

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 -

Douglas Steven Cunliffe
("Cunliffe")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2000/390

DATE OF DECISION: October 17, 2000

DECISION

OVERVIEW

Douglas Steven Cunliffe (“Cunliffe”) has appealed, pursuant to section 112 of the *Employment Standards Act* (the “Act”), a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 15th, 2000 under file numbers 086934 & 091189 (the “Determination”). Although this appeal was not filed within the statutory appeal period (see section 112 of the *Act*), in a decision issued on June 5th, 2000 (BC EST #D212/00), I extended the appeal period pursuant to section 109(1)(b) of the *Act*. These reasons now address the substantive issues raised by Cunliffe’s appeal.

THE DETERMINATION

By way of the Determination, Cunliffe was ordered to pay \$21,209.11 on account of unpaid wages owed to eight former employees of one or more of C.T. Properties Ltd., C.T. Construction Ltd., Specialty Homes Inc., Specialty Trading Inc. and 451864 BC Ltd. In some seven previous determinations, the Director had declared that these latter five corporations were “associated corporations” as defined in section 95 of the *Act* and held these corporations liable for various unpaid wage claims. The present Determination was issued against Cunliffe pursuant to section 96 of the *Act* which states that corporate officers and directors—subject to certain statutory and regulatory exceptions—are personally liable for up to 2 months’ unpaid wages for each corporate employee.

ISSUES ON APPEAL

In his appeal documents, Cunliffe does not dispute his status as a director or officer of the corporate entities in question but does question the former employees’ unpaid wage entitlements. Cunliffe’s appeal documents also raise various other matters over which I have no jurisdiction (such as the Director’s conduct in carrying out certain enforcement activities pursuant to Part 11 of the *Act*).

BACKGROUND FACTS AND ANALYSIS

The Director’s delegate wrote to Cunliffe on July 20th, 2000 (this letter was also copied to the Tribunal) and advised that a total sum of \$29,569.24 was due and payable under the various corporate determinations issued in favour of the complainant employees. Further, the delegate indicated that when the section 96 Determination was issued there remained \$11,765.67 due and owing under the various corporate determinations and that following the issuance of the section 96 Determination, an additional \$3,728.48 was collected as a result of the seizure and sale of certain corporate assets. The delegate’s July 20th letter concluded:

“The Director of Employment Standards is of the view that further collection action from the directors of the companies would not be successful. Accordingly,

the Director wishes to cancel the Director's Determination issued against you on 15 February, 2000. The Employment Standards Tribunal advises that your consent is required for cancellation of the Determination".

On August 25th, 2000 the Director's delegate again wrote to Cunliffe (this letter was also copied to the Tribunal) and advised that the sum of \$22,091.09 had been collected and disbursed to the complainant employees resulting in each employee receiving slightly less than 75% of the amount due to them as set out in the various corporate determinations. The delegate's August 25th letter concluded with a request that Cunliffe "please respond to the Tribunal indicating your consent to the cancellation of the Director's Determination issued against you on 15 February, 2000".

Cunliffe responded to the delegate's July 20th and August 25 letters in a written submission to the Tribunal dated September 1st, 2000. Cunliffe's September 1st submission is, almost entirely, an attack on the merits of the underlying corporate determinations and the procedures undertaken by the Director in order to enforce those determinations. Although Cunliffe apparently objects to the cancellation of the section 96 Determination, his objection is grounded in the mistaken belief that if his appeal goes forward he will be entitled to attack the merits of the underlying corporate determinations and that he will be able to obtain certain orders and declarations which, as a matter of law, the Tribunal has no authority to issue. For example, Cunliffe seeks "Orders pursuant to sections 99(g) and (h) [sic] that the director be examined and disclose the file records on this issue of motivation and the propriety of the delegate's enforcement and understanding of the Law and Act" and asks that the Tribunal "Make rules pursuant to section 99(c) [sic] to ensure against the use of the *Act* by employees to engage in harassment of parties, or activity that might be deemed to be harassment in a one-sided, politicized manner".

The Tribunal has repeatedly stressed that an appeal of a section 96 determination cannot be used as a springboard to attack the merits of the underlying corporate determination (see *e.g.*, *Perfekto Mondo Bistro Corp.*, BC EST #D205/96). If there are legitimate issues about the correctness of complainant employees' unpaid wage awards, those issues should be addressed in a proper appeal of the corporate determination establishing the employees' wage entitlements.

In the instant case, of the seven corporate determinations issued with respect to the complainant employees' unpaid wage claims, four determinations were never appealed to the Tribunal. The remaining three determinations were appealed to the Tribunal but, in each case, the appeal was dismissed and the determination confirmed. Thus, as matters now stand, the employees' unpaid wage claims have been finally determined. The only issue that could be properly before the Tribunal concerns Cunliffe's status and, in that regard, Cunliffe concedes that he was a director and officer of the various corporations at the material time. Further, the Director, as noted, does not now wish to take any enforcement proceedings against Cunliffe personally and thus seeks the cancellation of the section 96 Determination.

Finally, I note that although the Director has been able—through Part 11 collection proceedings—to recover about 75% of the complainants' unpaid wages, none of these monies have been recovered from Cunliffe personally in accordance with the section 96 Determination now under appeal before me. All enforcement proceedings instigated by the Director have been undertaken pursuant to the liabilities formalized under the various corporate determinations. Although it is

clear that Cunliffe objects (and objects strenuously) to the manner in which the Director carried out her enforcement powers under Part 11 of the *Act*, it should be noted that the Tribunal does not have supervisory authority over the Director with respect to the exercise of her statutory powers of enforcement other than to issue a suspension order pending appeal (see section 113).

In the absence of an appeal, the Director could have cancelled the Determination under section 86 of the *Act*, however, in light of the Tribunal's decision in *Devonshire Cream Ltd.* (BC EST #D122/97), the Director cannot act unilaterally and thus the proposed cancellation of the section 96 Determination requires the Tribunal's consent.

Given the foregoing circumstances, I cannot find any valid reason to refuse the Director's request to cancel the section 96 Determination.

ORDER

Pursuant to section 115(1)(a) of the *Act*, I order that the Determination issued against Douglas Steven Cunliffe on February 15th, 2000 under file numbers 086934 & 091189 be cancelled.

Kenneth Wm. Thornicroft

**Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal**