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 -

Top Finalist Services Inc. and
Golden Packages Service Limited, Associated Corporations
("the "Employers")

- and -

Nanda K. Duraisami a Director or Officer
Of Top Finalist Services Inc. and
Golden Packages Service Limited, Associated Corporations

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE No: 1999/534 and 1999/535

DATE OF HEARING: November 26, 1999

DATE OF DECISION: January 13, 2000

DECISION

APPEARANCES:

Mr. Nanda Duraisami	on behalf of the Employers
Mr. Dillon Sherif	
Ms. Anita Zhou	on behalf of herself

OVERVIEW

This is an appeal by the Employers and Nanda Duraisami pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against two Determination of the Director of Employment Standards (the "Director") issued on August 10, 1999. The Determination against the Employers found, first, that the Employers were "associated corporations" for the purposes of the *Act* and, second, that a number of complainant employees (the "Employees") were owed wages for their final pay period (the "Corporate Determination") and awarded them $5,979.79. The Determination against Mr. Duraisami ("Duraisami") found that he was a director or officer of the Employers at the time wages were earned or should have been paid and held him liable as a director and officer of the Employers for that amount.

FACTS AND ANALYSIS

The appellants have the burden to show that the Determination is wrong. Ms. Anita Zhou ("Zhou") participated by conference call from California. Initially, the Employer challenged Zhou's participation in the hearing on the ground that she was not who she said she was. Following questioning of her, he agreed that she was who she said she was. At the hearing Duraisami and Dillon testified. Having heard and considered the evidence presented at the hearing at the Tribunal's offices on November 26, 1999, I am of the view that the appeal cannot succeed.

The facts are quite straight forward. The Employers were in the business of selling lottery tickets by telephone. The Employees were employed as tele-marketers. The delegate found that they were last paid on October 31, 1997. The Employees alleged that they reported to work on November 13, 1999 and were told--by the police--to go home. They did. It appears that the Employers' business was closed as the result of an investigation by Director of Trade Practices and others and that the Employers had to refund customers substantial amounts of money. In any event, subsequently, the Employees filed complaints with the Employment Standards Branch that they had not been paid for their last pay period.

The Employers and Duraisami questioned the Determinations as follows:

1) the Employees were not entitled to the wages because the work for which they were supposed to be paid was "illegal";

2) an amount of $3,461.48 had in fact been paid to the Employees on November 12, 1997 through the Employers' payroll company;

3) the police stopped the Employees from entering the work place and, in the result, they are not entitled to the two hour minimum pay; and,

4) the companies are not associated.

I propose to deal with the issues in that order.

First, there was nothing before me to support the argument that the work was "illegal" such that the Employees were not entitled to be paid for their work. I do not agree with the appellants that the situation is akin to one where a thief is claiming wages for his or her participation in theft. I understood from Duraisami's and Dillon's testimony at the hearing that the Employers' business was closed by the authorities because of concerns over the manner in which it was operated. Duraisami explained that the tele-marketers broke "tele-marketing rules", did not sell "properly", and "guaranteed winnings". That may be true. I agree with the delegate that the Employees worked in a business established and operated by the Employers. The Employers had the authority to properly train, supervise and discipline the Employees. There was no issue that the Employees worked--performing labour or services, selling lottery tickets--at the Employers' place of business up to and including--at least--November 12. The Employers are responsible for paying the wages for the time they are "required to be at the work place" (Section 34(1)(b)). In my view, the Employees are entitled to be paid. I dismiss this ground of appeal.

Duraisami explained--in fairly general terms--that the Employees were part-time employees who did not have any definite schedule, but were allowed to come and go as they wanted. When they came to work, they were paid an hourly rate. Neither Duraisami nor the Employers produced any evidence with respect to hours worked that was at variance with those set out in the Determinations.

Second, Duraisami argued that an amount of $3,461.48 had in fact been paid to the Employees on November 12, 1997 through the Employers' payroll company, ADP Canada. The Employers relied upon a bank statement issued to Top Finalist Services Ltd. which showed a withdrawal or transfer to ADP on November 12, 1997 in the amount of $3,461.48. The Employers argued that the Employees had, in fact, therefore, been paid that amount which, then, should be deducted from the amount owing under the Determinations. I disagree. From the correspondence attached to the appeal, it appears to me that the delegate conducted a thorough investigation, allowing the appellants a full opportunity to respond, either on their own or through counsel. The delegate requested documentation through counsel (at that time) to confirm payment from ADP Canada to the Employees. As the appellants did not respond to that request, the delegate did not, in my view, err in failing to deduct the amount. Moreover, on the assumption that I was willing to entertain the argument, I note that the appellants did not produce any evidence at the hearing to show that the Employees were actually paid. The appellants could, for example, have had a summons issued to compel ADP Canada to appear and to produce records to that effect. Zhou testified that she did not get paid for the November pay period. I dismiss this ground of appeal.

Third, the Employers argue that the Employees did not report for work and are, therefore, not entitled to the two hour minimum pay for November 13, 1997. Duraisami testified that the Employees did not work a set schedule. Zhou said she attended the work place on November 13 and was told by Duraisami to go home. He denied that. In any event, he also denied that Employees generally reported to work on that day as found in the Determination. However, he did testify that he saw employees at the work place, including--some employees--running from the work place when it appeared that there was a police presence there. He did not say who he saw. In my view, given the burden to show that the delegate erred in making the Determinations is on the appellants, I do not accept that the employees named in the Determinations did not report for work as required by the Employers. There is nothing to show that the delegate was wrong in his conclusion that Employees did attend the work place for the purpose of working, *i.e.*, performing labour or services for the Employer. While I am somewhat sympathetic to the Employers' situation, the operation being closed by the authorities, Section 34(2)(b) provides that the employee (with certain exceptions which do not apply in the instant case) must be paid "for a minimum of 2 hours at the regular wage" if they report for work. The fact that they were prevented by the police from entering the work place does not, in my view, mean that they did not report for work. If the agreement between the employees and the Employers is that the employees are paid when they come to work at a time set by them and according to their schedule, and they attend work, I am prepared to accept that Section 34(2)(b) applies and the Employees are entitled to two hours' pay. I dismiss this ground of appeal.

Fourth, the Corporate Determination state:

> "Both company names have been used in the style of cause for this Determination based on the available evidence that the companies had common directors/officers, common office staff and payroll facilities, operated from the same physical location doing the same type of business and that wages were paid from whichever company had money in its account at the time."

Apart from stating that the Employers merely used one another to deal with cashflow problems, and that the Employees were employees of Top Finalist Services Ltd., the appellant did not address any of the issues under Section 95. In my view, given the burden on appeal, this is insufficient. Moreover, and in any event, I note as well, that the delegate did provide the appellants with an opportunity to address the issue of associated employers through their counsel. It does not appear that they availed themselves of the opportunity to respond. Accordingly, I dismiss this ground of appeal.

Finally, Duraisami did not address any of the issues under Section 96, *i.e.*, whether he was a director or officer at the material time or whether the liability was correctly calculated. There is nothing before me to conclude that the delegate was wrong when he found Duraisami liable as a director or officer. In the result, I dismiss his appeal.

In the result, both appeals are dismissed.

ORDER

Pursuant to Section 115 of the Act, I order that Determinations in this matter, dated August 10, 1999 be confirmed.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal