

An appeal

- by -

Richard Stephen Luscombe, a Director or Officer of Celestial Delights Fine
Food Co. Ltd. o/a Imperial Diamond Cie and Imperial Diamond Company
("Luscombe")

- 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.: 2002/481

DATE OF DECISION: November 5, 2002

DECISION

INTRODUCTION

This is an appeal filed by Richard Stephen Luscombe (“Luscombe”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Mr. Luscombe appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on July 10th, 2002 (the “Determination”). A more immediate concern is whether this appeal ought to be heard on its merits since the appeal was filed after the governing appeal period expired. These reasons address only this latter matter which is being adjudicated, in accordance with the Vice-Chair’s October 21st, 2002 letter to the parties, on the basis of written submissions (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575).

The Director’s delegate determined that Luscombe owed Shannon Cyre (“Cyre”), a former employee of Celestial Delights Fine Food Co. Ltd. doing business as Imperial Diamond Cie and Imperial Diamond Company (“Celestial Delights”), the sum of \$735.69 on account of unpaid wages and section 88 interest. I understand that an earlier determination, dated April 23rd, 2002, was issued against Celestial Delights, also in the sum of \$735.69, and that this latter “corporate determination” was not appealed to the Tribunal.

The Determination now under appeal before me was issued against Luscombe on the basis that he was a Celestial Delights director and officer when Cyre’s unpaid wage claim crystallized. The Director’s delegate issued the Determination against Luscombe pursuant to the provisions of section 96(1) of the *Act* which provide as follows:

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.

Mr. Luscombe’s appeal documents raise several issues, virtually all of which should have been placed before the Tribunal by way of an appeal of the corporate determination. In essence, Mr. Luscombe asserts that Cyre was not employed by a corporation--namely, Celestial Delights--but rather by a proprietorship operated under the firm name “Imperial Diamond Cie” (the alleged individual proprietor is not specifically identified in Luscombe’s appeal documents).

Mr. Luscombe does not deny that he was a director or officer of Celestial Delights during the relevant time frame.

TIMELINESS OF THE APPEAL

Appended to the Determination is a notice headed “IMPORTANT INFORMATION”. This notice indicates that the appeal deadline is “4:30 P.M. on Thursday, August 8, 2002”--see section 112(2)(a) of the *Act* which provides that an appeal to the Tribunal must be filed within 15 days if the determination was served by registered mail. This latter notice also set out various particulars regarding how an appeal could be filed.

The material before me discloses that Luscombe's appeal was filed on September 13th, 2002 at 3:28 P.M., over 5 weeks after the appeal period expired. Accordingly, on September 16th, 2002, the Tribunal's Vice-Chair wrote to all parties requesting their submissions regarding the appropriateness of the Tribunal granting an extension of the appeal period pursuant to section 109(1)(b) of the *Act*. The Vice-Chair's July 31st letter also identified the relevant criteria governing such extensions as set out in the Tribunal's jurisprudence and specifically directed the parties to turn their minds to those criteria in their submissions.

THE PARTIES' SUBMISSIONS

In response to the Vice-Chair's July 31st letter, the Tribunal received a curiously worded letter dated September 17th, 2002 on Celestial Delight's letterhead and signed by its president, A. Christiane von Pfahlenburg, that does not, even on a most generous reading, respond the matter of the late appeal. The September 17th letter, purportedly on behalf of Celestial Delights, Luscombe and several other persons, simply states among other things that Celestial Delights et al. "reserves the right to take further legal action in this matter".

The Director's delegate, in a submission dated September 20th, 2002, noted the following facts:

- the corporate determination was issued on April 23rd, 2002 and was served, by registered mail, on the company's business address and, *inter alia*, delivered to Mr. Luscombe's residence since he was a corporate officer and director.
- the corporate determination was issued against the very party that was identified by its president (during a February 5th, 2002 "factfinding conference") as the employer;
- on April 29th, 2002 a demand for payroll records was forwarded by registered mail to the company's business address (and to other named individuals including Luscombe); Mr. Luscombe replied to the delegate, in his capacity as corporate secretary, by way of an undated letter received on May 6th, 2002. In his May 6th letter Luscombe stated that he had forwarded the demand to Celestial Delight's president;
- the president's undated response, received by the delegate on May 10th, 2002, simply asserted that Cyre had never been employed by Celestial Delights and that the latter firm had never employed anyone.

Finally, I have before me a letter written on "Imperial Diamond Cie" letterhead, dated October 15th, 2002 and signed by A. Christiane von Pfahlenburg-Marienburg as "Senior Broker", that sets out several assertions that are not relevant to the timeliness issue. The October 15th letter once again simply challenges the delegate's finding that Cyre was employed by Celestial Delights.

FINDINGS

The Vice-Chair's September 16th letter to the parties could not have been clearer--the parties were asked to turn their minds to the timeliness of the appeal *and to no other issue*--"The only issue right now is whether the Tribunal should extend the deadline and accept this late appeal". The Vice-Chair's letter plainly indicates that the merits of the appeal will only be addressed (and that the parties will be entitled

to make submissions with respect to the merits) if the appeal period is extended in accordance with the discretionary authority vested in the Tribunal by way of section 109(1)(b) of the *Act*.

The delegate submits that this is not a proper case to extend the appeal deadline. I entirely agree. Among other reasons, it must be noted that, inexplicably, Mr. Luscombe has not seen fit to file any submission in his own right explaining why this appeal was not filed within the statutory appeal period. The Determination clearly indicates that there is an appeal deadline and, further, provides a clear set of instructions about how such an appeal might be filed.

It is also clear that Mr. Luscombe has been aware of Cyre's unpaid wage claim for many months. A corporate determination was issued (and delivered to Luscombe) but never appealed. The present appeal is largely an *ex post facto* attempt to challenge findings that ought to have been challenged by way of an appeal of the corporate determination.

Mr. Luscombe does not deny that he was a director and officer during the relevant time frame and Cyre's unpaid wage claim as against Celestial Delights has now been finally determined. As previously noted, Luscombe does not dispute his status as a corporate officer or director. His appeal documents do not raise any of the available statutory defences.

In short, there is absolutely no explanation before me that would justify hearing this late appeal on its merits and, in any event, if the appeal were to go forward on its merits it would, in all likelihood, not succeed.

In light of the foregoing circumstances, the appellant's application for an extension of the appeal period is **refused**.

ORDER

Pursuant to section 114(1)(a) of the *Act*, I order that this appeal be **dismissed**.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal