

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 -

Seacorp Properties Inc.,
Alan Yong,
Alfred Yong,
Patrick P.Y. Ng and
Gordon T.C. Lim

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 97/539

DATE OF DECISION: October 1,1997

DECISION

OVERVIEW

This decision arises from two appeals under Section 112 of the *Employment Standards Act* (the “*Act*”). There is an appeal against Determination #CDET 004609 dated November 6, 1996 (the “Corporate Determination”) in which a delegate of the Director of Employment Standards found that Seacorp Properties Inc. (“SPI”) was required to pay wages, compensation for length of service, vacation pay and interest totalling \$32,856.72 to a former employee, William Jones. There is also an appeal against four Determinations (DDET 890; DDET 893; DDET 894; and DDET 895) which were issued on June 26, 1997 by the Director’s delegate who found that: Alan Yong, Alfred Yong, Patrick P.Y. Ng and Gordon T.C. Lim (“Yong et al”) were directors of SPI; William Jones was owed wages, vacation pay and interest by SPI; and, under Section 96 of the *Act* Yong et al were each personally liable in the amount of \$22,483.38.

Counsel for SPI and Yong et al submits that Yong et al have standing to appeal the merits of the Corporate Determination and, in the unusual circumstance of this case, issue estoppel does not arise. She also submits, on behalf of Yong et al, that the Corporate Determination is in error for the following reasons:

- William Jones was an officer and director of Seacorp Properties Inc. at the time the “wages” set out in the Determination became owing and therefore he is also personally liable for up to two months of his unpaid wages;
- the Corporate Determination is based on a monthly salary of \$10,000 when in fact Jones had agreed to reduce his monthly salary to \$8,000;
- Jones was not dismissed, or alternatively Seacorp Properties Inc. had cause to dismiss him for conflict of interest and, therefore, he was not entitled to compensation for length of service;
- Jones had used his vacation entitlement at the time his employment ended and therefore the Corporate Determination of vacation pay is incorrect.

I have conducted a review and an analysis of the Determination and the parties’ written submissions and have decided that the Determinations should be confirmed.

REASONS

Suspension of Corporate Determination

When Counsel for SPI and Yong et al submitted the appeal to the Tribunal on July 17, 1997 she requested that the Tribunal suspend the effect of the Corporate Determination pending the outcome of the appeals by Yong et al. Counsel for the Director of Employment Standards opposed the application for a suspension on three grounds:

- i Yong et al were out of time to appeal the Corporate Determination:
- ii Collection proceedings against SPI had begun in December, 1996; and
- iii In the absence of a timely appeal against the Corporate Determination, Yong et al are unable to avail the corporation of the statutory provision of Section 113 of the *Act* (suspension of determination).

On September 8, 1997 counsel for Yong et al advised the Tribunal that they would “...pay into trust with the Director on or before September 15, 1997 the sum of \$32,856.72” to secure the full amount of the Corporate Determination. With that payment, the issue of suspending the effect of the Corporate Determination becomes a moot issue and it is not necessary to deal further with that aspect of the appeal.

Timeliness of appeal against the Corporate Determination

Yong et al seek to appeal the Corporate Determination which was issued on November 6, 1996 and which contained the following statement:

“An appeal of this Determination must be received by the Employment Standards Tribunal not later than 1996 November 29. See attached appeal procedures.”

While the appeals on behalf of Yong et al were received within the statutory time limit set out in Section 112 of the *Act*, SPI’s appeal was filed more than six months beyond the statutory time limit. Thus, I must decide whether I should extend the time period for requesting an appeal, as permitted by Section 109 (1) (a) of the *Act*. The Tribunal has dealt with this issue in previous appeals [*Niemisto* (BCEST #D099/96) and *Perfekto Mondo Bistro* (BCEST #D205/96)] and set out the following principles in those decisions:

Certain common principles have been established by various courts and tribunals governing when, and under what circumstances, appeal periods should be extended. Taking into account the various decisions from both courts and tribunals with respect to this question, I am of the view that appellants seeking time extensions for requesting an appeal from a Determination issued under the Act should satisfy the Tribunal that:

- i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
- iii) the respondent party (*i.e.*, the employer or employee), as well the Director, must have been made aware of this intention;
- (iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
- v) there is a strong *prima facie* case in favour of the appellant.

The above criteria are not intended to constitute an exhaustive list. Adjudicators may find that in particular cases, certain other, perhaps unique factors ought to be considered.

In her submission to the Tribunal, Counsel for SPI and Yong et al acknowledges that the Corporate Determination was issued on November 6, 1996 and was received by the Corporation and by its solicitors on November 12, 1996. She also acknowledges that it contained a written notice which required that any appeal must be received by the Employment Standards Tribunal not later than November 29, 1996. However, she submits that Alan Yong, acting on behalf of SPI faxed a letter to the Director's delegate on November 23, 1996 in which he stated that he "...would appreciate it if you can arrange another review of the case." According to Counsel's submission, Mr. Yong heard nothing further from the Director's delegate or any other representative of the Director of Employment Standards until the four Determinations were issued against Yong et al on June 26, 1997.

In my view, the fact that Mr. Yong wrote to the Director's delegate and asked him "...to arrange another review of the case" does not constitute a reasonable explanation for SPI's failure to deliver an appeal to the Tribunal before November 29, 1996. It is clear that SPI and its solicitors were properly served with the Corporate Determination. It is also clear that SPI was aware that its right to appeal the Corporate Determination had to be exercised not later than November 29, 1996. Furthermore, appeal procedures were attached to the Determination, including the Tribunal's address for delivery of any appeal. (I pause to note that the appeal on behalf of Yong et al was delivered to the Tribunal within the statutory time limit and in compliance with the procedures attached to the four Determinations issued against them.)

I also find that SPI has not demonstrated that there was an on-going *bona fide* intention to appeal the Corporate Determination. If that *bona fide* intention has existed, it would have been made known to the Director's delegate in December, 1996 when collection proceedings under the Corporate Determination were initiated against SPI. Furthermore, Counsel for SPI and Yong et al does not indicate in her submission that the respondent

(William Jones) was ever made aware of SPI's intention to appeal the Corporate Determination.

When I review the Determinations, the parties' written submissions and the documents which have been placed before me I find that there is not a strong *prima facie* case in favour of the appellants for the following reasons. In her appeal submission of July 17th, Counsel for SPI and Yong et al noted the time frame within which Yong et al must file their appeal precluded them from providing "... extensive documentation which will evidence the fact that (Jones) was in substance an officer and director throughout his employment." An undertaking was made to provide that documentation. On September 8, 1997, Counsel submitted her reply submission and provided the documentation which she had undertaken to provide. However, the documentation was submitted without any explanation or commentary on its significance or its relevance. All of the documents are photocopies and their relevance is not apparent since most of them are dated prior to October 25, 1995 (when Jones resigned as a director) and some of them are addressed to Alan Yong (one of the appellants) and some of them do not indicate to whom they are addressed.

Section 112 (1) of the *Act* gives a right of appeal to any person served with a determination provided that right is exercised within the time limits in Section 112 (2) and the appeal is delivered to the Tribunal's offices. As noted in the appeal procedures which were attached to the Corporate Determination, the Tribunal is an independent body which is established under Part 12 of the *Act* to hear and decide appeals from determinations. It is the only body with the legal authority to conduct an appeal of a determination. For that reason, I do not accept SPI's submission that the Director's delegate or some other representative of the Director of Employment Standards had a responsibility to inform Mr. Yong that his letter of November 23, 1996 was insufficient to commence an appeal. Nor should the Director's delegate be held responsible to forward Mr. Yong's letter to the Tribunal. In my view, any prospective appellant bears the full responsibility for ensuring that an appeal is delivered to the Tribunal within the statutory time limit set out in Section 112 of the *Act*.

For all these reasons, I am satisfied that I ought not to grant a time extension to SPI to appeal the Corporate Determination and, therefore, I confirm the Determination (#CDET 004609 dated November 6, 1996).

Issue Estoppel

The Determinations against Yong et al were issued because the Director's delegate found that each of the four individuals were directors of SPI. He then relied on the provisions of Section 96 of the *Act*, which states:

Corporate officer's liability for unpaid wages

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.

Yong et al do not dispute or deny that they are directors or officers of SPI. Rather, as noted above, their appeal is primarily against the findings made by the Director in the Corporate Determination. In addition, Yong et al appeal against the four Determinations which were issued to them individually on June 26, 1997. They submit that Jones is also liable under Section 96 of the *Act* "... for payment of that portion of the (Corporate) Determination which is equal to up to 2 months' unpaid wages." While acknowledging that Jones resigned as a director of SPI on October 25, 1995 they submit that he was an officer of SPI until February 12, 1996 and that "... he continued in substance to carry out the duties of a director and therefore was both an officer and director within the meaning of the *Employment Standards Act*."

Counsel for the Director of Employment Standards submits that Yong et al are estopped from arguing the merits of their appeal because the issues that arise in their individual Determinations are identical to those in the Corporate Determination. Authority for that submission is based on several earlier decisions of the Tribunal [*Steinemann, Director/Officer of Pacific Western Vinyl Windows* (BCEST #D175/96); *Perfekto Mondo Bistro* (BCEST #D205/96); and *Penner and Hauff* (BCEST #D378/96)]. In each of those decisions the Tribunal held that directors and officers are limited to arguing those issues which arise from Section 96 of the *Act*: are they a director or officer of the Corporation; and is the amount of their personal liability properly limited to up to two months' unpaid wages for each employee? Counsel for the Director of Employment Standards also opposes the submission that Jones continued to be an officer of SPI during the two-month period for which Yong et al have been found liable to pay wages.

In *Steinemann*, 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.

I find that the appeal by SPI against the Corporate Determination is identical to the appeals by Yong et al against the Determinations which were issued to them individually. This can be seen clearly in the reasons given for the appeals (as set out above at page 2). The Corporate Determination was not appealed within the statutory time limit and I have refused the application for an extension of time limit. Therefore, the Corporate Determination is now a final order. It was decided by the Tribunal in *Steinemann*, supra, that directors/officers are privies to the Corporation. There is no new and cogent evidence in front of me, nor is there any allegation of fraud. Thus, Yong et al are only entitled to argue that they were not directors or officers at the material time or that the Determinations dated June 26, 1997 exceed the wage amounts allowed under Section 96 (1) of the *Act*. Neither argument has been made on behalf of Yong et al. Therefore I dismiss the appeals on behalf of Yong et al.

ORDER

I order, under Section 115 of the *Act*, that Determinations # CDET 004609 (Seacorp Properties Inc.), #DDET 893 (Alan Yong), #DDET 895 (Patrick P.Y. Ng), #DDET 890 (Gordon T.C. Lim) and #DDET 894 (Alfred Yong) be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal