

Appeals

- by -

Cackleberries Entertainment Inc. (“Cackleberries”)

- and -

Eronne Ward a Director or Officer of Cackleberries Entertainment Inc.  
 (“Ward”)

– of Determinations 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 (as amended)

and

Applications for suspension

- by –

Cackleberries Entertainment Inc. (“Cackleberries”)

- and -

Eronne Ward a Director or Officer of Cackleberries Entertainment Inc.  
 (“Ward”)

– of Determinations issued by –

The Director of Employment Standards  
 (the “Director”)

Pursuant to section 113 of the  
*Employment Standards Act* R.S.B.C. 1996, C. 113 (as amended)

**TRIBUNAL MEMBER:** Kenneth Wm. Thornicroft

**FILE Nos.:** 2010A/154, 2010A/155,  
2010A/156, & 2010A/157

**DATE OF DECISION:** January 6, 2011

## DECISION

### SUBMISSIONS

Eronne Ward	on behalf of Cackleberries Entertainment Inc. and on her own behalf
Inbal Tal	on her own behalf
Karry Kainth	on behalf of the Director of Employment Standards

### INTRODUCTION

1. On March 23, 2010, Inbal Tal (“Tal”) filed an unpaid wage complaint against Cackleberries Entertainment Inc. (“Cackleberries”) pursuant to section 74 of the *Employment Standards Act* (the “*Act*”). This complaint was investigated by a delegate of the Director of Employment Standards (the “delegate”) who ultimately issued two determinations, both dated September 24, 2010, each in the amount of \$2,487.42 against, respectively, Cackleberries (the “Corporate Determination”) and Ms. Ward personally (the “Section 96 Determination”). The two determinations each include a wage payment order in favour of Ms. Tal (\$1,487.42 including interest) and two separate \$500 monetary penalties (see *Act*, section 98).
2. On October 29, 2010, Ms. Ward appealed both the Corporate Determination and the Section 96 Determination (Tribunal File Nos. 2010A/154 and 2010A/156). She asks the Tribunal to vary both determinations by “delet[ing] the monetary penalties” on the ground that the delegate failed to observe the principles of natural justice in making the determinations (section 112(1)(b)). However, as I read the appeal documents it appears that the central thrust of the appeal is that the delegate erred in law and the appellants are seeking a broader remedy than simply the cancellation of the two administrative penalties. There is nothing in the material before me that speaks to a “natural justice” issue. Accordingly, and consistent with the Tribunal’s decision in *Triple S Transmission Inc.* (BC EST # D141/03), I propose to address the arguments advanced as alleged “errors of law” (section 112(1)(a)).
3. I also have before me an application, made pursuant to section 113 of the *Act*, to suspend both determinations pending the adjudication of this matter (Tribunal File Nos. 2010A/155 and 2010A/157). However, since I am addressing the merits of the two appeals in these reasons, I do not find it necessary to address the section 113 applications.
4. I am adjudicating these two appeals based on the parties’ written submissions (see *Act*, section 103 and *Administrative Tribunals Act*, section 36) and I have before me submissions from all parties (including the delegate) as well as the section 112(5) record.

### BACKGROUND FACTS

5. Accordingly to the information set out in the delegate’s “Reasons for the Determination” appended to the Corporate Determination (the “delegate’s reasons”), Cackleberries operates a children’s website and originally engaged Ms. Tal as a programmer. Ms. Tal’s first engagement was as a co-op student placement through Langara College from May to August 2008. She was initially paid an hourly rate of \$15 and that was raised to \$20 during the last month of her placement. Toward the end of the placement, Ms. Ward offered Ms. Tal a continuing position and she continued working for Cackleberries until mid-December 2009 when she quit

since she was advised that she was not going to be paid because the company was facing severe financial problems.

6. When Ms. Tal transitioned from a co-op student to an ongoing position, Cackleberries treated her as an independent contractor and she invoiced Cackleberries at a \$20 hourly rate. In August 2009, at Ms. Tal's request, her status was changed to an "employee" although the nature of her duties and relationship with Cackleberries does not appear to have changed.
7. The delegate determined that Ms. Tal was an "employee" as defined in section 1 of the *Act* as and from April 21, 2008, (when her co-op position commenced) until she left the firm on December 16, 2009. The delegate awarded Ms. Tal \$660 in unpaid wages for her final pay period (December 1 to 16, 2009 – 33 hours x \$20 per hour) and this figure is not disputed by the appellants. The delegate also awarded Ms. Tal 2 weeks' wages (\$462.40 based on her average weekly earnings during her last 8 weeks of employment) as compensation for length of service payable under section 63 of the *Act* given her 20-month service dating from April 21, 2008, to December 16, 2009, and \$338.66 vacation pay. The total amount payable to Ms. Tal, including section 88 interest, is \$1,487.42.
8. Although, Ms. Tal advanced a claim for statutory holiday pay, this claim was dismissed since the delegate determined that Ms. Tal was a "high technology professional" as defined in section 37.8(1) of the *Employment Standards Regulation* and thus excluded from Part 5 of the *Act* (the statutory holiday provisions). This finding has not been challenged.
9. The delegate levied two separate \$500 administrative penalties based on Cackleberries' failure to pay wages (section 18) and to produce payroll records (*Employment Standards Regulation*, section 46). Thus, the total amount payable under the Corporate Determination is \$2,487.42. In light of Cackleberries' admitted financial difficulties, the delegate issued a concurrent determination against Ms. Ward personally under the section 96 "director/officer" liability provision. The Section 96 Determination includes the unpaid wages payable under the Corporate Determination and the two \$500 monetary penalties (see *Act*, section 98(2)) and thus is also in the total amount of \$2,487.42.

## THE APPEALS

10. Ms. Ward filed a single Appeal Form and a second submission regarding both the Corporate Determination and the Section 96 Determination. As noted above, the stated ground of appeal is an alleged breach of the principles of natural justice (section 112(1)(b)), however, the thrust of the appellants' arguments concern alleged errors of law (section 112(1)(a)). The Appeal Form seems to address only the correctness of the administrative penalties, however, in the 4 ½ page submission appended to the appeal form Ms. Ward advanced the following additional arguments:
  - "The outstanding issues are whether or not she [Ms. Tal] was an employee and in conjunction with the length of service" (page 1);
  - Ms. Ward queries how Ms. Tal could be characterized as an employee under the *Act* when, apparently, the Canada Revenue Agency was prepared to accept that Ms. Tal was an independent contractor (page 2);
  - "In closing I'd like to state that the entire amount owing to Inbal [Tal], other than the penalties, is really a small payment in lieu of the contribution she's made. The only issue is that there is no money. Cackleberries has none and I have none. As soon as any source of funding has been

found, she will be paid, with or without the government's involvement. Until that happens there is no way to pay her." (page 4);

- On May 31<sup>st</sup> [2008] the Delegate sent a demand for payroll records for the period April 21<sup>st</sup> 2008 to December 16<sup>th</sup> 2009. I supplied all the records I have, not only to the Delegate but also to the employee. Inbal became an employee when we opened our office on August 1<sup>st</sup>, 2009...If the issue is that I did not supply payroll records from April 8, 2008 to July 31, 2009, that is because there weren't any. Cackleberries had no employees until August 1, 2009. I cannot supply something that does not exist. I did supply a listing of her [Tal's] contract earnings." (pages 4 – 5)

11. The appellants' latter point regarding the production of payroll records is the sole matter addressed in Ms. Ward's final submission dated December 9, 2010, where she states: "I continue to insist that I did provide ALL the records I had. It was just one page. Perhaps [the delegate] didn't realize that was all there was."

## FINDINGS AND ANALYSIS

12. The first issue to be addressed is whether the delegate correctly determined that Ms. Tal was a Cackleberries employee during the period April 21, 2008 to July 31, 2009. As is noted above, the appellants concede that Ms. Tal was an employee as of August 1, 2009. There is nothing in the material before me to indicate that there was any material change in Ms. Tal's duties and responsibilities as of August 1, 2009. The delegate, at pages R6 to R12 of his reasons appended to the Corporate Determination, set out the governing legal principles and applied those principles to the facts at hand. I see no error in his conclusion that Ms. Tal was an employee throughout her association with Cackleberries (and not just from August 1, 2009 onwards). Among other things, Ms. Tal was providing services to Cackleberries, using their equipment, reporting to and being directed by its supervisors, and was paid wages for her efforts. The fact that Cackleberries, prior to August 1, 2009, treated Ms. Tal as an independent contractor has no bearing on the matter.
13. Further, there is nothing in the record before me indicating that this issue was adjudicated by the Canada Revenue Agency ("CRA"). Rather, at most, it would appear that Cackleberries declared, for income tax purposes, that Ms. Tal was a contractor and CRA may have simply taken that declaration at face value. The principle of issue estoppel does not apply here. The delegate was obliged to interpret and apply the definition of "employee" found in the *Act* and, in my judgment, he correctly determined that Ms. Tal was an employee throughout her entire tenure with Cackleberries.
14. Since Ms. Tal was employed for approximately 20 months, she was entitled to 2 weeks' wages as compensation for length of service (section 63(2)(a)). The appellants do not contest the delegate's calculation regarding Ms. Tal's weekly wage based on average earnings during the 8-week period prior to the end of her employment (section 63(4)). Similarly, in light of this finding, it follows that the delegate's vacation pay and section 88 interest calculations must stand.
15. Section 96 of the *Act* states that directors and officers are personally liable for unpaid wages up to 2 months per employee. Ms. Ward does not challenge the delegate's finding that she was a Cackleberries director and officer when Ms. Tal's unpaid wage claim crystallized. The wages owed under the determinations are well within the 2-month threshold. Although it appears that Cackleberries is in severe financial difficulty – and may even be technically insolvent – there does not appear to have been any formal insolvency proceedings commenced and thus none of the section 96(2) defences is applicable. Thus, I find that the delegate correctly determined that Ms. Ward was personally liable for Ms. Tal's entire unpaid wage claim.

16. I now turn to the two penalties. The first penalty was levied based on a failure to pay wages in accordance with section 18 of the *Act* and it is clear that Cackleberries contravened this provision – indeed, Cackleberries concedes as much. Ms. Ward is equally liable for this penalty pursuant to section 98(2) of the *Act*.
17. The second penalty, issued under section 46 of the *Employment Standards Regulation*, is more problematic. Section 46(1) provides as follows:
46. (1) A person who is required under section 85(1)(f) of the Act to produce or deliver records to the director must produce or deliver the records as and when required.
18. On May 31, 2010, the delegate issued a section 85 demand for payroll records relating to Ms. Tal for the period April 21, 2008 to December 16, 2009. The documents were to be delivered to the delegate by no later than June 15, 2010. As is noted above, Ms. Ward says that she supplied the only records that she had in her possession – namely, 1 1/2 pages summarizing Ms. Tal’s compensation as and from April 21, 2008. The delegate, on the other hand, in his submission dated November 8, 2010 states: “No records were supplied to me; not from April 21, 2008 to July 31, 2009 or from August 01, 2009 to December 16, 2009...Also, I was not supplied with a listing of Ms. Tal’s contract earnings.”
19. Ms. Ward does not say when she provided the 1 1/2 pages of payroll records to the delegate. She has not provided a copy of any covering letter that was sent to the delegate along with the records. The section 112(5) record contains absolutely no payroll information of any kind from Ms. Ward to the delegate. There are only two written communications in the record from Ms. Ward to the delegate (an e-mail dated July 8, 2010, and a later 1-page letter dated August 6, 2010). Neither communication contains any reference to any payroll records and no records are attached to either communication.
20. On balance, therefore, based on the material before me, I cannot conclude that Ms. Ward complied with the section 85 demand and, accordingly, the section 46 penalty appears to have been properly levied. I might add, simply for the sake of completeness, that the payroll records that Ms. Ward says she supplied do not include section 27 wage statements and, in any event, are otherwise woefully deficient. A separate penalty could have been imposed for a section 27 contravention.
21. To summarize, I find that there is no demonstrable error regarding either the determination of Ms. Tal’s unpaid wage claim or in regard to the two administrative penalties. I see no reason to vary or cancel either the Corporate Determination or the Section 96 Determination.

## ORDER

22. Pursuant to section 115 of the *Act*, I confirm both the Corporate Determination and the Section 96 Determination, each in the amount of \$2,487.42, together with whatever further interest that may have accrued under section 88 of the *Act* since the date of issuance.

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