

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 -

Wayne Smith, a Director or Officer of 457660 B.C. Ltd.
operating as Jim's Auto Towing
("Smith")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 1999/242

DATE OF DECISION: July 7, 1999

DECISION

OVERVIEW

This is an appeal by Wayne Smith (“Smith”) a Director or Officer of 457660 B.C. Ltd. operating as Jim’s Auto Towing (“Jim’s”) under Section 112 of the *Employment Standards Act* (the “Act”), against a Director’s Determination (“DDET”) dated April 7, 1999 issued by a delegate of the Director of Employment Standards (the “Director”). Smith alleges that the delegate of the Director erred in the Determination by concluding that Smith, as a Director or Officer of Jim’s was liable for wages in the amount of \$1,821.23 (includes interest) for a former employee Timothy Andrew McCaig (“McCaig”).

The appeal by Smith of the DDET includes a number of allegations with respect to the merits of the Corporate Determination (“CDET”) issued against 457660 B.C. Ltd. operating as Jim’s Auto Towing (“Jim’s”) on December 10, 1998. The appeal of the CDET was not accepted by the Employment Standards Tribunal (the “Tribunal”) as the appeal was not made within the period set for making appeals to the Tribunal.

This decision was rendered on the basis of the written submissions on file, and no oral hearing was required.

ISSUES

The issues to be decided in this appeal are:

1. Was Smith a Director or Officer of 457660 B.C. Ltd. operating as Jim’s Auto Towing (“Jim’s”) during the relevant periods and therefore personally liable for wages owing to McCaig as calculated in the DDET ?
2. Does the appeal by Smith of the DDET within the time established for appeal include, within its scope, an appeal of the Corporate Determination (“CDET”).

FACTS

The facts in this matter are straight forward.

1. A CDET was issued on December 10, 1998. That Determination included the statement that any appeal of the Determination must be delivered to the Tribunal by January 4, 1999.
2. An appeal of the CDET was not filed with the Tribunal until March 10, 1999.

3. The Registrar of the Tribunal advised Smith by letter dated March 11, 1999 “ *...The Determination dated December 10, 1998 states clearly that the deadline for receipt of an appeal by the Tribunal was January 4, 1999. It is the responsibility of the appellant to ensure that the Tribunal has received an appeal by the deadline indicated on the Determination. I regret that your appeal will not be considered since it does not comply with the requirements of Section 112(2) of the Employment Standards Act (the “Act”).*”
4. Smith responded to the Registrar’s March 11, 1999 letter on April 13, 1999 and stated “*....the 21 day restriction for my response was unfitting for the situation, especially with the E.S.B. taking 1140 days.(from date of complaint to date of issuance of Determination) I don’t think that anyone would label that fair. I am not a professional just a layman at best.*”
5. The Registrar responded to Smith’s April 13, 1999 letter on April 19, 1999 and advised in part that “*... The Tribunal has held consistency (sic) that it will not grant extensions to the time period to file an appeal unless there are compelling reasons to do so. You have not provided any adequate explanation for your failure to request an appeal within the statutory time limit. Given the foregoing, I consider this matter to be closed.*”
6. The delegate of the Director issued a DDET on April 7, 1999 naming Smith as a Director or Officer of Jim’s.
7. The date for any appeal of DDET was April 30, 1999.
8. Smith filed an appeal of the DDET on April 22, 1999.
9. Smith states in this appeal that his reasons for appeal are:
 - Error in findings of fact, a just moral consideration
 - I just do not this (sic) it is fair & just
 - For instance, you (ESB) want me to pay this employee a minimum of (4) four hours a day (Att. form #3) when I do not know even if he is going to show up for work !!!?
 - All the days he worked less than four hours were his own choice, not mine. Any overtime hours he worked were also his own choice, not mine.
 - These drivers work on a commission basis, they do a job, they get paid for it, regardless of when they do it.
 - Reconsider the facts (not just the law as it’s written) and lets be fair about this. Please read all the material sent.

ANALYSIS

The DDET was issued under Section 96 of the *Act* against Smith as Director or Officer of 457660 B.C. Ltd. operating as Jim's Auto Towing ("Jim's"). Section 96 of the *Act* provides that:

Section 96, Corporate officer's liability for unpaid wages

(1) A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months' unpaid wages for each employee.

(2) Despite subsection (1), a person who was a director or officer of a corporation is not personally liable for

(a) any liability to an employee under section 63, termination pay or money payable under a collective agreement in respect of individual or group terminations, if the corporation is in receivership or is subject to action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act,

(b) vacation pay that becomes payable after the director or officer ceases to hold office, or

(c) money that remains in an employee's time bank after the director or officer ceases to hold office.

(3) This Act applies to the recovery of the unpaid wages from a person liable for them under subsection (1).

The appellant Smith has not disputed that he was a director or officer of Jim's at the relevant times. Instead, Smith is challenging the merits of the CDET issued December 10, 1998. Smith provides no argument why the Tribunal should review the merits of the CDET in the appeal of the DDET.

The Tribunal has addressed the specific question of the scope of an appeal of a determination made under Section 96 of the *Act* in several previous decisions. In Seacorp Properties Inc., *supra*, the Tribunal said the following:

In Steineman, *supra*, the Tribunal decided that once a final determination is issued against a Corporation, the principle of issue estoppel prevents the Corporation's directors or officers from challenging subsequent determinations which are issued against them personally under Section 96 of the *Act*, provided that three criteria are met:

- the identical issue has been decided previously,
- the previous decision was final; and
- the previous decision involved the same parties, or their privies.

There are two exceptions to that principle - there was a fraud in issuing the Corporate Determination or the directors/officers have new and cogent evidence that was not available previously.

In the case at hand, the sole focus of the appeal of the DDET is the validity of the prior CDET. The dispute is therefore about the identical issue which was determined in the CDET. In the absence of a decision granting an extension of time limits in which to file his appeal against the original CDET, it is a final decision. Finally, the parties are the same, as the directors and officers have been found by the Tribunal to be privies to the Corporation (see Seacorp Properties Inc.).

As to the exceptions to the principles set out above, the submissions by Smith has disclosed no new evidence which was not previously available. Finally, there is in fact no evidence of fraud in any of the circumstances surrounding the issuance of the CDET.

Accordingly, I find that the scope of the appeal of the DDET is limited to those issues which arise specifically under Section 96 of the *Act*, that is, arguments concerning the accuracy of the findings regarding the status of Smith as a director or officer of the Corporation and the accuracy of the calculations of the personal liability of Smith. Smith cannot use his appeal of the DDET in order to challenge the validity of the CDET.

Smith has not argued that he was not a director or officer of the corporate entity (Jim's) during all relevant times, nor is there an argument that the amounts under the DDET exceeds the permissible maximum set out in Section 96 of the *Act*.

For all of the above reasons, the appeal by Smith is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated April 7, 1999 in the amount of **\$1,821.23** be confirmed together with whatever further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Hans Suhr
Adjudicator
Employment Standards Tribunal