

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the
Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

Gordon Feil
("Feil")

-of a Decision issued by-

The Director Employment Standards
(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	96/562
DATE OF DECISION:	July 2nd, 1997

DECISION

FACTS

On April 2nd, 1996 the Director of Employment Standards (the “Director”) issued a Determination under number DDET 000207 against Gordon Feil (“Feil”) in the amount of \$5,851.80 (the “Feil Determination”). This Determination was issued against Feil in his capacity as a director and/or officer of a company known as Pacific Western Vinyl Windows & Doors Ltd. (“Pacific Vinyl”).

On April 2nd, 1996, the Director also issued related Determinations, each in the like amount of \$5,851.80, against Pacific Vinyl (Determination No. CDET 001839) and another Pacific Vinyl officer/director, Kerry Steinemann (Determination No. DDET 000208). I shall refer to these latter two determinations as the “Pacific Vinyl” and the “Steinemann” Determinations, respectively.

The Pacific Vinyl Determination related to unpaid wages owed to two former Pacific Vinyl employees, Kerry W. Whitters and Kelly R. Monych. The Steinemann and Feil Determinations were issued in accordance with Section 96 of the *Act* (corporate director/officer liability for unpaid wages).

Kerry Steinemann filed an appeal with respect to his personal liability under Section 96 of the *Act*. Neither Pacific Vinyl nor Feil filed an appeal with respect to the Determinations issued against them. The statutory time limit for appealing the Pacific Vinyl and Feil Determinations expired on April 25th, 1996 (see Section 112 of the *Act*).

In a carefully reasoned written decision, issued on July 16th, 1996 (B.C. EST #180/96), Registrar Edelman held that a director or officer’s appeal of a Determination issued pursuant to Section 96 of the *Act* is, except in a few special circumstances, limited to the question of the individual’s status (*i.e.* Was the appellant an officer or director during the relevant time period?) and whether or not the liability under the Determination exceeds the two-month wage ceiling (or the other statutory constraints) set out in Section 96. Registrar Edelman held that an appeal of a Determination issued by reason of Section 96 of the *Act* is not to be used as a springboard to re-litigate the issue of the corporation’s liability under the *Act*. In the end result, the Steinemann appeal was dismissed. The principles set out in the *Steinemann* decision have subsequently been consistently applied by other Tribunal adjudicators.

ISSUE TO BE DECIDED

In a letter dated September 20th, 1996, and received by the Tribunal on September 26th, 1996, Feil requested, on behalf of Pacific Vinyl, an extension of the time period for filing an appeal. In his September 20th letter, Feil did not specifically request an extension in order to file an appeal in his own right although Feil’s solicitors, in subsequent correspondence to the Tribunal, appear to have assumed that such a request was, in fact, made by Feil. For the purposes of the present

application for reconsideration, however, I am prepared to proceed on the assumption that Feil has requested an extension both on behalf of Pacific Vinyl and in his personal capacity.

In a letter dated September 27th, 1996, Registrar Edelman refused the application for a time extension [see Section 109(1)(b) of the *Act*]. Subsequently, in a letter dated April 14th, 1997, Feil's solicitors sought a reconsideration of the Tribunal's refusal to extend the appeal period. It is this reconsideration request that is now before me.

ANALYSIS

In support of the reconsideration request, Feil's solicitors forwarded the following documents:

- a brief medical report dated November 22nd, 1996;
- a "Notice of Assessment" issued by Revenue Canada to Pacific Vinyl dated August 15th, 1996;
- a letter from Revenue Canada to Pacific Vinyl dated August 26th, 1996;
- a Revenue Canada "Auditor's Statement of Account" dated August 8th, 1996 and directed to Pacific Vinyl; and
- a copy of 1995 T-4 statement apparently issued to Kerry Whitters.

The medical report states that Feil was "medically unfit to work from Jan. 26, 1996 until Mar. 31, 1996". However, this report appears to be undermined by Feil's own document--he corresponded with the Employment Standards Branch on March 19th, 1996 regarding the very investigation that ultimately resulted in the three Determinations being issued. I might further add that the substantive issue that Feil continues to press, namely, the employment status of Kelly Monych, was specifically addressed in this March 19th letter.

There is one further concern regarding the medical note--the doctor says that Feil was fit to return to work on a limited basis after March 31st, 1996. The Determinations were issued on April 2nd, 1996 and yet the request for a time extension was not filed with the Tribunal until late September 1996.

I have reviewed the other documents noted above and cannot conclude that, on their face, they support Feil's contention, set out in this initial September 20th letter to the Tribunal, that Monych never was a Pacific Vinyl "employee" as that term is defined in the *Act*. I might further add that Feil's argument on this point was specifically raised and addressed in the three Determinations.

In *Niemisto* (EST Decision #099/96, May 17th, 1996 reported at [1996] B.C.E.S.T.D. 320.03.20-02) I specifically addressed the criteria that ought to govern a request for an extension of the time within which an appeal must be filed:

The Legislature has established very short time frames for appealing a Determination issued pursuant to Section 79 of the Act. These time periods are set out in Section 112(2)(a) and (b) of the Act. A person served with a Determination has only 8 or 15 days to file their appeal depending on the mode of service. In the case of service by registered mail, the time period is 15 days; the time period is only 8 days if the Determination is personally served.

As these short time frames may, in some circumstances, create undue hardship for particular individuals or firms, the Legislature saw fit to grant the Employment Standards Tribunal the authority to extend these time limits. This latter authority to extend the time for requesting an appeal is set out in section 109(b) of the Act. It should be noted that the Legislature did not set out any particular criteria that should govern the Tribunal's discretionary authority to extend the statutory time limits. Accordingly, it falls to the Tribunal to establish such criteria.

In my view, extensions should not be granted as a matter of course. The Legislature has established very tight time frames for filing an appeal from a Determination issued under the *Act*. Although relatively short, the appeal periods established in Section 112(2) are not that unusual. For example, parties who wish to challenge decisions made by arbitrators under the *Residential Tenancy Act* have as little as 2 days and, at most, only 15 days to file an application for review with the Arbitration Review Panel (*cf. Residential Tenancy Act*, section 45.3). An application for reconsideration of a decision issued by the B.C. Labour Relations Board must be made within 15 days [*cf. Labour Relations Code*, section 141(5)]. As a final example, an appeal to the B.C. Court of Appeal must be brought within 30 days (*cf. Court of Appeal Act*, Section 14).

Certain common principles have been established by various courts and tribunals governing when, and under what circumstances, appeal periods should be extended. Taking into account the various decisions from both courts and tribunals with respect to this question, I am of the view that appellants seeking time extensions for requesting an appeal from a Determination issued under the *Act* should satisfy the Tribunal that:

- i) there is a reasonable and credible explanation for the the failure to request an appeal within the statutory time limit;
- ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
- iii) the respondent party (*i.e.*, the employer or employee), as well the Director, must have been made aware of this intention;
- iv) the respondent party will not be unduly prejudiced by the granting of an extension; and

v) there is a strong *prima facie* case in favour of the appellant.

Applying the *Niemisto* criteria to the situation at hand, I am satisfied that Registrar Edelman's decision to refuse the requested time extension was entirely appropriate.

ORDER

In light of the all the foregoing circumstances, I am of the opinion that Registrar Edelman's decision to refuse a time extension for filing an appeal, by one or both of Feil and Pacific Vinyl, ought not to be disturbed. Accordingly, the request for reconsideration is refused and the suspension of the Feil Determination, issued by Registrar Edelman on May 27th, 1997, is now vacated.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal