Employment Standards TRIBUNAL

An appeal

- by -

Academex Systems, Inc. and Venturex Global Investment Corporation and Kelowna Independent School Society and North Vancouver Independent School Society and Steveston Independent School Society and South Delta Independent School Society

- of a Determination 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

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2004A/216

DATE OF DECISION: March 9, 2005

DECISION

SUBMISSIONS

Quentin J. Adrian	for the Appellants
Shafik Bhalloo	Legal counsel for the former employees of North Vancouver Independent
Kathleen Thomas	on her own behalf
Amanda Clark Welder	for the Director of Employment Standards

INTRODUCTION

This is an appeal filed by Quentin Adrian. This appeal is filed pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) and concerns a Determination that was issued by a delegate of the Director of Employment Standards (the "delegate"), following an investigation, on November 23rd, 2004 (the "Determination").

It is my understanding that Mr. Adrian, who is a lawyer, filed the appeal on behalf of the following corporations:

- Academex Systems, Inc. ("Academex");
- Venturex Global Investments Corporation ("Venturex");
- Kelowna Independent School Society operating as Central Okanagan Academy ("Kelowna Independent");
- North Vancouver Independent School Society operating as Seymour Academy ("North Vancouver Independent");
- Steveston Independent School Society operating as Steveston Academy ("Steveston Independent"); and
- South Delta Independent School Society operating as Southpointe Academy ("South Delta Independent")

I shall refer to the above corporations, collectively, as the "Appellants". Mr. Adrian is also a director and officer of Kelowna Independent and acted as the spokesperson and representative for the Appellants during the delegate's investigation.

This appeal is being adjudicated based solely on the parties' written submissions because, in my view, the matter does not require the hearing of any oral evidence nor does it raise any other issue that would lead me to conclude that an oral appeal hearing is required (under Section 103 of the *Act*, Section 36 of the *Administrative Tribunals Act* ("*ATA*") applies to the Tribunal. Under Section 36 of the *ATA*, the Tribunal is not obliged to hold an oral hearing). I note that Mr. Adrian, for the Appellants, advised the Tribunal (in his appeal form) that he did not believe an oral appeal hearing was necessary.

THE DETERMINATION

The Director's delegate determined that the Appellants were jointly and separately (severally) liable to pay $111,045.11 in unpaid wages and section 88 interest owed to 96 former employees of Kelowna Independent, North Vancouver Independent, Steveston Independent and South Delta Independent. Further, the Director also levied a $500 administrative penalty pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation.*

By way of the Determination, the delegate issued a section 95 declaration that the Appellant corporations were "associated". Accordingly, the firms are considered to be "one employer" for purposes of the *Act* and jointly and separately liable for the employees' unpaid wages.

The employees were all formerly employed by one of the four independent schools: 29 employees were employed by Kelowna Independent; 16 employees by North Vancouver Independent; 7 employees by Steveston Independent; and 44 employees by South Delta Independent.

With respect to the employees' unpaid wage claims, the delegate concluded that certain contractually agreed amounts were not paid, and in some cases deductions were not remitted, to various providers of employee benefits. These latter entities included the Medical Services Plan ("MSP"), Manulife Financial ("Manulife")--who provided extended health benefits--and a number of firms that managed Registered Retirement Savings Plans ("RRSPs"). The delegate determined that the Appellants breached section 26 of the *Act* which states:

> **Payments by employer to funds, insurers or others**
>
> 26. An employer who agrees under an employment contract to pay an amount on behalf of an employee to a fund, insurer or other person must pay the amount in accordance with the contract.

The delegate also relied on section 23 of the *Act* which states that amounts deducted from an employee's wages to pay, among other things, benefit premiums, must remit such monies to the insurer or benefit-provider "within one month after the date of the deduction".

REASONS FOR APPEAL

The Appellants do not challenge the correctness of the section 95 declaration nor do the Appellants deny that they have some liability to the various employees. Rather, the thrust of the Appellants' challenge to the Determination is that the delegate did not properly account for some payments that were to RRSP management firms and other insurance or benefit providers. The Appellants request, by way of remedy, that the Determination be varied.

The Appellants appeal the Determination under section 112(1)(c) of the *Act:*

> **Appeal of director's determination**
>
> 112.(1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds: ...
>
> (c) evidence has become available that was not available at the time the determination was being made.

The Appellants say that the delegate did not credit them for $38,584.51 in payments that were made to various entities and, accordingly, the total amount payable to the employees should be reduced to $88,009.37. On February 22nd, 2005, Mr. Adrian forwarded a cheque, in the amount of $88,637.73 and payable to the "Director of Employment Standards, in trust", to the Tribunal. The Director is now holding these latter funds in her trust account pending the outcome of these proceedings.

FINDINGS AND ANALYSIS

Governing Principles

Section 112(1)(c) states that the appellant must show that their proffered new evidence "was not available at the time the determination was being made". In *Davies et al. (Merilus Technologies Inc.)*, B.C.E.S.T. Decision No. D171/03, the Tribunal stated (at p. 3):

> This ground [i.e., the "new evidence" ground] is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions:
>
> (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
>
> (b) the evidence must be relevant to a material issue arising from the complaint;
>
> (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

The Appellants' Evidence

The "new evidence" proffered by the Appellants falls into four separate categories.

First, the Appellants say that on November 26th, 2004 payments totalling $13,652.95 were made to various RRSP providers, MSP, and to the Director. These payments, separately identified as 1(a) through 1(f) in the Appellants' appeal documents, were made on behalf of former employees of Kelowna Independent.

Second, Mr. Adrian alleges that on October 20th, 2004 he personally issued a $1,348.32 payment to a particular law firm's trust account in full satisfaction of monies owed to Ms. Berit Dolden, a former North Vancouver Independent employee.

Third, the Appellants allege that Venturex has submitted five cheques (some being post-dated) to Manulife totalling $20,815.21 "for insurance premiums payable for the period ending June 30, 2004".

Fourth, the Appellants allege:

> All insurance claims made by employees of the Societies named in the Determination after July 1, 2004 and prior to August 31, 2004 will be received, and paid, by Venturex. In addition, all insurance claims made by employees of [Academex] and [Venturex] after July 1, 2004 will be received, and paid, by Venturex. As no premiums were paid for those periods to Manulife, the policies in question were cancelled. As a result, Manulife will now not accept payment for premiums covering these periods.
>
> Claims have been by employees [sic] of the societies between July 1, 2004 and August 31, 2004, and employees of the companies following July 1, 2004. Those claims total $19,234.83. Venturex will pay to those employees the portion of that sum for which the various employers are responsible.

New Evidence: Analysis

I propose to deal with each of the four categories in turn.

The RRSP and other payments apparently made on behalf of the Kelowna Independent employees were made on November 26th, 2004. In other words, these payments were made *after* the Determination was issued (on November 23rd, 2004). These payments do not call into question the correctness of the delegate's unpaid wage calculations as of the date of the Determination. The Tribunal does not enforce determinations; that task falls to the Director under Part 11 of the *Act.* If these payments have been made, they may serve to reduce the amount of unpaid wages that may be collected by the Director through enforcement proceedings. In this latter regard, I note that the delegate, in her submission to the Tribunal dated January 25th, 2005, stated:

> With regards to point 1 of the employer's appeal, I confirm that subsequent to the issuance of the determination the Branch received copies of payments listed in points (a) to (e). I also confirm that the Branch received the payment noted in point (f).

The payment that was apparently made to the law firm on account of Ms. Dolden's claim was, so far as I can determine, properly credited by the delegate in her calculations (see Schedule appended to Determination where each employee's wage claim is separately calculated).

The cheques provided to Manulife are, in some cases, post-dated and, accordingly, it is not clear whether all of the payments have actually been made. However, and in any event, these cheques relate to payment of a portion of the amount due under the Determination (that is, the payments concern a question of enforcement); they do not relate to the correctness of the Determination at the point of issuance. I might also add that if these cheques were submitted to Manulife prior to the Determination being issued, I have nothing before me to explain why this evidence was not provided to the delegate during the course of her investigation [see *Davies et al.*, above, point (a)].

Finally, with respect to the fourth category, the Appellants merely allege that certain insurance claims *will be* satisfied by Venturex. I have nothing before me to show that such claims have, in fact, been satisfied, and, in any event, as with the previous categories, this evidence does not call into question the correctness of the Determination. Rather, the evidence relates to enforcement proceedings. I might add that I wholly endorse the delegate's January 25th, 2004 submission with respect to this particular issue:

> ...the fact that the employer has agreed to pay any out of pocket expense incurred by employees as a result of the cancelled benefit plan does not satisfy the requirements of the Act...

> The employer's commitment to pay these out of pocket expenses may attempt to mitigate any civil liability that might exist because of the failure to provide the benefit coverage but does not satisfy the requirements of the Act.

It follows from the foregoing that I would dismiss the Appellants' appeal.

The Respondent Employees' Submissions

Legal counsel for the former employees of North Vancouver Independent filed a submission, dated January 20th, 2005, seeking a variance of the Determination as it relates to Cyndie Gilley, Skye Desjardins, Tamara Gris and Cathy Meakes. Counsel submits that each of these latter former employees should be awarded additional monies over and above that set out in the schedule appended to the Determination. So far as I can determine, the additional monies all relate to claims that were submitted to various insurers or benefit-providers that were subsequently rejected by those insurers of benefit-providers.

Counsel submits that the Determination should be varied (by a total amount of approximately $2,500) to reflect these "rejected" claims. In my view, these additional compensation claims are not properly before me. If these employees wished to claim additional compensation, they should have filed an appeal and presented an appropriate case to justify varying the Determination. The Tribunal has repeatedly held that the filing of an appeal by one party with respect to certain particular issues does not "open up" the determination being appealed such that respondents may raise their own separate challenges to the determination. An appeal to the Tribunal is not in the nature of a *de novo* hearing.

If these four former North Vancouver Independent employees' claims are meritorious, they have avenues of recourse open to them. They may be able to file a new complaint, or amend their existing complaints (subject to limitation periods), regarding these amounts and a new determination may be issued. Alternatively, the employees can sue for these amounts in the Small Claims Division of the B.C. Provincial Court. It may be that these claims can be settled directly with one or more of the Appellants and/or the directors or officers of the Appellant firms.

ORDER

Pursuant to section 115(1)(a) of the *Act,* I order that the Determination be confirmed as issued in the amount of **$111,545.11** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act,* since the date of issuance.

I do note, however, that the delegate, in a submission to the Tribunal dated March 4th, 2005, indicated that the sum of $88,637.73 now held in the Director's trust account constitutes "payment in full" of the amount due under the Determination.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal