

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.: 2000/343

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 18th, 2000 under file number ER 083-211 (the “Determination”).

The Director’s delegate determined that Anne and Timothy Lowan owed their former employee, Kelly Walker (“Walker”), the sum of \$15,664.01 on account of unpaid wages and interest.

This appeal is essentially identical to an appeal of a determination issued on April 14th, 2000 against the appellants in favour of Michelle DesChenes (“DesChenes”). In both appeals the appellants’ principal grounds of appeal are as follows:

- the province of British Columbia was the actual employer or, alternatively, Anne and Timothy Lowan and the province of B.C. were, jointly, the employer (see section 95 of the *Act*) of Kelly Walker;
- 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.

The appellants also 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.

Counsel for the appellants seeks an order suspending the Determination “without requiring any deposit with the Director”. 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 submissions before me with respect to the suspension request are identical to those filed in the DesChenes appeal (in which a suspension request was also sought).

In a decision issued concurrently with these reasons (B.C.E.S.T. Decision No. D253/00), I refused the request for a suspension of the DesChenes determination pending the hearing of the appeal. For the reasons set out in that latter decision, I am similarly of the view that it is not appropriate to order the suspension of the Determination in this appeal.

While I would not be prepared to characterize the present appeal as frivolous, this appeal nonetheless appears to have limited prospects of success. On the basis of the material before me it would appear that Walker was a Corner House employee. 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 Walker’s unpaid wage claim.

Corner House is no longer operating and both Anne and Timothy Lowan apparently have limited liquid financial resources. I do not share the appellants’ view that a suspension without deposit would result in little, if any, prejudice to Walker simply because she did not file a complaint--her entitlement arose as a result of an audit triggered by another employee’s unpaid wage complaint. 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.

Given the legitimate concerns about the appellants’ ability to pay the Determination should it be confirmed 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 might add that I have no information before me regarding the appellants’ equity in their property and thus cannot comment on whether or not the respondent employee’s claim could be fully satisfied by attaching that equity). 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, 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 the property pending a decision on the merits of the appeal. Such an approach would not, presumably, affect the appellants’ present cash flow nor would it require that they immediately liquidate any of their assets.

ORDER

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

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal