

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 -

Yoshihiro Tabo, a Director or Officer of Yoshi Japanese Restaurant Ltd.,
Teresa Tabo, A Director or Officer of Yoshi Japanese Restaurant Ltd. and
Yoshi Japanese Restaurant
(the “Employer” and the “Appellants”)

- of Determinations issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Hugh R. Jamieson

FILE No.: 2000/107, 2000/108 & 2000/430

DATE OF DECISION: August 21, 2000

DECISION

OVERVIEW

Two of these appeals were filed by the Appellants on February 23, 2000. They were brought against two Determinations issued by the Director on January 31, 2000, wherein it was found that pursuant to Section 96 (1) of the *Employment Standards Act (the Act)*, the Appellants were liable as Directors or Officers of Yoshi Japanese Restaurant Ltd., (the Employer), for an amount of \$15,484.26, being wages owing to Alexander Yamagishi, George Kita, Kayo Ukai, Yoshiko Blakely and So-Young Hoehnle (the Employees). These wages include regular wages, vacation wages and compensation for length of service. The wording of these two appeals is identical and they are jointly signed by the Appellants. The grounds for the appeals are basically that the restaurant where the foregoing employees were employed was closed suddenly on August 14, 1998, due to a landlord and tenant dispute; that the amounts found due to the employees are too high; that the Appellants are themselves involved in a wage dispute with the owners of another restaurant where they have worked since 1998; and, that they need time to pay to avoid being forced into bankruptcy.

The third appeal was brought on May 15, 2000, in the name of the Employer. This appeal is against a third Determination that was issued by the Director on January 31, 2000, finding that the Employer owes the above amount of wages to the Employees. The bases for this appeal are identical to the above two appeals and it is also jointly signed by the Appellants. Notwithstanding the obvious late filing of this appeal, in that it ought to have been filed within the fifteen (15) day time limit from the date of service of the Determination, as required by Section 112 of the *Act*, the Tribunal accepted this appeal.

ISSUES TO BE DECIDED

The issues here are whether the Director erred in determining the amount of wages owing to the Employees and also whether the Director was mistaken in finding that the Appellants are liable for the amount of wages in question as Directors or Officers of the Employer.

FACTS

As indicated above, the Employees worked at the Yoshi Japanese Restaurant Ltd., which was situated at 1923 West 4th Avenue, Vancouver. On August 14, 1998, the doors of the restaurant were closed, allegedly by court order. According to the Employer, this was due to the fact that their lawyers failed to pay some \$15,000.00 to the landlords. Following the closure of the restaurant, three of the Employees, Alexander Yamagishi, George Kita and Kayo Ukai, worked for the Employer from September 2, 1998 to September 5, 1998, providing catering service for a wedding.

Acting on complaints from the Employees that they were not paid all wages, vacation pay, and compensation for length of service that they had earned, the Director conducted an investigation

that resulted in the three Determinations, referred to above, being issued on January 31, 2000. The amount found due to each Employee is clearly indicated in the Determination to the Employer as follows:

Alexander Yamagishi:	\$ 7,930.96
George Kita:	\$ 6,765.07
Kayo Ukai:	\$ 458.04
Yoshiko Blakely:	\$ 155.34
So-Young Hoehnle	\$ 174.85

There is also a break down of these individual amounts showing the period the wages were earned as well as the category of wages, i.e., regular wages, vacation wages or compensation for length of service.

This Determination also summarizes the investigation and the efforts by the Director's Delegate to obtain access to the Employer's payroll records. With the restaurant being closed and the telephone disconnected, contact with the Employer was limited. Letters sent by certified mail to the Appellants' home address were returned marked unclaimed. Telephone messages went unanswered. Ensuing regular mail to the Appellants demanding the production of payroll records did bring a response however, the only payroll records produced were restricted to the period from January 16, 1998 to August 15, 1998. No other form of records or information was forthcoming from the Employer.

As for the unpaid wages, the Employer concedes that wages are owed but claims inability to pay as there are no assets or funds available. On March 25, 1999, the Employer did provide the Delegate with cheques for some wages owing to two Employees, Yoshiko Blakely and So-Young Hoehnle, and indicated that more time was needed to pay the balance of the outstanding wages. According to the information in the Determination, from then until the Determination was issued on January 31, 2000, no effort was made by the Employer to make any payment arrangements.

As for the two appeals against the Determinations finding Director or Officer liability that were issued against the Appellants on dated January 31, 2000, the facts basically speak for themselves. Heeding the insolvency claims by the Employer, the Delegate conducted a search of the appropriate records of the Registrar of Companies and confirmed that the Appellants were in fact Directors or Officers of the Employer at the time the wages in question were earned and ought to have been paid.

It can also be noted that in response to questions raised by the Appellants in these two appeals going to the high amount of wages found due to two of the Employees, the Delegate provided further information as to the basis for the calculations. The Appellants replied, challenging some of this information supplied by the Delegate. For example, they claimed that an N.S.F. pay cheque issued to Alexander Yamagashi, back in 1997 had been replaced by cash. They also questioned the validity of a claim by Kayo Ukai that one of her cheques did not clear.

ANALYSIS

There is really very little to analyze in this situation. It is trite to say that insofar as the Determination issued against the Employer on January 31, 2000, it is the Employer that carries the burden to convince the Tribunal that the Director's Delegate erred in finding that the aforesaid amount of wages are in fact due to the Employees. Or, the Employer must show that the Delegate has somehow acted in an arbitrary, bad faith or discriminatory fashion in arriving at the conclusion that the wages are owed as stipulated in the Determination. In the appeal, the Employer attempts to cast doubt on the calculation of the wages owing to the Employees and expresses surprise that some of the amounts found due are so high. Also, the Employer seeks more time to meet its commitments to pay these wages. Given the circumstances, none of these are proper grounds for an appeal.

To begin with, there is nothing in the Appeal that suggests that the Delegate acted improperly. Moreover, as for the amount of wages found owing to the Employees, which the Employer, (or the Appellants), now disputes, there was ample opportunity during the lengthy investigation of the Employees' complaints for the Employer, (or the Appellants), to have met with or have discussions with the Delegate regarding the contracts of employment that the Employees worked under. The Employer could also have produced the necessary payroll records which would have revealed exactly what wages and benefits the Employees had earned and what had actually been paid. This was obviously not done and it is simply too late now during the appeal process to begin challenging the Delegate's calculations, particularly with information that could have been, but was not provided to the Delegate during the investigation - see - Tri-West Tractor Ltd., BC EST# D268/96; Kaiser Stables Ltd., BC EST# D58/97; and Specialty Motor Cars (1970) Ltd., BC EST# D570/98. In these circumstances this appeal by the Employer is dismissed.

As for the appeals by the Appellants against the Determinations issued on January 31, 2000, finding that they, in their capacity as Directors or Officers of the Employer, are liable for the wages owing to the Employees. There is nothing in either of these appeals that throws doubt on the fundamental bases for the Determinations i.e., that wages are owing to the Employees and that

The Appellants were in fact, Directors or Officers of the Employer at the time these wages were earned and should have been paid. Consequently, in the circumstances where these fundamental factors are not really in dispute, there can be little doubt that pursuant to Section 96 (1) of the *Act*, the Appellants can indeed be found to be personally liable for up to two months' unpaid wages for each of the Employees:

“ 96 (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.”

Accordingly, these two Appeals are also dismissed.

ORDER

Pursuant to Section 115 of the *Act*, the three Determinations in question are hereby confirmed.

Hugh R. Jamieson
Adjudicator
Employment Standards Tribunal