characterize the transaction between Jordan and Swetnam as an “outstanding offer” to purchase “the company”. I take those statements to mean that a concluded sale agreement was never reached in that a contract must contain both an offer and an unequivocal acceptance of that offer. I take the reference in the solicitors’ letter to the sale of “the company” to mean that a share transfer was contemplated.

I am bolstered in these latter conclusions by the following documentation:

i) in a one-page document dated December 9, 1995 Swetnam makes an offer to purchase the “shares” and “corporate entity” of Cordova Cafe Ltd. The line where Jordan was to affix his signature is blank which would indicate to me that the offer was not accepted by Jordan.

ii) a second one-page document dated December 12, 1995, signed by Jordan but not Swetnam, refers to the latter’s “offer to purchase” the “issued shares” of Cordova Cafe Ltd.

Jordan’s solicitors’ letter to Ms. Polukoshko of January 19, 1996 states as follows:

“Ms. Swetnam informed Mr. Jordan that she was not interested in completing on her outstanding offer to buy the company. He offered to discuss how to deal with closing down the cafe in the least painful way for all concerned.

Mr. Jordan then arranged to complete the sale of the company to another party at a convenient time.”

In my opinion, there never was a consummated “arrangement” whereby Ms. Swetnam would purchase the shares of Cordova Cafe Ltd. I am not prepared to find that there was or was not, in fact, a binding contract between the parties. However, based on the material that I have reviewed, I am inclined to the view that a contract never came into existence. Accordingly, Cordova Cafe Ltd. was the only employer of any employees working at the Cafe, including Ms. Polukoshko. In any event, even if there was a binding contract for the purchase of the shares of Cordova Cafe Ltd., the nature of a share purchase agreement is such that the employer, namely, Cordova Cafe Ltd., would continue to be the employer of any employees working in the cafe both before and after the share sale was completed.

To the extent that Ms. Swetnam hired any employees or made any contractual arrangements regarding the cafe, in my opinion, she did so as the agent (either as an agent by express agreement or as an agent by estoppel) of Cordova Cafe Ltd. In my view, any Determination issued regarding the employment claims of Ms. Polukoshko must be issued against Cordova Cafe Ltd. Further, as it appears to be acknowledged by all concerned that Ms. Swetnam never was an officer or director of Cordova Cafe Ltd. she cannot be held personally liable under section 96 of the Act.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 003059 be cancelled.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal