

**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 -

Anne Elizabeth Lowan  
(" Anne Lowan ")

-and-

Timothy James Lowan  
(" Timothy Lowan ")

jointly operating as "Corner House"

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 2000/330

**DATE OF DECISION:** July 5, 2000

## DECISION

### OVERVIEW

This is an appeal brought by Anne Elizabeth Lowan (“Anne Lowan”) and Timothy James Lowan (“Timothy Lowan”), jointly operating as “Corner House”, pursuant to section 112 of the *Employment Standards Act* (the “Act”). The appellants appeal a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on April 14th, 2000 under file number ER 083-211 (the “Determination”).

The Director’s delegate determined that Anne and Timothy Lowan owed their former employee, Michelle DesChenes (“DesChenes”), the sum of \$18,622.47 on account of unpaid wages and interest. The appellants’ principal grounds of appeal are as follows:

- the province of British Columbia was DesChenes’ actual employer or, alternatively, Anne and Timothy Lowan and the province of B.C. were, jointly, her employer (see section 95 of the *Act*);
- during the delegate’s investigation, the appellants were not afforded a reasonable opportunity to be heard (see section 77) with respect to the “employer” issue.

In addition, the appellants seek, pursuant to section 113 of the *Act*, an order suspending the effect of the Determination pending a decision on the merits of the appeal. *These reasons for decision address only the application for a suspension of the Determination.*

### ANALYSIS

Section 113 is reproduced below:

#### **Director's determination may be suspended**

113. (1) A person who appeals a determination may request the tribunal to suspend the effect of the determination.

(2) The tribunal may suspend the determination for the period and subject to the conditions it thinks appropriate, but only if the person who requests the suspension deposits with the director either

(a) the total amount, if any, required to be paid under the determination, or

(b) a smaller amount that the tribunal considers adequate in the circumstances of the appeal.

The Tribunal will not suspend determinations pending appeal as a matter of course. Even where a determination is suspended, it should be noted that the entire amount of the determination will be ordered to be posted as security unless a smaller amount is “adequate in the circumstances of the appeal”.

Counsel for the appellants seeks an order suspending the Determination “without requiring any deposit with the Director”. In only the most extraordinary of circumstances will such an order be appropriate. Counsel for the Director’s position is that the Determination should be suspended only if the appellants deposit the total amount required to be paid under the Determination.

The appellants have advanced the following reasons in support of their suspension application:

- “The sum at issue is a very large sum of money and this Appeal raises serious issues as to the liability of Corner House to pay that money” (May 8th, 2000 submission);
- the appeal has *prima facie* merit inasmuch as the question of whether or not Corner House was DesChenes’ true “employer” has never been addressed (May 23rd, 2000 submission);
- “Requiring the payment of any sum will cause hardship [to the appellants who are] no longer in business and therefore they have no revenue from the business to pay [the Determination]...the [appellants] would [have] to remortgage or sell a home to make the contribution. Requiring [the appellants] to take such extraordinary steps would result in either [severe] or irreparable harm to them.”(May 23rd, 2000 submission);

Counsel for the appellants also submits that there would be little prejudice to the respondent employee, Ms. DesChenes, if no security was posted particularly since this award was made in her favour not because she filed a complaint, but rather because her entitlement was determined in the course of an unpaid wage audit of the operations of Corner House which, in turn, was triggered by a complaint of another individual. Counsel also says that Anne and Timothy Lowan “have a strong presence in the province”.

It should be noted that the appellants appeal (and ask for a suspension pending the hearing of the appeal) not only this Determination but also a separate determination, in the amount of \$15,664.01, issued in favour of another former Corner House employee, Kelly Walker. Thus, the total amount of the appellants’ current liability is, with further accrued interest, some \$35,000.

As noted above, the principal issue in this appeal relates to the question of whether or not DesChenes was employed by the appellants. In my view, the argument that DesChenes was not employed by the appellants is most unlikely to succeed--all of the incidents of a typical employment relationship appear to be present in this case. I also note that the thrust of the appellants’ argument is not so much that DesChenes was not an employee but rather, that this question was not formally investigated by the delegate and subsequently adjudicated in the Determination. The material before me overwhelmingly suggests that there was an employment relationship between the appellants and DesChenes particularly in light of the expansive definition of “employee” contained in section 1 of the *Act*. Among other things, the appellants paid the wages of, and maintained payroll records relating to, DesChenes as if she was their employee; they exercised direction and control (including the right to discipline and terminate) over her working activities and evaluated her performance.

Further, even if it could be said that the province of B.C. was an “associated” employer together with the appellants pursuant to section 95 of the *Act*, the appellants would nonetheless remain jointly and severally liable for the full amount of DesChenes’ unpaid wage claim.

Finally, and quite apart from the merits of the appeal, this is a situation where there is a substantial sum owing to the respondent employee and the appellants are no longer operating the Corner House facility. Thus, there is no ongoing business entity that would be in a position to pay the Determination should this appeal be dismissed.

I do not share the appellants’ view that a suspension without deposit would result in little, if any, prejudice to DesChenes simply because she did not file a complaint. The possibility of there being a “dry” judgment in the end of the day cannot be wholly discounted. This is not a “windfall” situation (as is asserted by counsel for the appellants); employees are entitled to be paid wages in accordance with the provisions of the *Act*. In my view, ignorance of one’s entitlements under the *Act* does not mean that a subsequent award reflecting that entitlement is a windfall. Indeed, to the extent that an employer is able to avoid (even for a time) its lawful wage obligations under the *Act*, the “windfall” lies with the employer.

I do not consider this to be an appropriate case for a suspension order. As I understand the appellants’ position, if the Determination is ultimately confirmed, the appellants will have to remortgage or sell their home in order to pay the Determination. I do not have any evidence before me regarding what property or properties the appellants may own or their equity in such property(ies) and thus simply cannot judge whether or not DesChenes’ position as an unpaid wage claimant is comparatively secure.

While it is not for me to instruct the Director in the matter of enforcement proceedings, it would appear that if there is sufficient equity in one or more properties (including their current home), the Director could simply register the Determination against the appellants’ home in which case payment of the Determination would be secured and, for the moment, the appellants would not have to sell or remortgage their property(ies) pending a decision on the merits of this appeal.

## **ORDER**

The appellants’ request for an order suspending the effect of the Determination pending a decision on the merits of their appeal is **refused**.

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