An appeal

\- by -

Nobility Environmental Software Systems Inc.
(“Nobility Environmental”)

\- 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/214

DATE OF DECISION: March 18, 2005

DECISION

SUBMISSIONS

Kenneth M. Strong	on behalf of Nobility Environmental Software Systems Inc.
Victor Lee	for the Director of Employment Standards

INTRODUCTION

Nobility Environmental Software Systems Inc. ("Nobility Environmental") appeals, pursuant to section 112 of the *Employment Standards Act* (the *"Act"*), a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on November 8th, 2004 (the "Determination"). This appeal was originally filed by Kenneth M. Strong ("Strong"). Mr. Strong is one of two directors of Essa Technologies Group, Ltd., ("Essa"), the sole shareholder of Nobility Environmental. Essa has now appointed Mr. Strong as Nobility Environmental's sole director and, further, has authorized him to act on that latter firm's behalf with respect to this appeal.

The Director's delegate determined that Nobility Environmental owed its former employee, Christopher Clibbon ("Clibbon"), the sum of $17,453.82 on account of unpaid wages and an additional $1,214.00 representing interest payable pursuant to section 88 of the *Act.* Further, by way of the Determination, the Director also assessed a $500 administrative penalty pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation.* Accordingly, the total amount payable under the Determination is $19,167.82.

Section 103 of the *Act* incorporates several provisions of the *Administrative Tribunals Act* ("*ATA*") including section 36 of the *ATA*. Section 36 of the *ATA* states that "the tribunal may hold any combination of written, electronic and oral hearings" (see also *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575). By way of a letter dated March 9th, 2005 the parties were advised by the Tribunal's Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held. I note that Nobility Environmental, in its original appeal documents, did not request an oral appeal hearing nor has the Director's delegate subsequently requested an oral hearing.

In addition to the section 112(5) record, I have before me written submissions filed by Mr. Strong and the Director's delegate, Mr. Victor Lee (who originally investigated the matter and issued the Determination). Mr. Clibbon, the respondent employee, was given written notice of these proceedings (he has also been provided with all submissions and relevant documents) but he has not participated in these proceedings in any way.

ISSUES ON APPEAL

Nobility Environmental seeks the cancellation of the Determination on the grounds that the Director's delegate erred in law [section 112(1)(a)] and failed to observe the principles of natural justice in making the Determination [section 112(1)(b)]. In addition, it is asserted that there is new evidence that was not available when the Determination was being made [section 112(1)(c)].

In essence, it is alleged that Mr. Clibbon, in light of Nobility Environmental's precarious financial situation, agreed to forgo (and possibly waive entirely) his full entitlement to his unpaid wages. Mr. Strong, on behalf of Nobility Environmental submits:

> The "salary owed" to Mr. Clibbon as stated in the letter from was [sic] not a "hard' accrued liability of the company, but rather an amount that he would have received to compensate for his hardship should the company have been successful in securing new sources of revenues, or in the event that assets off [sic] the company were liquidated or sold on a basis that provided funds to repay creditors of the company.

As for the matter of "natural justice", Nobility Environmental states:

> It would violate the principles of natural justice should Mr. Clibbon, alone amongst all former employees and creditors, obtain a preferential position in receiving monies from any such event.

BACKGROUND FACTS

Mr. Strong asserts that Nobility Environmental "has ceased all operations, and has no employees nor funds" and that it has not been wound up solely because there are some ongoing efforts "to extract some value for the remaining assets of the company, with the only likely remaining avenue for same being a sale of the company's technology".

According to the information set out in the Determination, Nobility Environmental formerly employed Mr. Clibbon as its "Director of Operations" from April 1st, 1999 to April 9th, 2003; his annual salary was $68,000. Mr. Clibbon claimed unpaid wages of $17,453.82 for the period October 15th, 2002 to April 9th, 2003. Mr. Clibbon submitted, in support of his unpaid wage claim, a letter dated April 30th, 2003 signed by Nobility Environmental's Manager of Administration, Ms. Monique Cornish, in which she acknowledged the "outstanding salaries that are owed to you by Nobility, which total $17,453.82". Ms. Cornish's letter also confirmed that Nobility Environmental was in difficult financial circumstances and that the balance due to Mr. Clibbon would be retired as soon as the company was "financially able" to do so.

The delegate noted that Nobility Environmental did not dispute the amount claimed by Mr. Clibbon. In the Determination, the delegate referred to his letter dated September 19th, 2003 addressed to Nobility Environmental and copied to its sole director, Mr. William Holt. In his September 19th letter, the delegate requested that Nobility Environmental and/or Mr. Holt provide any relevant information they might have regarding Mr. Clibbon's complaint. On September 25th, 2003 Mr. Holt wrote the delegate advising that he was not a Nobility Environmental director or officer. On September 29th, 2003 Mr. Strong wrote the delegate (on Nobility Environmental letterhead) advising that Nobility Environmental was apparently endeavouring to satisfy Mr. Clibbon's unpaid wage claim and that Mr. Clibbon had agreed "to postpone proceeding further with this matter for a period of eight weeks". Mr. Strong also advised that Nobility Environmental was not currently operating and was endeavouring to sell its assets to a third party.

On January 12th, 2004 the delegate once again wrote Nobility Environmental and advised that since Mr. Clibbon's unpaid wages had not been satisfied, he wished to pursue his complaint. The delegate requested further submissions regarding Mr. Clibbon's claim and also indicated that he intended to issue a determination after January 23rd based on the information in hand at that time.

Mr. Holt wrote the delegate on January 20th, 2004 reiterating his position that he was not an Nobility Environmental director or officer. On January 22nd, 2004, Mr. Strong wrote a letter to the delegate on letterhead designating him as the president of Technology Development Corporation ("TDC"). In his January 22nd letter, Mr. Strong indicated that TDC had loaned over $1 million to Nobility Environmental and that Nobility Environmental had "no cash, no employees, no liquid assets and no directors or officers". Mr. Strong requested, although it is not clear that he had any legal right to do so, that Mr. Clibbon "produce records and evidence supporting his claim for unpaid wages that may be shared with other creditors".

On January 23rd, 2004 the delegate requested further information from Mr. Clibbon regarding his claim and, on January 24th, 2004, Mr. Clibbon provided the delegate with the requisite particulars and supporting documents. The delegate, in turn, provided this latter information to Mr. Strong by way of a letter dated February 10th, 2004 in which the delegate also solicited a reply "as soon as possible". Having received no reply from Mr. Strong, the delegate faxed a second communication on April 1st, 2004 reiterating his request for a further response. There was no reply and, on November 8th, 2004, the Determination was issued for the full amount of Mr. Clibbon's unpaid wage claim—the delegate noted that he had no reason to question the authenticity of the supporting documents provided by Mr. Clibbon.

FINDINGS AND ANALYSIS

Error in Law

The thrust of the argument on this ground appears to be that the delegate should not have awarded Mr. Clibbon the full amount of his unpaid wage claim. Nobility Environmental asserts that some sort of deferral (or even waiver) agreement was entered into between Mr. Clibbon and Nobility Environmental.

There are several points to be noted with respect to this argument. First, the "deferral/waiver" issue was never formally placed before the delegate as a defence; the Determination appears to have been quite correctly issued based on the evidence that was before the delegate at the point of issuance. Second, even if such evidence had been before the delegate, it would not have been probative since, on the face of things, the alleged agreement appears to be nothing more than an unlawful attempt by Nobility Environmental to "contract out" of its unpaid wage liability—something that is prohibited under section 4 of the *Act*. Third, and in any event, such an agreement (if one accepts there *was* such an agreement—and there is no evidence before me on that score beyond Mr. Strong's uncorroborated assertion) would have no force in law since there does not appear to have been any consideration (i.e., a valuable benefit) that flowed from Nobility Environmental to Mr. Clibbon; as a matter of law, the alleged agreement would seemingly be null and void.

With respect to the matter of consideration, Mr. Strong asserts that in exchange for Mr. Clibbon's "deferral" or "waiver" of his wages, Mr. Clibbon received some "additional stock options". There is no evidence before me that such options were ever given to Mr. Clibbon. Further, stock options in a firm that, by Mr. Strong's own admission, is essentially insolvent would not appear to constitute valuable consideration as a matter of law.

New Evidence

Nobility Environmental's position, of course, turns on whether the evidence of the "deferral/waiver" agreement is properly admissible in these proceedings. In my view, such evidence is not admissible as it

clearly was available and could have been provided to the delegate prior to the issuance of the Determination (see *Davies et al.*, B.C.E.S.T. Decision No. D171/03).

Natural Justice

Since Mr. Clibbon appears to be entitled to unpaid wages in the amount determined by the delegate, no natural justice issue arises in terms of his being paid in circumstances where other employees—who apparently have not filed unpaid wage complaints—have not been paid. Further, if Nobility Environmental does go bankrupt (as seems likely), Mr. Clibbon's wage claim will be processed in accordance with the scheme of distribution established by the federal *Bankruptcy and Insolvency Act*; he will not receive any special treatment relative to any other employee merely because his unpaid wage claim has been formally adjudicated by way of the Determination.

More generally, the record before me discloses that this case, quite simply, does not raise any natural justice issue. The delegate made full and fair disclosure to all affected parties (indeed, in my view, he exceed his statutory disclosure obligation) and, so far as I can tell, properly issued the Determination based on a fair consideration of the evidence before him.

In light of the foregoing findings, it follows that this appeal must be dismissed as it relates to the unpaid wage claim and, since that latter claim has been confirmed, also with respect to the $500 administrative penalty.

ORDER

Pursuant to section 115(1)(a) of the *Act,* I order that the Determination be confirmed as issued in the amount of **$19,167.82** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act,* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal