

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 -

Mr. Alexander Donetz Sr., a Director of Par Cedar Industries Ltd.
("Donetz Sr.")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR : David Stevenson

FILE NO.: 98/595

DATE OF DECISION: December 29, 1998

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "Act") by Mr. Alexander Donetz Sr., a Director of Par Cedar Industries Ltd. ("Donetz Sr.") of a Determination which was issued on August 21, 1998 by a delegate of the Director of Employment Standards (the "Director"). In that Determination the Director found Donetz Sr. had contravened Sections 17(1), 20 and 58(a) of the *Act* in respect of the employment of Joseph G. F. Rioux ("Rioux") ordered Donetz Sr. to cease contravening the *Act* and, pursuant to Section 96(1) of the *Act*, ordered Donetz Sr. to pay an amount of \$4249.68.

Donetz Sr., through Counsel acting on his behalf, has appealed the Determination. The Tribunal has reviewed the appeal and has decided an oral hearing is not required in this case.

ISSUES TO BE DECIDED

The issue raised by the appeal is whether Donetz Sr. has met the burden of persuading the Tribunal that the Determination ought to be varied or cancelled because the Director erred in fact or in law.

FACTS

On January 13, 1987, Rioux filed a complaint with the Employment Standards Branch claiming he had been employed as a security guard by Par Cedar Industries Ltd. ("Par Cedar") and had not received all wages payable to him. Following an investigation, the Director concluded Rioux was entitled to wages from Par Cedar and on February 24, 1987 issued an Order to Pay against them. On April 1, 1987, this Order was converted to a Certificate, naming Par Cedar as the defendant, and was filed in the Court on April 6, 1987. The Director was unable to find any assets of Par Cedar against which to enforce the Order or the Certificate.

Approximately 2 ½ years later, on October 23, 1989, the Director caused a search of Par Cedar to be made in the Corporate Registry. On October 30, 1989 the Director received information from the Registry indicating Mr. Alexander Donetz Jr. (Donetz Jr.) was a director of Par Cedar and on the same day issued an Order to Pay against him. A Certificate naming Donetz Jr. as the defendant was filed in the Court on May 2, 1990. Again, the Director was unable to find any assets against which to enforce the Order or the Certificate. On May 29, 1997, Donetz Jr. filed an assignment in bankruptcy.

In July, 1998, for some reason which is left unexplained in either the Determination or the material on file (although there is a vague reference to the "tenacity of the complainant"), the Director caused another Corporate Registry search of Par Cedar to be made. This search listed Donetz Sr. as a director of the company. The Director concluded, following receipt of that information, that Donetz Sr. was a director of the company at all material times relative to the complaint of Rioux and was, under the *Act*, personally liable for the amount of the Order issued against Par Cedar on February 24, 1987. The Determination under appeal was issued.

The submission of the Director in reply to the appeal attaches a document which is said to be the information received by the Director on October 30, 1989. The document shows Par Cedar was dissolved/removed from the Registry on June 23, 1989 for "failure to file". One of the lines in the document also states:

Last Annual Report Date: 01 FEB., 1986 Number of Principals: 2

Counsel for the appellant says in his appeal submission that Donetz Sr. believes he may have resigned as a director and officer of Par Cedar and delivered his resignation in writing to the registered and records office of the company. There are two key issues of fact that are raised by that statement. The first is whether Donetz Sr. did resign and, if he did, the second is whether he did so before the liability of Par Cedar to Rioux was incurred. It is unlikely either of those facts can be established one way or the other because any legal requirement to preserve the records that might resolve those issues of fact ended long ago.

ANALYSIS

In the appeal submission, Counsel for Donetz Sr. says the Determination is wrong in law and in fact. He says the Determination is wrong in law because the complaint was not filed within the time limit established in Section 74(3) of the *Act* and because Donetz Sr. was not the "employer" of Rioux - the employer was Par Cedar - and could not personally be found to have contravened Sections 17(1), 20 and 58 of the *Act*. He says it is wrong in fact because Donetz Sr. had ceased to be a director of Par Cedar at the time the Determination was made and, as indicated above, might have ceased to be a Director of Par Cedar at the time Par Cedar became liable to Rioux for unpaid wages.

As a final comment in the appeal, Counsel for Donetz Sr. says:

The delay in this determination clearly has impacted against Alexander Donetz Sr.'s ability to effect a proper defense. Further, in view of the time passed in respect to the matter, the time frame for filing the appeal to the Employment Standards Tribunal is extremely short. The only documents available to Alexander Donetz Sr. may have been destroyed and finding them now is difficult if not impossible. There is clear prejudice to Alexander Donetz Sr. by the time frame involved in making this determination in the limited time frame for filing the appeal.

In reply to the appeal, the Director says the original complaint, upon which the Determination is based, was filed in accordance with the time requirements of the *Act*; the Corporate Registry records show Donetz Sr. was a director of Par Cedar "at the time in question" and therefore Section 96(1) applies; and the absence of Donetz Sr.'s name in the document provided by the Corporate Registry was an "oversight" by the Registrar of Companies office and represents a "technical irregularity" which, under Section 123 of the *Act*, does not invalidate the Determination.

The Director also submitted that a Certificate filed in Court is valid for 10 years following the date of registry, and as the Determination, which in effect was an addition to the "Director's Certificate" of October 30, 1989, was issued within that 10 year time frame it should also be effective.

Counsel for Donetz Sr. filed a supplemental submission in reply to the above position, noting that the Certificate against Par Cedar was no longer valid at the time the Determination was issued and that the October 30, 1989 Certificate was directed solely at Donetz Jr. and submitting it could not be extended to Donetz Sr.

I do not intend to respond in detail to the arguments of the parties because, for the reasons which follow, I have concluded the determination must be cancelled. This result is dictated by application of the principles of natural justice and reasonableness implicit in the *Act*, by the statutory requirements of fairness and efficiency and by common sense.

The original complaint relating to this appeal was filed by Rioux on January 13, 1987. Eleven years, seven months and 8 days passed between the filing of the complaint and the Determination under appeal. The Director attributes this delay to an "oversight" during an initial search of the Corporate Registry. This is the only explanation given for the lapse of time that has occurred in this case.

The Director suggests this "oversight" is attributable solely to the Corporate Registry. I have two responses to that suggestion. First, I do not accept it. The search results received by the Director in October, 1989 clearly indicate on its face that there are two principals in the company. Even if I accept that Donetz Sr. did not appear in the document received by the Director, there is no attempt to explain, and therefore no explanation, why the apparent omission from the document of the name and address of one of two principals of the company was not pursued. Second, even if I did accept it, it would still not justify a delay of more than eleven and one-half years between the date of the complaint and the Determination.

The prejudice to Donetz Sr. is significant. A fair hearing is virtually impossible. Documents that might have shown whether he resigned as a director of Par Cedar before Rioux earned the wages to which he was entitled have likely been destroyed.

The delay between the date of the complaint and the Determination is without precedent. In a case involving considerably less delay than is present in this case, the Court of Appeal described the delay by the Medical Services Commission in investigating and hearing an issue before them as "so egregious as to amount to an abuse of power" (see *Ratzlaff v. Province of British Columbia*, (1996) 17 B.C.L.R. (3d) 336). I echo those words in this case and find the circumstances amount to an abuse of power.

The prejudice to Donetz Sr. and the abuse of power is not outweighed in this case by the rights of the complainant under the *Act*. Rather, it is an application of the "fundamental principles of justice" that must determine this appeal.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated August 21, 1998 be cancelled.

David Stevenson
Adjudicator
Employment Standards Tribunal