EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act

- by -

Rescan Environmental Services Ltd.
(“Rescan**”)**

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR:	John McConchie
FILE NO.:	96/491
DATE OF DECISION:	January 6, 1997

DECISION

OVERVIEW

This is an appeal by Rescan Environmental Services Ltd. pursuant to section 112 of the *Employment Standards Act* (the "*Act*") against Determination Number CDET 3562 issued by the Director of the Employment Standards Branch (the "Director") and dated August 7, 1996. The Determination found that Rescan had contravened Section 40 (2) of the Employment Standards *Act* (weekly overtime for employees not on flexible work schedule). The Determination required Rescan to pay the amount of $16,547.65.

Rescan has appealed the Determination alleging that the Director erred in applying the provisions of s. 80 of the new Employment Standards *Act* to the current dispute.

This matter has proceeded on the basis of the materials on file without the need for an oral hearing.

FACTS

Rescan is a company incorporated under the laws of British Columbia. The complainant, Janet Freeth ("Freeth"), was employed by Rescan as an Environmental Geologist from June 9, 1992 until her resignation effective July 14, 1995.

During that time, Freeth worked overtime hours for which she was not fully compensated. On her departure from Rescan, Freeth asked Rescan to pay her for overtime hours owing. Rescan calculated the amount and tendered to her an overtime payment based on the last 6 months of her employment. At the time it did so, the *Employment Standards Act*, S.B.C. 1980, c. 10 (the "old *Act*") limited the complainant's recovery of wages to those which became payable in the 6 months immediately preceding the date of her departure. Freeth refused to accept this money in full payment of her claim and so Rescan paid the sum of $1082.51 into trust with the Employment Standards Branch. Freeth did not file a complaint under the old *Act*. The matter remained unresolved.

The current *Employment Standards Act*, S.B.C. 1995, c. 38 (the "new *Act*") came into effect on November 1, 1995. On its face, Section 80 of the new *Act* permitted a claim to be made for wages owing in the past 24 months of employment. Freeth filed a complaint with the Employment Standards Branch on November 14, 1995 alleging that Rescan had breached the *Act* by failing to pay overtime which had accrued over the last 24 months of her employment with Rescan.

Although her complaint was brought under the new *Act*, the entire period of Freeth's employment was during the currency of the old *Act*. The issue between the parties is whether, as a matter of statutory interpretation, Freeth is limited in her claim for overtime wages to the 6 month period permitted under the old *Act*. If the temporal scope of the claim is 6 months, then Rescan has tendered sufficient funds to cover its liability during this period. If, instead, Freeth is entitled to

payment of overtime for the last 24 months of employment, then the parties agree that the additional gross sum to which she would be entitled is $14,643.50.

In other words, there is no dispute that certain overtime monies were earned by Freeth in the 24 month period and have not been paid. The company has tendered payment in full for its liabilities falling within the 6 month period. The sole dispute between the parties is whether amounts falling outside the 6 month period stipulated in the old *Act* can now be recovered by Freeth under the new *Act.*

On reviewing the matter, Mr. Ages, the delegate of the Director of Employment Standards, issued a Determination requiring Rescan to pay the sum of $16,547.65, which represents the amount in trust plus the agreed-upon sum for the balance of the two year period. He did so after reaching the conclusion that s. 80 of the current *Act* applied and permitted the complainant to claim for wages owing within the 24 month period immediately preceding the end of her employment.

Rescan has appealed the Determination and argues that the Director has made an error in law in holding that Rescan's liability to Freeth is governed by section 80 of the new *Act.* It says that the effect of the Determination is to apply the terms of the new *Act* retroactively to the events giving rise to the complaint since all of those events occurred during the life of the former *Act.* Freeth and the Director disagree and submit that the new *Act* is not being applied in a retrospective manner or, alternatively, if it is, then the new *Act* clearly requires such application.

THE STATUTORY PROVISIONS

This case requires a review of the provisions of both the old *Act* and the new *Act.* The following two provisions in the new *Act* are referred to several times in this adjudication:

> **Section 80.**
>
> The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning
>
> (a) in the case of a complaint, 24 months before the earlier of the date of the complaint or the termination of the employment, and
>
> (b) in any other case, 24 months before the director first told the employer of the investigation that resulted in the determination, plus interest on those wages.

Section 128 (3)

If, before the repeal of the former *Act*, no decision was made by the director, an authorized representative of the director or an officer on a complaint made under that *Act*, the complaint is to be treated for all purposes, including section 80 of this *Act*, as a complaint made under this *Act*.

ISSUES TO BE DECIDED

As I have stated, the issue in this case is whether Section 80 of the new *Act* should be construed so as to permit Freeth to seek recovery under the *Act* of wages earned but unpaid during the 24 month period preceding her departure from her employment.

ANALYSIS

The Arguments

The written submissions of the parties were well-presented and comprehensive. While I have read and considered all of the submissions before me, I will not attempt to recite them in their entirety. The following summary is intended to only briefly set out the principal arguments of the parties.

Rescan's Arguments

Counsel for Rescan argues that the Director erred in law in applying s. 80 of the new *Act* retroactively or retrospectively to Freeth's claim. There is a presumption against retroactivity or retrospectivity unless such a construction is expressly or by necessary implication required by the language of the Statute. Retrospective intent must be clearly intended. It must arise very clearly in the terms of the act or by necessary and distinct implication (see *Meurer v. McKenzie* [1978] 1 W.W.R. 114 at 116-7; and *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue* [1977] 1 S.C.R. 271 (SCC)). Further, there is a presumption that a new law must be construed so as to interfere as little as possible with vested rights. Unless the language is expressed to the contrary, changes in the law by the introduction of new statutory provisions are to be taken as intended to apply only to facts coming into existence after the new *Act* is proclaimed (*see Re Roden and the City of Toronto* (1898), 15 O.A.C. 13 at 14). Section 35 of the *Interpretation Act* RS 1979 c. 206 confirms that a new statute is not to be construed as affecting vested rights.

Here, submits counsel, there is nothing in the new *Act* which requires or permits the Director to apply s. 80 retroactively or retrospectively in this case. While section 128 (3) is a transitional provision, it does not apply here because Freeth did not file her claim under the old *Act*.

The impact of the Determination is to affect Rescan's vested rights. Rescan submits that there are several bases for this conclusion. Firstly, all relevant events had occurred by the time of the proclamation of the new *Act.* All legal consequences of those events had crystallized and rights and obligations were fixed. Rescan tendered to Freeth an amount which represented its entire liability (and more) under the old *Act* but she refused it. The Determination which came later had the effect of fixing different legal consequences to the events based on the new *Act.* These consequences could be felt by both the company and its corporate directors, who both would have good cause to be entitled to rely on vested rights. Secondly, on the jurisprudence, the 6 month limitation of claims under the old *Act* was a substantive right accruing to Rescan [see *Angus v. Hart et al* (1988) 92 D.L.R. (4th) 193 at 200; and *MacInnis v. Saskatchewan (Department of Labour Standards)* (1996) 44 C.P.C. (3d) 381]. Thirdly, to permit recovery of more than 6 months wages in these circumstances would constitute a penalty, forfeiture or punishment. Both the company and its corporate directors could potentially be found liable for the commission of an offence under the new *Act.* Our law does not permit retroactive or retrospective application in view of all of these potential consequences and effects.

Freeth's Arguments

Counsel for Freeth submits that there is nothing retroactive or retrospective about the Determination. Alternatively, if there is, then the new *Act* permits retroactive or retrospective application by its clear terms or by necessary implication. The new Act does not change the rights and obligations of the parties in respect of the subject matter of the complaint, namely, the requirement for the payment of overtime. The cases cited by Rescan are all distinguishable. Here, by its own admission, Rescan failed to pay overtime wages to which Freeth was entitled. Rescan can not claim a "vested right" to protection from its own unlawful behaviour. The limitation period in this case is not a substantive right for Rescan – in the *MacInnis* decision, *supra*, the new statute sought to limit an employee's right to recovery. That was interference with a vested right - the instant case represents the reverse situation.

As a matter of statutory interpretation, submits counsel, Rescan's interpretation of the new *Act* makes no sense. Under s. 128 (3), if Freeth had filed an unresolved claim prior to November 1, 1995, she would be entitled to claim for the full 24 months. Rescan says that, since she filed 14 days later, she is limited to 6 months. Section 128 (3) is at least an implicit legislative recognition that the scope of section 80 is 24 months under the new *Act*. Discussion regarding the liability of corporate officers is a red herring as there is no issue of corporate liability in this case. In any event, submits counsel for Freeth, the Determination is not in error and should be upheld.

Director's Arguments

Counsel for the Director submits that this case does not require any decisions respecting transitional matters because, firstly, the circumstances do not fall with s. 128 of the new *Act* and, secondly, the case does not involve a question about the retrospective application of *entitlements.* Freeth was entitled to the overtime wages prior to the enactment of the new *Act* over the entire

period. Nothing in the new *Act* changed the substantive obligations of the parties. The new *Act* simply extended the Director's ability to collect unpaid wages from 6 months to 24 months.

DECISION

It is my judgment that the Determination must be upheld. My reasons for this conclusion are as follows.

The issues in this case revolve around the retroactivity or retrospectivity of the new *Act*. The concepts are somewhat different. A "retroactive" statute is one which changes the law as of a time prior to its enactment; a "retrospective" statute is one which attaches new consequences to an event that occurred prior to its enactment: Driedger, *Statutes: Retroactive Retrospective Reflections* (1978), 56 Can. Bar. Rev. 264.

It is apparent that this case does not involve any question of *retroactivity*. The new *Act* makes no change in the law respecting the payment of overtime wages. Rescan's statutory obligations to Freeth regarding her overtime work would have been no different under the new *Act* than under the old *Act*.

It is equally apparent that this case does involve an issue of *retrospectivity*. On its face, s. 80 of the new *Act* permits a claimant to use the provisions of the *Act* to recover unpaid wages which became payable in the in the period beginning 24 months before termination. Under the old *Act*, that same period was only 6 months. Section 80 does not deal expressly with the issue of *retrospectivity* – it does not distinguish between wages which became payable before or after the introduction of the new *Act*. The critical issue in this case is whether the new *Act* provides that claims filed under s. 80 may reach back 24 months even if part or all of this period is prior to November 1, 1995.

The formulations of law -- as distinct from their application -- were not in dispute between the parties in this case. The initial question, therefore, is whether Rescan had a "vested" or "accrued" right prior to November 1, 1995 which would trigger the statutory presumptions in favour of its preservation. Clearly, prior to that date, the old *Act* permitted an employee to claim only 6 months unpaid wages no matter what was the temporal scale of the employer's breach of the *Act*. As Rescan argued, it and other employers were entitled to arrange their affairs in accordance with their obligations under the *Act* and the limitations placed on those obligations by statute. I agree with Rescan that this is not a trivial right. It takes on additional significance when others, such as the directors and officers, may come to rely as well upon that statutory entitlement. There are good policy reasons for the presumptions against interference with such rights, whether they are called "vested" rights or whether they are given some other name. Apart from the obvious issues of fairness, unwarranted interference with accrued rights can affect the willingness of the parties to support and foster laws which are intended to provide fair regulation of conduct in the workplace.

A review of the cases referred to by the parties, among others, indicates that there is ongoing debate about the usefulness of the terms "vested right" and "accrued right". In one formulation, the *MacInnis* decision, supra, identified the nature of the interests to be protected as being "existing interests or expectations that have economic value ." (my emphasis) It is obvious on the facts of this case that Rescan had an interest prior to the introduction of the new *Act* which had economic value. That value has been fixed by agreement of the parties. In my view, Rescan has established in this case that it had the kind of right which would on its face attract the protection afforded by the legal presumptions referred to earlier in this decision. It would also be a vested right within the meaning of s. 35 of the *Interpretation Act*..

However, having said that, it remains to be decided whether the new *Act* has expressly or by necessary implication displaced that expectation. A right which is found to be "vested" may nevertheless give way if the new legislation requires it. This is so with respect to both common law and *Interpretation Act* presumptions: see *S.D. v. S.J.T.*, [1996] B.C.J. No. 87 DRS 96-04247 Vancouver Registry No. CA019074. In the *S.D.* decision, the British Columbia Court of Appeal observed, agreeing with *Driedger on the Construction of Statutes* (3d ed.), that (at para41)

> "it is a common law presumption that the legislature does not intend legislation to interfere with vested rights but ... it nonetheless can if there is evidence that it was meant to apply despite its prejudicial impact."

The durability of the presumption in a given case depends both on the characteristics of the individual case and the specific wording of the legislation in question.

By the *characteristics of the case*, I would refer, as the Court of Appeal did (para41), to the following passages from *Driedger on Construction of Statutes*, supra, where the authors said:

> In reaching their conclusions, the courts consider the nature and importance of the interest affected, the reasonableness of the claimant's expectations, the extent of potential losses and offsetting gains and so on. An existing interest in a practice that exploits others or creates public costs or harms is less likely to attract protection than an interest in being paid for services rendered. Losses that are judged to be excessive or disproportionate are less likely to be tolerated than losses that appear to be modest given the offsetting gains. This work of evaluation and judgment is pervasive in interpretation. There is no reason why it should not be acknowledged in this context, as in others.

And later:

> "The key to weighing the presumption against interference with vested rights is the degree of unfairness the interference would create in particular cases. Where the curtailment or abolition of a right seems particularly arbitrary or unfair, the courts require cogent evidence that the legislature contemplated and desired this result. Where the interference is less troubling, the presumption is easily rebutted."

In a closer case, it would be necessary to closely evaluate the merits of the arguments presented by Rescan and Freeth regarding the degree of harm to the interests of each which would result from an adverse decision on this issue. From Rescan's point of view, the harm is irreparable because Rescan could do nothing after the fact to mitigate its reliance on the law as it was. From Freeth's point of view, she earned wages for which she was not paid and, in the absence of any debate about that particular fact, she should be entitled to recover those wages now. However, it is not necessary to weigh these arguments any more finely here because, in my judgment, the new *Act* clearly purports to and does affect the right of the employer under the old *Act* to rely upon the 6 month limitation on the claim for unpaid wages.

The key to this interpretative judgment is found in the language of Section s. 128 (3). An employee who files his or her claim for unpaid wages prior to November 1, 1995 is limited to a 6 month period if a decision is made on the claim by the Director prior to that date. Section 128 (3) makes that clear. What it makes equally clear is that an employee in identical circumstances who files a complaint prior to November 1, 1995 and who does not receive a decision prior to that date, is entitled to pursue the claim for the extended period of 24 months set out in s. 80 of the new *Act* [see, among others, the Tribunal's decision in *Burnaby Select Taxi Ltd and Zoltan Kiss*, BC EST #091/96]. The transitional language is straight-forward -- the "complaint is to be treated for all purposes, including section 80 of this *Act*, as a complaint made under this *Act*." (my emphasis)

The instant case is one step removed. Here, the employee, who could have filed prior to November 1, 1995 but chose not to, has filed her claim under the new *Act* and not the old *Act*. If Rescan is to succeed, then I must decide that an employee who files her complaint under the new *Act* is in a worse position than an employee who, with an identical claim, is merely *deemed* to have filed under the new *Act* (having filed prior to November 1, 1995). It is very difficult to see why a complainant who actually files her claim under the new *Act* can be in any lesser position than a complainant whose complaint is deemed under s. 128 (3) to have filed under the new *Act*. The very purpose of s. 128 (3) is to put both classes of claimant in precisely the same situation. It is true, as Rescan argues, that Freeth cannot bring herself within the transitional language of s. 128 (3). However, she need not do so. It is only the claimant whose complaint is already before the Employment Standards Branch under the old *Act* who needs the assistance of the transitional provisions. A claimant filing under s. 80 of the new *Act* is, on the face of the provision, entitled to claim 24 months unpaid wages. There is no need for transitional language, although the language of s. 128 (3) makes the legislative intention as a whole entirely clear. The objective of the Legislature was to make the liberal provisions of s. 80 available to complainants who were owed wages and whose claim had not been the subject of a decision under the old *Act*. Legislation is to be read as a whole and "given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects" (*Interpretation Act*, s. 8).

Therefore, the language of the new *Act* expressly or by necessary implication serves to rebut the presumptions which would otherwise favour the protection of existing rights, such as that which previously inured to Rescan under the former legislation.

Before concluding, it is necessary to deal with two further matters. The first is Rescan's concern that corporate directors of the company would be exposed to unexpected and additional liabilities in the event that s. 80 were determined to be retrospective or retroactive. I conclude that there is no issue of corporate officer liability before the Tribunal and it is therefore unnecessary to make any judgement respecting this issue. I leave open the issue of whether, in the circumstances presented by this complaint, the corporate officers of Rescan could be found liable for amounts which exceed the amounts for which they were liable under old *Act*.

Secondly, counsel for Freeth argued that Rescan has *dragged its feet* in the current proceedings. This argument carried with it the usual implications of bad faith and culpability. In my view, the evidence is to the contrary. The introduction of new legislation is an event which is often accompanied by serious issues involving transitional matters. Rescan clearly had an existing interest which was affected by the new *Act* and it was entitled to make the arguments which it made in these proceedings. Any suggestion that its arguments in this proceeding were frivolous or taken for the purposes of delaying are rejected.

In the result, it is my judgement that section 80 of the new *Act* has retrospective application, in the sense that it permits recovery for unpaid wages which became payable in the period prior to November 1, 1995. I have not limited this period to 6 months as I have found that the new *Act* by "necessary and distinct implication" permits that period to be extended to 24 months.

ORDER

Pursuant to Section 115, I order that Determination No. CDET 003611 be confirmed.

John McConchie
Adjudicator
Employment Standards Tribunal

JLM:jel