

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the
Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

Allen Ledger
("Ledger")

-and-

Kenneth Cowdery
("Cowdery")

-of a Decision issued by-

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 99/173

DATE OF DECISION: June 14th, 1999

DECISION

OVERVIEW

This is an application filed on behalf of Allen Ledger (“Ledger”) and Kenneth Cowdery (“Cowdery”) pursuant to section 116 of the *Employment Standards Act* (the “Act”) for reconsideration of an adjudicator’s decision issued on February 19th, 1999 under BCEST Decision No. 061/99.

FACTUAL BACKGROUND

On May 19th, 1998 David Lequesne (“Lequesne”) filed an unpaid wage (including termination pay) complaint with the Employment Standards Branch. This complaint was investigated by a delegate of the Director of Employment Standards and a Determination was issued, in the amount of \$2,217.26, in Lequesne’s favour on December 4th, 1998 (the “Determination”). The delegate issued the Determination against “Gary Fitzpatrick” and “Allan [sic] Ledger/Ken Cowery [sic] dba Westwind Taxi Company”; the delegate declared that these two separate parties were “associated firms” as defined by section 95 of the *Act*. The delegate also concluded that Gary Fitzpatrick was a “successor employer” (see section 97 of the *Act*) to Allan Ledger/Ken Cowery. I might add that, in my view, the Determination does not adequately set out a proper (or indeed, any) foundation for either of the section 95 or 97 declarations.

The delegate held that “Westwind Taxi Company” owed Lequesne \$1,806.30 in unpaid wages and that Fitzpatrick owed Lequesne \$410.96 in unpaid wages, however, by virtue of the section 95 declaration, both Fitzpatrick and Westwind Taxi Company were said to be “mutually [sic] and severally liable for payment”.

On December 30th, 1998, Gary Fitzpatrick filed an appeal of the Determination with the Tribunal; although not as clearly delineated as they might be, so far as I can gather, Fitzpatrick’s grounds of appeal included, *inter alia*:

- an assertion that Lequesne’s initial complaint was initiated in “bad faith”;
- Lequesne was not an employee but, rather, an independent contractor;
and
- Lequesne was not entitled to termination pay under section 63 because he was an “on-call employee” [see section 65(1)(a) of the *Act*].

Gary Fitzpatrick, in his appeal documents, did not challenge either the section 95 or the section 97 rulings. So far as I can gather, although served with the Determination, Allen Ledger/Ken Cowdery never filed any documents on their own behalf appealing the Determination nor did Gary Fitzpatrick purport to act as their agent on the appeal.

The appeal was decided on the basis of the written submissions filed with the Tribunal by Gary Fitzpatrick and Lequesne. The adjudicator, by way of her February 19th, 1999 decision (*i.e.*, the decision now under reconsideration), confirmed the Determination. The adjudicator noted at the outset of her decision that “this is an appeal by Gary Fitzpatrick and Allen [sic] Ledger/Ken Cowery [sic] dba Westwind Taxi Company” even though, as I have previously noted, I do not have any material before showing that Ledger, Cowdery or Westwind ever filed an appeal of the Determination.

THE REQUEST FOR RECONSIDERATION

On March 5th, 1999, the solicitors for Westwind Cabs Ltd. (“Westwind”), Allen Ledger and Kenneth Cowdery, wrote to the Tribunal asserting the following:

- that Westwind was, in fact, a corporation and not a partnership between Ledger and Cowdery;
- that Ledger and Cowdery are directors and shareholders in Westwind but that Gary Fitzpatrick was not an officer or director in that firm and had no authority to act on behalf of Westwind;
- that Ledger and Cowdery “were denied a proper opportunity to be heard and to present evidence”; and
- that, in any event, that Lequesne was incorrectly determined to be an employee.

Ledger and Cowdery’s solicitors requested that the Tribunal suspend any enforcement proceedings with respect to the Determination pending further legal action.

On March 10th, 1999, the Tribunal Registrar wrote to the solicitors and advised them regarding the provisions of section 116 of the *Act*--the reconsideration provision--and asked for further submissions with respect to the suspension request.

On March 19th, 1999 the solicitors for Ledger and Cowdery filed a formal written request for reconsideration. The Director of Employment Standards and Lequesne. have both filed written submissions with the Tribunal in response to the reconsideration request.

ANALYSIS

While a number of issues have been raised in the reconsideration request, I find that I need only address two particular points.

First, the delegate clearly proceeded on the assumption that Ledger and Cowdery were partners and thus, by reason of the joint and several liability provisions contained in the *Partnership Act*, both would be personally liable for Lequesne's unpaid wages as set out in the Determination. However, there is no evidence before me of any such partnership and, as noted earlier, this particular issue was not examined in a meaningful way in the Determination (it would appear that the delegate simply--and it appears erroneously--proceeded on the assumption that there was a partnership in place between Ledger and Cowdery). The only evidence before me shows that Westwind Cabs Ltd. is a corporation, incorporated on April 26th, 1989. While officers and directors may be held personally liable for up to 2 months' unpaid wages pursuant to section 96 of the *Act*, no such personal liability was imposed on Ledger and Cowdery in this case. A determination may only be issued against a person who has contravened the *Act* [see section 79(3)]--"Allan Ledger/Ken Cowery dba Westwind Taxi Company" could not have contravened the *Act* since no such "person" exists. It may well be that Westwind Cabs Ltd. may be appropriately named in a future determination, or even perhaps named by way of a variance (see section 86) to the Determination now before me, but as matters now stand, all references in the Determination to "Allan Ledger/Ken Cowery dba Westwind Taxi Company" must be deleted as there is no such legal entity.

Second, one could certainly argue that the foregoing issue ought to have been addressed at the original appeal. As I noted above, I am not satisfied that "Allan Ledger/Ken Cowery dba Westwind Taxi Company", or anyone purporting to act on that entity's behalf, ever filed an appeal. However, the evidence before me also shows that by reason of an incorrect address set out in the Determination--the street address was correct but not the named city; an incorrect postal code was also listed--the Determination was not received by Ledger and Cowdery in sufficient time for them to file a timely appeal.

ORDER

Pursuant to section 116(2)(b) of the *Act*, I have the authority to vary the Tribunal decision under review. In my view, that is the appropriate disposition in this case. Since there is no such legal entity as "Allan Ledger/Ken Cowery dba Westwind Taxi Company", that entity's liability, as set out in the Determination, ought to be cancelled outright. Further, it follows that since there is no such entity, there cannot be a proper finding of successorship (section 97) or association (section 95) between that entity and Gary Fitzpatrick and thus, all that remains of the Determination is the unpaid wage liability of Gary Fitzpatrick to Lequesne (*i.e.*, \$410.96). The Director of Employment Standards, of course, is free (after conducting the appropriate investigation) to issue a new Determination, or to vary the current Determination under section 86, in order that Westwind Cabs Ltd.'s liability, if any, to Lequesne on account of unpaid wages may be formalized.

As noted above, the adjudicator confirmed the Determination as issued. I order that the adjudicator's decision be varied and the following "Order" substituted for that which appears in the decision:

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination dated December 4th, 1998 be varied such that Gary Fitzpatrick's unpaid wage liability to Lequesne be fixed at \$410.96 together with interest to be calculated in accordance with section 88 of the *Act*. The Determination is further varied by deleting all references to "Allan Ledger/Ken Cowery dba Westwind Taxi Company" and by deleting all findings set out in the Determination with respect to that latter entity and with respect to sections 95 and 97 of the *Act*.

The application to vary the decision of the adjudicator in this matter is upheld as set out above.

I understand that the Director of Employment Standards is currently holding certain monies as security pending the outcome of these proceedings. Those funds are to be released to Westwind Cabs Ltd. (or its nominee) forthwith.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal