# 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 -

Anne Elizabeth Lowan
and –
Timothy James Lowan
operating as “Corner House”
(the “Lowans”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 2000/326 & 2000/340

**DATE OF HEARING:** September 28, 2000

**DATE OF DECISION:** October 30, 2000

## DECISION

### APPEARANCES

| | |
|---|---|
| Chris Buchanan, Barrister & Solicitor | for Anne Elizabeth Lowan and Timothy James Lowan |
| Michelle DesChenes | on her own behalf |
| Kelly Walker | on her own behalf |
| Adele Adamic, Barrister & Solicitor and Wayne H. Dennis, I.R.O. | for the Director of Employment Standards |

### OVERVIEW

I have before me two essentially identical appeals brought by Anne Elizabeth Lowan and Timothy James Lowan, jointly operating as "Corner House" and jointly referred to as the "Lowans", pursuant to section 112 of the *Employment Standards Act* (the *"Act"*).

The first appeal is of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on April 14th, 2000 under file number ER 083-211 pursuant to which the delegate ordered the Lowans to pay their former employee, Michelle DesChenes ("DesChenes"), the sum of $18,622.47 on account of unpaid wages and interest.

The Lowans also appeal a Determination issued by a delegate of the Director of Employment Standards (the "Director") on April 18th, 2000 under file number ER 083-211 pursuant to which the delegate ordered the Lowans to pay their former employee, Kelly Walker ("Walker"), the sum of $15,664.01 on account of unpaid wages and interest.

Both appeals were heard together in Victoria on September 28th, 2000. For the most part, the appeal hearing consisted of legal submissions by both counsel for the Lowans and for the Director although Mr. John James Lowan (Anne Elizabeth Lowan's spouse and Timothy James Lowan's father) did provide some brief *viva voce* evidence. Although both respondent employees, Ms. DesChenes and Ms. Walker, were present at the appeal hearing, neither chose to give any evidence or to make any substantive submissions with respect to the issues raised by the Lowans' appeals of the two Determinations.

At the conclusion of the appeal hearing, I expressed the view that I did not accept the position advanced by the Lowans' legal counsel, namely, that the delegate did not address, in the Determination, the question of whether or not DesChenes and Walker had been employed by the Lowans. Accordingly, I indicated to the parties that I was not prepared to accede to the Lowans' counsel's request to refer the matter back to the Director for further investigation of what counsel referred to as the "true employer" issue. In light of the manner in which the appeal had been argued, I suggested that I was prepared to hear further evidence regarding whether the delegate

was correct in finding such an employment relationship and Thursday, October 19th, 2000 was tentatively set aside as the date for the hearing of such further evidence.

On October 4th, 2000, counsel for the Lowans delivered, by fax, a letter to the Tribunal advising that "after considering our position, we have decided not to proceed with the hearing scheduled for later this month" and further requesting that I issue written reasons for rejecting the appellants' position that the delegate had not adequately investigated or addressed the "true employer" issue. These reasons for decision are now delivered in accordance with the appellants' counsel's request.

**ISSUES ON APPEAL**

As noted above, the two appeals are virtually identical and are based on the following grounds:

- the province of British Columbia, rather than the Lowans, was DesChenes' and Walker's actual employer;
- Alternatively, the appellants say that they and the province of B.C. were, jointly, the employer (see section 95 of the *Act*); and, thirdly,
- that the appellants were not afforded a reasonable opportunity to be heard (see section 77) with respect to the "employer" issue prior to the issuance of the two Determinations.

The appellants also requested, in their appeal documents, that the two Determinations be suspended pending the outcome of the appeals (see section 113 of the *Act*). I refused to suspend the Determinations pending a decision on the merits of the appeals–see BC EST #D253/00 (*DesChenes*) and BC EST #D254/00 (*Walker*). I might add that counsel for the appellants did not object–I raised the matter at the outset of the appeal hearing–to my hearing the appeals even though I had previously refused the suspension requests and had issued a reconsideration decision in a related claim.

In his opening statement, counsel for the appellants stressed that he was only seeking an order referring DesChenes' and Walker's unpaid wage claims back to the Director for further investigation. Counsel's position was that the Director's delegate did not properly, or, indeed, at all, investigate the question of whether or not the Lowans were the complainants' "true employer". This issue is set out in the appellants' appeal documents at paragraphs 1.1 and 1.3 as follows:

> "1.1. ...the Determination is wrong because it does not address a critical issue in dispute: whether Corner House is the employer of [the respondents] or whether the Government of British Columbia, through the Ministry for Children and Families, (the "Government") is [their] employer. As a result, the Director did not address the issue of whether [the respondents have] one employer, two employers, or an employer constituted of associated individuals (Corner House and the

> Government). Consequently, the liability of Corner House to pay the sum[s] set out in the Determination[s] has not been properly investigated...
>
> 1.3. Finally, the Determination is wrong because the Director did not provide [the appellants] with a reasonable opportunity to make submissions on the employer status issue."

## BACKGROUND FACTS AND ANALYSIS

The appellants operated, pursuant to an operator's agreement between themselves and the provincial government, a licensed respite care home for mentally challenged children. This facility was operated under the name "Corner House".

### The Richards Determination

In 1997, Ms. Jo-Ann E. Richards, who worked at Corner House as a "relief worker", filed an unpaid wage complaint alleging, principally, that she did not receive overtime pay in accordance with the provisions of Part 4 of the *Act.*

Richards' complaint was investigated and on September 5th, 1997 a determination was issued against the Lowans in favour of Ms. Richards in the amount of $23,600.14. The Lowans appealed the Richards determination to the Tribunal and following an oral hearing, the determination was confirmed by Adjudicator Orr (see BC EST #D254/98); I refused the Lowans' subsequent application for reconsideration (see BC EST #D269/98). The key issue in both the appeal and the subsequent reconsideration was whether Richards was a "residential care worker" as defined by section 34(1)(x) of the *Employment Standards Regulation*; if her employment could be so characterized, Richards would not be entitled to receive overtime pay. The delegate, Adjudicator Orr (on appeal) and I (on reconsideration) all held that Richards was *not* a "residential care worker".

The question of whether the Lowans were Richards' "employer" was raised during the appeal but was not addressed by Adjudicator Orr:

> "The Lowans indicated that they wished to argue that they were not the employer in this case. They submitted that because of their relationship with Government that they themselves were employees of the Government and that they could not be the employer of Ms. Richards. They suggested that Richards was, therefore, also an employee of the Government and not Corner House. *This issue is being investigated by the Director in relation to complaints filed in November and December 1997.*
>
> I concluded that, because this issue had not been raised with the Director at the time of the investigation, I was not going to allow it to be raised at this appeal. Such matters require careful investigation and it is not proper for the appellant to raise this matter for the first time on appeal." ( my *italics;* see BC EST #D254/98 at pp. 3-4)

On reconsideration, I held that the adjudicator had not erred in refusing to hear evidence and argument on the "employer" issue (see BC EST #D269/98 at p. 3)

**The Delegate's Investigation**

The Richards complaint triggered a more general investigation of Corner House's operations, particularly with respect to the matter of overtime pay [see section 76(3) of the *Act*]. On May 23rd, 1997, and in the course of that broader investigation, a Demand for Employer Records (see section 85 of the *Act*) was issued seeking production of all payroll records for *all* Corner House "employees" for the period March 17th, 1995 to March 16th, 1997. For various reasons, this investigation did not proceed expeditiously. In any event, on May 11th, 1999, the delegate again wrote to the Lowans and requested that they reply, *inter alia*, to the Demand within 21 days. On June 10th, 1999 and in response to the delegate's May 11th, 1999 letter, legal counsel for the B.C. Government and Service Employees' Union (the union was, at that point, representing the Lowans) wrote to the delegate and requested that the Employment Standards Branch "hold in abeyance any outstanding claims against [the Lowans] under the *Employment Standards Act*". In his June 10th letter, legal counsel for the Lowans submitted that the Lowans' were not the "true employer" of the Corner House employees:

> "Mr. and Ms. Lowan contend that while employed as contracted caregivers they were 'employees' of the Ministry for Children and Families and that the staff of Corner House also were employees of the ministry.
>
> The true employer of themselves and their staff Mr. and Ms. Lowan say was the Ministry for Children and Families.
>
> Mr. and Ms. Lowan further contend that any disputes arising from the relationship between themselves and the ministry or between their staff and the ministry are matters arising under the BCGEU collective agreement...
>
> Ms. and Mr. Lowan are two of the six grievors named in the Vicki Bridge *et al*. grievance before [an arbitrator]...
>
> The Union has ensured that the arbitrator is aware that the decision on the matters before him also will determine who is liable for the cost of any outstanding claims under the *Employment Standards Act.*
>
> The arbitrator is asked by the Union to find that the grievors are 'employees' of the Ministry for Children and Families. However, the arbitrator also will be asked to find that the work performed by the grievors and their staffs in the group homes is bargaining unit work and that the terms of the collective agreement must apply when they are performing this work.
>
> [The arbitrator's] decision will determine that Ms. and Mr. Lowan are independent contractors or that they are 'employees' and that the true employer of Ms. and Mr. Lowan and of their staff is the Ministry for Children and Families...

> The Union and Mr. and Ms. Lowan request that any further processing of any outstanding claims be held in abeyance until after [the arbitrator's] decision has been received."

It would appear that the Director did, in effect, hold off further adjudicative and enforcement proceedings pending the outcome of the arbitration. The arbitration proceeded before Arbitrator Dorsey in May and again in September 1999 occupying a total of 10 hearing days. Arbitrator Dorsey's 93-page decision was issued on November 12th, 1999. As noted in the two Determinations, Arbitrator Dorsey rejected the Lowans' contention that they were "employees" of the Ministry for Children and Families.

The position advanced by the Lowans in their appeal, namely, that they were not the "true" employer of DesChenes or Walker was not specifically addressed by Arbitrator Dorsey although there are any number of comments in his reasons which suggest that the arbitrator was inclined to the view that the Lowans were the employer of the employees working at the various respite homes including Corner House (at p. 91):

- "The burden to pay remuneration *to their employees* for the services they contract to provide rests with the contract caregivers.";
- "With the requirements on them as public social sector *employers,* they have limited ability to set the wages and benefits for those *employees* they require.";
- "The contract caregivers *hire.*";
- "...they seek out and welcome recommendations for prospective *employees.*";
- "They establish probationary periods and evaluate *new employees* to decide if they will pass probation.";
- "They direct and discipline *those who work for them*";
- "...they...would not readily dismiss *an employee* because they were asked [by the Ministry] to if they believed it to be unfair."

(my italics)

**CONCLUSIONS**

In my view, the so-called "true employer" issue was very much in the forefront of the delegate's investigation. Indeed, the delegate's investigation of the Corner House employees' overtime claims (excepting Richards' claim) was held in abeyance for some considerable period of time solely so that this issue could be addressed in the arbitration proceedings. As noted by Adjudicator Orr in his decision: "This issue [*i.e.*, the "true employer" issue] is being investigated by the Director in relation to complaints filed in November and December 1997".

Once the arbitrator's decision was handed down, the appellants were free to make further submissions to the delegate as to why they were not an "employer" for purposes of the *Act*–so far as I can determine, they never made any such submission to the delegate. In May of 1999 the delegate specifically invited the Lowans' submission with respect to the other unpaid wage claims "within twenty-one days" and in response to that letter their then legal counsel advanced the position that the Lowans were not the "employer" of the Corner House employees. This position was rejected–at least by implication–by Arbitrator Dorsey and, as previously noted, the Lowans did not provide any further information to the delegate after the arbitrator's decision was handed down.

It should be noted that the two Determinations now under appeal were not issued until some five months following the issuance of the Dorsey arbitration award. The Lowans were very much aware (or, certainly, should have been following the appeal before Adjudicator Orr during which, it will be recalled, Adjudicator Orr refused to hear evidence and submissions on the "true employer" issue) that if they wished to assert that they were not the "true employer" of DesChenes or Walker they were obliged to make a proper submission on that point to the delegate; and yet, curiously, they never did so.

In my view, the only reasonable implication to be drawn from the two Determinations now before me is that the delegate concluded–and so far as I can gather, the delegate's conclusion appears to be correct based on the available evidence–that the Lowans were the "employer" of both DesChenes and Walker. While it is true that the delegate did not, in either Determination, embark upon a detailed analysis of the definition of "employer" and the governing legal principles, one can hardly criticize the delegate for not setting out such an analysis when the Lowans did not make *any* submission, or provide *any* evidence, to the delegate on that point even though the Lowans were very much aware that there were other unpaid wage claims (other than Richards') and that these other claims were only being held in abeyance pending the outcome of the arbitration proceedings. Although, as I have noted, the delegate did not undertake a detailed analysis of the "employer" issue, it is apparent that the delegate concluded that the Lowans were DesChenes' and Walker's employer; for example, in the two Determinations, the delegate repeatedly refers to the Lowans as the *employer* of the various Corner House employees.

To summarize, I am satisfied that the delegate fully complied with section 77 of the *Act* in relation to the unpaid wage claims of DesChenes and Walker and that the delegate conducted a full and fair investigation in which all relevant issues–including the so-called "true employer" issue–were considered and addressed.

The appeals are dismissed.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination dated April 14th, 2000 issued against the Lowans in favour of Michelle DesChenes in the amount of $18,622.47 be confirmed.

Pursuant to section 115 of the *Act*, I order that the Determination dated April 18th, 2000 issued against the Lowans in favour of Kelly Walker in the amount of $15,664.01 be confirmed.

In addition, both Ms. DesChenes and Ms. Walker are entitled to whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance of the respective Determinations.

***Kenneth Wm. Thornicroft***

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