

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act

-by-

Erwin Penner
("Penner")

and

Beverly Hauff
("Hauff")

-of two Determinations issued by-

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/435

DATE OF HEARING: December 17th, 1996

DATE OF DECISION: December 27th, 1996

DECISION

APPEARANCES

Erwin Penner	on his own behalf
Beverly Hauff	on her own behalf
Peter Gala	on his own behalf
John P. Holden	on his own behalf
Brenda MacPherson	on her own behalf
W.G. (Bill) Bull & Michelle Alman	for the Director of Employment Standards

OVERVIEW

This matter concerns two appeals brought by Erwin Penner (“Penner”) and Beverly Hauff (“Hauff”) pursuant to section 112 of the Employment Standards Act (the “Act”) from Determination Nos. DDET 000322 and DDET 000323, respectively. Both Determinations were issued by the Director of Employment Standards (the “Director”) on June 28th, 1996.

The Director determined that both Penner and Hauff were Directors and/or Officers of a company known as Cafe Orestes’ Limited when this firm failed to pay certain employees the wages that were due them. The two Determinations were issued in accordance with the provisions of section 96 of the Act and, in effect, impose a personal liability on Penner and Hauff for Cafe Orestes’ Limited’s failure to pay wages in the total amount (including interest) of \$7,549.74.

The Director also issued Determinations against Cafe Orestes’ Limited and a further section 96 Determination against one Richard Victor Penner. No appeal has been filed with respect to these latter two Determinations and the time for filing such an appeal [see section 112(2) of the Act] expired on July 26th, 1996. Accordingly, and in accordance with previous judicial (*e.g.*, *Stelmaschuk v. Dean* [1995] 9 W.W.R. 131) and Tribunal decisions [*e.g.*, *Steinemann*, EST Decision No. 180/96, July 16th,

1996; *Perfekto Mondo Bistro*, EST Decision No. 205/96, July 29th, 1996] the principle of issue estoppel applies and the two appellants are not entitled to utilize the present appeal process to, in effect, reopen the Determination that has already been issued against the corporate employer, Cafe Orestes' Limited. There are some limited exceptions to this principle (such as fraud in the issuance of the initial corporate Determination or the submission of new and relevant evidence that was not available at the time the corporate Determination was issued) none of which applies here.

The appellants profess almost total ignorance regarding the business affairs of Cafe Orestes' Limited. Indeed, their evidence, which I do not find credible, was that they did not even know who holds the shares of Cafe Orestes' Limited. Their appeal is based on the simple assertion that they were neither directors nor officers of Cafe Orestes' Limited when the employees' claims for unpaid wages arose.

The appeal hearing in this matter was held in Abbotsford, B.C. on December 17th, 1996. Penner and Hauff testified before me and also submitted an extensive brief prepared by their solicitors; none of the three former Cafe Orestes' employees named in the Determinations, whom also appeared at the hearing, testified. The Director elected not to call any evidence but did make an extensive final submission.

This matter began when some former employees of Cafe Orestes' Limited (which operated a restaurant in the Abbotsford area) filed complaints with the Director following the termination of their employment. The complaints, for the most part, related to unpaid regular wages, vacation pay and termination pay. The names of these employees, their wages due as determined by the Director, and other employment information, are set out below:

<u>Employee</u>	<u>Job Title</u>	<u>Period of Employment</u>	<u>Wages Due</u>
John Bazinet	Sous Chef	Sept. 16/95 - Jan. 7th/96	\$ 975.54
Peter Gala	Manager	July 1/95 - Jan. 6/96	\$3,935.35
Leanne Hill	Line Cook	Sept. 11/95 - Dec. 31/96	\$ 384.58
John Holden	Dishwasher	Nov. 1994 - Jan. 7/96	\$ 546.06
Brenda MacPherson	Waitress	Dec. 31/95 - Jan. 6/96	\$ 30.13
Yan Chuen Wat	Exec. Chef	July 1/95 - Jan. 7/96	<u>\$1,678.08</u>
Total			<u>\$7,549.74</u>

ISSUE TO BE DECIDED

In every case, the employee's wage claim is less than the two-month maximum wage liability that may be imposed on a director or officer pursuant to section 96 of the Act. Thus, the only issue that I need address is whether or not Penner and Hauff were directors or officers of Cafe Orestes' Limited at the time the above-noted employees' wages "were earned or should have been paid".

ANALYSIS

It is common ground that at the time the above-noted employees' wage claims accrued, neither Penner nor Hauff were directors or officers of Cafe Orestes' Limited according to the records maintained by the Registrar of Companies. The only named director during the relevant period was one Richard Victor Penner, the twenty year old son of Erwin Penner. According to the Registrar's records, during the relevant time period there was no named officer for Cafe Orestes' Limited (see Exhibits 5 and 7).

The Director's submission is that, notwithstanding the official corporate records, Penner and Hauff may have been, as a matter of law, directors or officers under the "functional" test set out in the *B.C. Company Act*. The terms "director" and "officer" are not defined in the *Employment Standards Act*, so one must look to the *Company Act* for guidance. In this latter legislation, the term "director" is defined, in section 1(1), as follows:

"director" includes every person, by whatever name he is designated, who performs the functions of a director;

Although the *Company Act* does not specifically define the term "officer", the position of "senior officer" is defined so as to include:

"...any other individual who performs functions of the corporation similar to those normally performed by an individual occupying any of [certain named offices such as president and secretary]".

Thus, the law appears clear that one can be held to be a director or senior officer even though he or she does not formally hold such a title. The key point is not whether an individual is formally named in the corporate records as an officer or director but, rather, whether that person exercises the typical functions, tasks, or

duties that a corporate director or officer would, in the usual course of events, exercise [see *G. Elmitt Construction Ltd. v. Kaplan* (1992) 1 C.L.R. (2d) 219].

The evidence before me is that Penner and/or Hauff:

- had initial input into the menu and restaurant design (Hauff).
- contacted a firm known as C.T.E.W. Hospitality Inc. in June 1995 and executed an agreement on behalf of Cafe Orestes' Limited which agreement authorized C.T.E.W. to take responsibility for the "day-to-day management" of the restaurant (Exhibit 4).
- Hauff received regular monthly sales reports from C.T.E.W. during the period when that firm was managing the restaurant. According to the aforementioned agreement, these reports were to be submitted "only to the designated principal of the owner" of Cafe Orestes. (underlining in original document--see Exhibit 4, paragraph 8)
- When Ms. Hauff was dissatisfied with the quality of the reports, she arranged for her accountants to review the financial reports with C.T.E.W. directly.
- cancelled the C.T.E.W. agreement, in October 1995, and negotiated a settlement of C.T.E.W.'s outstanding invoices (Exhibit 6). I would parenthetically note that in the settlement agreement, dated October 12th, 1996, Penner and Hauff represented themselves and signed the agreement as the "owners of the Cafe Orestes".
- provided funds, either directly or indirectly, to meet Cafe Orestes' payroll and other financial obligations and signed cheques on behalf of Cafe Orestes' Limited.
- directly participated in the management of the restaurant during the Christmas 1995 season.
- in December 1995 Hauff dismissed a Cafe Orestes' employee, Leanne Hill, allegedly for cause.

- sought out a new purchaser for the restaurant (it would appear that there was a sale of assets, not shares) and, in fact, found a purchaser and arranged for the transfer of assets to this new purchaser in January 1996.
- received at least some of the proceeds from the sale of the restaurant's assets.
- received a letter dated July 2nd, 1996 from the solicitors for Cafe Orestes' Limited seeking instructions regarding the filing of an appeal with respect to the Determination issued against, *inter alia*, Cafe Orestes' Limited.

I should note that all of the above matters were put into evidence either directly by Penner and Hauff at the appeal hearing, or were contained in their solicitors' brief (which they both fully adopted as true and accurate).

In light of the appellants' evidence, as set out above, I have absolutely no doubt that both Penner and Hauff exercised the functions usually ascribed to corporate officers and directors. Therefore, in light of section 96 of the Act, it follows that the Determinations were properly issued against the two appellants.

I wish to make some final observations. The evidence before me is that Hauff was officially appointed a director of Cafe Orestes' Limited on June 9th, 1995 and resigned effective September 8th, 1995 at which time her son, Tyrone Quentin Hauff, aged 19 years, served as a director until October 10th, 1995 when he resigned to be replaced by Richard Victor Penner, the aforementioned twenty year old son of Erwin Penner. The latter remains the sole director of Cafe Orestes' Limited according to the firm's official corporate records (see Exhibits 5 and 7).

I find it curious, to say the least, that throughout this entire matter, Richard Penner (who was the only "official" corporate director or officer during the relevant period) seems to have had no involvement whatsoever in the affairs of Cafe Orestes' Limited. Neither Erwin Penner nor Hauff saw fit to involve Richard Penner (or even to seek his advice) in the various activities that they carried out on behalf of the restaurant.

I am driven to the conclusion that Penner and Hauff consciously and deliberately refused to officially serve as directors or officers of Cafe Orestes' Limited so that they could avoid the very liability (and any other statutory liabilities that can be imposed on directors and officers) that was imposed on them in this case. If I had the authority to do so, I would most certainly award costs against them. However,

as I do not have the statutory authority to award costs, all I can do is confirm the Determinations and I hereby do so.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination Nos. DDET 000322 (Penner) and DDET 000323 (Hauff) be confirmed, each in the amount of \$7,549.74, together with whatever further interest may have accrued since the date of issuance pursuant to section 88 of the *Act*.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal