

An appeal

- by -

A. Christiane von Pfahlenburg-Marienburg,  
a Director or Officer of Celestial Delights Fine Food Co. Ltd. o/a Imperial  
Diamond Cie and Imperial Diamond Company  
("von Pfahlenburg-Marienburg")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

pursuant to Section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 2002/419

**DATE OF DECISION:** November 5, 2002

## DECISION

### THE APPEAL

As will be seen, the instant proceedings are somewhat irregular. I have before me an appeal form, dated July 31st, 2002 and filed with the Tribunal on August 2nd, 2002, wherein the named appellant is described as “BC586145 Ltd. Celestial Delights Fine Food Co. Ltd.” (“Celestial Delights”).

However, the determination that is apparently being appealed is a determination that was issued on July 10th, 2002 against A. Christiane von Pfahlenburg-Marienburg pursuant to section 96(1) of the *Employment Standards Act* (the “Act”):

**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.

By way of this latter s. 96 determination, Mr. von Pfahlenburg-Marienburg was ordered to pay the sum of \$735.69 to a former Celestial Delights employee, Shannon Cyre (“Cyre”), on account of unpaid wages and section 88 interest.

Previously, on April 23rd, 2002, a determination was issued against Celestial Delights, ordering that firm to pay Cyre the same sum of \$735.69.

The material before me contains a submission, dated and filed September 17th, 2002. The covering letter delivering this submission to the Tribunal is written on Celestial Delights letterhead and is signed by A. Christiane von Pfahlenburg-Marienburg as “president”. Attached to the covering letter is a series of documents including a Tribunal appeal form dated September 18th, 2002 in the name of, and signed by, A. Christiane von Pfahlenburg-Marienburg.

### PRELIMINARY MATTERS CONCERNING THE FORM OF APPEAL

The appeal form filed in the name of “BC586145 Ltd. Celestial Delights Fine Food Co. Ltd.” may represent an attempt to appeal the April 23rd, 2002 determination that was issued against Celestial Delights. Certainly, some of the reasons for appeal relate to this latter determination--for example, it is asserted that Cyre was not employed by Celestial Delights but rather by another entity, Imperial Diamond Cie, which is described as a proprietorship (although the individual proprietor is not identified).

If this appeal was intended to be an appeal of the April 23rd, 2002 corporate determination issued against Celestial Delights, the appeal is statute-barred by reason of section 112(2) of the *Act*. Although the Tribunal does have the authority to extend the appeal period [see section 109(1)(b)], there is *absolutely nothing* in the material before me that would justify extending the appeal period (such an appeal would be nearly three months late). In this regard, I note that the corporate determination was properly served, by registered mail, on the company and on Mr. von Pfahlenburg-Marienburg (as well as on other individuals) shortly after it was issued but Mr. von Pfahlenburg-Marienburg apparently refused to accept delivery of the documents (not that this matters--see section 122 of the *Act*).

Accordingly, if the appeal documents were intended to constitute an appeal by Celestial Delights of the April 23rd determination issued against it, I would dismiss the appeal pursuant to the provisions of section 114(1)(a) of the *Act*.

On the other hand, this appeal, although nominally filed by Celestial Delights, may have been intended to constitute an appeal by Mr. von Pfahlenburg-Marienburg of the section 96 determination issued against him personally. If that was the intention, this appeal is timely. Certainly, some of the assertions contained in the appeal documents are consistent with this being an appeal by Mr. von Pfahlenburg-Marienburg of the July 10th section 96 determination. Accordingly, I intend to adjudicate the appeal on this basis, namely, as an appeal by Mr. von Pfahlenburg-Marienburg of the section 96 determination issued against him.

## FINDINGS

As previously noted, the appeal documents raise several issues that might have been germane to an appeal by Celestial Delights of the corporate determination but have little, if any, relevance, to an appeal of a section 96 determination. The principal submission is that Cyre was employed by a proprietorship, Imperial Diamond Cie, and not by Celestial Delights. This assertion is purportedly corroborated by a record of employment issued by Imperial Diamond (Canada) Cie to Ms. Cyre after her employment ended on September 30th, 2001. This record of employment was signed by Mr. von Pfahlenburg-Marienburg and he is identified on the form as the “contact person”--no other individual is identified. Certainly, the record of employment raises the inference that if Cyre was employed by a proprietorship, the individual proprietor was Mr. von Pfahlenburg-Marienburg. In that case, Mr. von Pfahlenburg-Marienburg is personally liable for Cyre’s unpaid wages in any event as an employer--the Director need not have relied on the statutory device of section 96(1).

However, the question relating to the identity of Cyre’s employer is not a matter that is properly before me in an appeal of a section 96 determination. In the absence of a proper appeal by Celestial Delights of the corporate determination (and I have already found there is no such proper appeal), the matters addressed in that corporate determination have now been finally adjudicated. In other words, the identity of Cyre’s employer and the amount of her unpaid wage claim cannot be challenged in this appeal by reason of the doctrine of *res judicata*, and more specifically, the principle of issue estoppel--see *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460; *Pacific Western Vinyl Windows & Doors Ltd.*, B.C.E.S.T. Decision No. D180/96; *Perfekto Mondo Bistro Corp.*, B.C.E.S.T. Decision No. D205/96; *Sawers*, B.C.E.S.T. Decision No. D174/97).

In appeals of section 96 determinations, appellants can properly assert any statutory defences open to them (for example, the wages ordered to be paid to the employee exceed the “2 month ceiling”) or, more fundamentally, appellants may argue that they were not a director or officer when the employee(s) wage claim(s) crystallized (bearing in mind that individuals who “function” as officers and directors are equally caught by section 96 even if not formally designated in the corporation’s records as an officer or director--see *e.g.*, *Penner and Hauff*, B.C.E.S.T. Decision No. D371/96).

In the instant case, Mr. von Pfahlenburg-Marienburg has not asserted any statutory defence. Further, the material before me clearly shows that Mr. von Pfahlenburg-Marienburg was both an officer and a director of Celestial Delights when Ms. Cyre’s unpaid wage claim arose.

In light of the foregoing, this appeal is dismissed.

There appears to be an inconsequential error in the determination with respect to the spelling of Mr. von Pfahlenburg-Marienburg's last name. In the determination Mr. von Pfahlenburg-Marienburg's last name is spelled von Phahlenburg-Marienburg; the determination is thus varied [see section 115(1)(a)] to correct this typographical error.

## **ORDER**

Pursuant to sections 114(1)(c) and 115(1)(a) of the *Act*, I order that this appeal be dismissed and that the Determination issued on July 10th, 2002 against Mr. von Pfahlenburg-Marienburg be confirmed (as corrected) in the amount of \$735.69 together with whatever additional interest that may have accrued as and from the date of issuance of the Determination.

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