Employment Standards TRIBUNAL

An appeal

- by -

Bero Investments Ltd., operating as King George Nissan
("Bero Investments")

- 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 (as amended)

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2006A/13

DATE OF DECISION: March 17, 2006

DECISION

SUBMISSIONS

Michael C. Woodward	on behalf of Bero Investments Ltd., operating as King George Nissan
Gail Jersak	on her own behalf
Judy Reekie	on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Bero Investments Ltd., operating as King George Nissan ("Bero Investments") of a Determination that was issued on December 14, 2005 by a delegate of the Director of Employment Standards (the "delegate"). The Determination found that Bero Investments had contravened Part 3, Section 17 and 21, and Part 7, Sections 57 and 58 of the *Act* in respect of the employment of Gail Jersak ("Jersak") and ordered Bero Investments to pay Jersak an amount of $4,290.69, an amount which included wages and interest.

2. The Director also imposed administrative penalties on Bero Investments under Section 29(1) of the E*mployment Standards Regulation* (the *"Regulation"*) in the amount of $2000.00.

3. The total amount of the Determination is $6,290.69.

4. Bero Investments says the delegate made three errors of law in the Determination and failed to observe principles of natural justice in making the Determination.

5. The alleged errors of law in the Determination are:

   (i) in finding Jersak was an employee of Bero Investments rather than an independent contractor;

   (ii) in finding the complaint was filed within the six month time limit set out in the *Act* and, in any event, awarding wages for a period longer than allowed in the *Act*; and

   (iii) in imposing multiple penalties.

6. Bero Investments says the failure to observe principles of natural justice arose from two circumstances:

   (i) from the refusal of the delegate to require the production by Jersak of her personal and GST tax returns for the period of time covered by her claim; and

   (ii) from the exclusion by the delegate of Mr. Bernie Rosenblatt, the principal of Bero Investments, from a complaint hearing held on January 13, 2005.

7. The Tribunal has reviewed the appeal and the materials submitted with it and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

8. The issues in this appeal are framed by the above description of the appeal - whether the delegate erred in law and whether the delegate failed to observe principles of natural justice in making the Determination.

THE FACTS

9. The Determination contains the following facts and findings of fact:

- Jersak filed a complaint under section 74 of the *Act* alleging Kari Lynds, operating as Kar Financial Services, and Bero Investments had contravened the *Act* by failing to pay annual vacation pay and statutory holiday pay and had made deductions from her wages and failed to reimburse those deductions.

- Bero Investments operates an automobile dealership in Surrey, BC. Ms. Lynds is a business manager for Bero Investments. Jersak was employed as an assistant business manager for Bero Investments from April 2002 to June 23, 2004 and was paid on a commission basis.

- On August 10, 2004, Jersak delivered a "Self Help Kit" to the Director. The employer information provided by Jersak on that form was: Kari Lynds, dba Kar Financial Services, Re: King George Nissan.

- The Director acknowledged receipt of the "Self Help Kit" by letter dated August 11, 2004. The letter instructed Jersak to send a copy of the "Self Help Kit" to the employer and advised her to file a formal complaint if the she was unable to resolve her complaint through the self help process.

- On August 23, 2004, Jersak filed a complaint with the Director. The employer information named Kari Lynds, operating as Kar Financial Services, Re: King George Nissan as the employer and listed King George Nissan's address, telephone number and fax number.

- Attached to the complaint was a letter, also dated August 23, 2005, from Ms. Lynds. The letter stated, among other things, that Ms. Lynds had been an independent contractor for nine years and was contracted by Bero Investments to generate income for its business office, that she had been introduced to Jersak in 2002 and had reached an agreement with her under which Jersak would provide business manager services for relief. I note parenthetically that the letter was copied to Bernie Rosenblatt, the sole director and officer of Bero Investments.

- Ms. Lynds was contacted by the Director on September 9, 2004 at the telephone number shown on the complaint form. She took the position during that telephone discussion that Jersak was an independent sub contractor. She provided the Director with an address and telephone number for Kar Financial Services.

- The Director attempted unsuccessfully to settle the complaint in a mediation session, conducted on October 12, 2004 and attended by Jersak and Ms. Lynds,.

- A complaint hearing was conducted by the delegate on January 13, 2005. The hearing notice identified Ms. Lynds, operating Kar Financial Services, as the employer. The oral hearing was attended by Jersak, Ms. Lynds and Mr. Rosenblatt, who attended as a witness for Ms. Lynds.

- As a witness, Mr. Rosenblatt was excluded from the hearing room until required to provide his evidence and was excused from the process once he had provided his evidence.

- After the hearing was adjourned, the delegate decided there was an issue about whether, if Jersak was an employee, Ms. Lynds or Bero Investments was her actual employer.

- A second oral hearing on the complaint was scheduled for March 31, 2005. A notice of hearing was sent to Jersak, Ms. Lynds and Bero Investments. That oral hearing was cancelled.

- The delegate decided to proceed by way of investigation on the complaint. Jersak, Ms. Lynds and Bero Investments were notified of this decision by letter dated March 23, 2005 and the reasons for it. Each of the parties were provided with a copy of the submissions made on the complaint up to the date of the letter and a "brief summary" of the evidence given at the complaint hearing on January 13, 2005.

- Included with the letter sent to Bero Investments was a demand for records relating to Bero Investments' relationship with Ms. Lynds. The requested records were provided by Bero Investments and received by the Director on July 6, 2005. They were forwarded to Jersak and Ms. Lynds for their response.

- An argument was raised at that time by legal counsel for Bero Investments that the complaint was out of time as against Bero Investments.

- Following completion of the investigation, the delegate found Jersak was an employee of Bero Investments, citing the following facts:

    - Bero Investments exercised direction and control over Jersak;

    - Jersak was hired by Mr. Rosenblatt as a relief business manager for Bero Investments;

    - Had it been left to her, Ms. Lynds would not have hired Jersak;

    - Mr. Rosenblatt set the rates that were paid to the business office;

    - Mr. Rosenblatt set the standards and determined if they were being met;

    - Mr. Rosenblatt had authority to terminate Jersak's employment;

    - Mr. Rosenblatt was the primary provider of funds;

- Bero Investments provided Jersak with the tools required in her work, which included Bero Investments computers, programs and office space;
- Reference material and manuals were provided by Bero Investments;
- Work performed by Jersak in her own home outside of Bero Investments' hours of operation were done in accordance with standards set by Bero Investments;
- The opportunity for Jersak to charge a customer an amount in excess of the guidelines set by Bero Investments was not dissimilar to the opportunity provided to other persons employed on a commission basis;
- Jersak was an integral part of Bero Investments business and the work performed was key to Bero Investments' operations;
- Jersak represented Bero Investments in her dealings with Bero Investments' customers; her business cards identified her as Business Manager for King George Nissan;
- Any revenue she generated was paid to Bero Investments.

10. During the course of the investigation, legal counsel requested the delegate to demand that Jersak provide her personal income tax returns and GST tax returns. The delegate declined to do so, indicating her belief that such information was not considered helpful in deciding Jersak's status as an employee or independent contractor and stating:

> I am not able to deem a person to be an "independent contractor" just because the employer tells her that she is an independent contractor and/or because the employer pays her as such.

11. The delegate accepted that Jersak had a GST number and that she was responsible for remitting her own income tax, EI and CPP.

12. The delegate found Jersak was owed wages, including annual vacation pay. The delegate found Bero Investments had contravened subsection 57(2) of the *Act* by failing to ensure Jersak took an annual vacation in the twelve months after qualifying for annual vacation under subsection 57(1) and contravened Section 58 of the *Act* by failing to pay annual vacation pay as required by that section.

ARGUMENT AND ANALYSIS

13. Subsection 112(1) of the *Act* sets out the grounds on which an appeal may be brought:

> *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:*
>
> *(a) the director erred in law:*
>
> *(b) the director failed to observe the principles of natural justice in making the determination;*
>
> *(c) evidence has become available that was not available at the time the determination was made.*

14. The Tribunal has continually noted an appeal is not a re-investigation of the complaint nor is it intended to be simply an opportunity to re-argue positions taken during the complaint process, hoping the Tribunal will reach a different conclusion. An appeal is an error correction process with the burden of showing the error being on the appellant, Bero Investments in this case. I shall address the grounds of appeal in the order they have been laid out in the submission of counsel for Bero Investments.

Preliminary Matter

15. In its reply to the submission filed by the Director, counsel for Bero Investments has raised a question of the role of the Director in the appeal. Counsel invokes the BC Court of Appeal decision, *British Columbia (Securities Commission) v Pacific International Securities Inc.*, 2002 BCCA 421 in which the Court applied the rule in the Supreme Court of Canada decision, *Northwest Utilities Ltd. v. The City of Edmonton*, (1978) 89 D.L.R. (3d) 161 which says that on judicial review an administrative tribunal has status for certain purposes but is not allowed to defend the correctness of its decision on the merits.

16. However, the rule restricting the right of a tribunal to make submissions before the court is a rule of the Court rather than a rule of law: see the decision of Osler, J. in *Consolidated Bathhurst Packaging Ltd. v. I.W.A.* (1985), 20 D.L.R. (4th) 84.

17. The Tribunal controls its own process under Section 103 of the *Act* and may adopt a different approach than taken by the Courts on judicial review.

18. The Director has a compelling interest in the administration of the *Act* that justifies being given status and standing as a party of right in any appeal. While there are circumstances where it is appropriate to impose limitations on the role of the Director in an appeal, those circumstances, and the limitations imposed, are best addressed by the Tribunal on a case by case basis. As a general statement, there are sound practical and policy reasons for not unduly limiting the role of the Director in an appeal. This general statement recognizes that the role of the Director *vis.* the Tribunal is not identical to that of an administrative tribunal to a Court on judicial review. The Director's function is not exclusively adjudicative, but is substantially investigative. Nor is the Tribunal's role under the *Act* like that of a court on judicial review.

19. Key distinctions are present in this case, where Bero Investments has attacked the fairness of the complaint process and has raised a question of the proper interpretation and administration of Section 80 of the *Act*. The Director has a statutory responsibility to administer the *Act*, including the responsibility to ensure the fairness of the complaint process. It is the Director's exercise of that statutory responsibility that is under appeal and justifies hearing the response on those matters. Also, and as noted above, the Director has an interest in the proper administration of the *Act*.

20. The Tribunal will not limit or otherwise restrict the role of the Director in this appeal.

Breach of Natural Justice

21. This ground of appeal arises from two circumstances: the refusal of the delegate to demand that Jersak produce her personal and GST tax returns for the time period covered by her claim and from the alleged failure to give Mr. Rosenblatt the opportunity to hear all of the evidence presented by Jersak in support of her claim for wages at the January 13, 2005 complaint hearing.

22. Counsel for Bero Investments argues that the refusal to require Jersak to produce her personal and GST tax returns deprived his client of the ability to make full answer and defence to the wage claim.

23. The authority to require a person to produce records arises under Section 85 of the *Act*. The relevant portions of that provision state:

> ***85*** *(1) For the purpose of ensuring compliance with this Act and regulations, the director may do one or more of the following: . . .*
>
> *(c) inspect any records that may be relevant to an investigation under this Part, . . .*
>
> *(f) require a person to produce, or deliver to a place specified by the director, any records for inspection under paragraph (c), . . .*

24. Based on the above provisions, the authority to require production of records is both discretionary and limited to records that are actually or potentially relevant to the investigation of a complaint. The letter from counsel for Bero Investments that included the request for the delegate to require Jersak to provide her personal and GST tax returns, provided no basis for the request and contained no argument relating to the actual or potential relevance of the records to an inquiry regarding Jersak's status under *Act*. The letter does contain the following comment:

> Once that information [the personal and GST tax returns] has been obtained and is provided to our client, our client will be able to make substantive submissions about the legal effect of these materials in so far as whether Ms. Jersak's status was that of a contractor or an employee, and as to who in fact was, the employer or the client, as the case may be.

25. The above comment, however, adds nothing of substance to the request and does not make the requested records either actually or potentially relevant to the investigation of the complaint.

26. The delegate advised counsel for Bero Investments in a letter dated May 25, 2005 that she would not request Jersak to provide the records, expressing her belief that the records were not necessary to the investigation. The same letter indicates that it was already established that Jersak had a GST number and was responsible for remitting her own income tax, EI and CPP. In a letter dated June 23, 2005, following communication of the refusal of the delegate to require Jersak to produce her records, counsel for Bero Investments wrote to the delegate, stating in part:

> While an independent contractor GST tax return and personal income tax return will not necessarily in and of themselves, point conclusively towards independent contractor of employee status, it is clearly established in the case law that they are very relevant pieces of evidence.

27. No authority for the above proposition was provided and I can find no support for it in decisions of the Tribunal considering the issue of an individual's status for the purposes of the *Act*. In fact, those decisions which specifically address the effect of the payment of GST on the status of a complainant under the *Act* consider it a matter of form, not substance (see, for example, *Jahanbakhshs Toghiani-Rizi*, BC EST #D133/96). That view is also consistent with the approach of the Tribunal generally to the status of individuals under the *Act*. Nothing in the appeal or appeal submissions cast any further light on the actual or potential relevance of the records on the issue before the delegate concerning the status of Jersak under the *Act*. While it is not essential to do so, I agree with the delegate that the production of Jersak's personal income tax and GST returns were unnecessary to a consideration of her status under the

Act. The fact that she had a GST number and was responsible for her own income tax, EI and CPP was established and it was presumed that she remitted GST under her number.

28. As I have indicated above, the burden in this appeal is on Bero Investments. That includes the burden of showing a failure to observe principles of natural justice in making the Determination. Notwithstanding its assertions to the contrary, Bero Investments has not shown the refusal to require production of Jersak's personal tax and GST returns has cost it an opportunity to fully express its position on Jersak's status as an employee or independent contractor under the *Act*.

29. The second natural justice argument relates to the allegation that Bero Investments was not allowed to be present at the January 13, 2005 complaint hearing and, as a consequence, did not hear "the entirety" of the evidence against it or have the opportunity to cross-examine Jersak on the evidence she provided at that hearing.

30. On one level, the decision of the delegate to exclude Mr. Rosenblatt from the January 13, 2005 complaint hearing is explicable because Bero Investments was not considered by the delegate to be a party in the complaint process at that time. On the other hand, the delegate heard evidence at that hearing that was undoubtedly considered in making the Determination. If the argument of Bero Investments were confined only to the circumstances relating to the January 13, 2005 complaint hearing, there would be a genuine concern about the procedural fairness of the process.

31. However, following the hearing and a review of the evidence provided at that hearing, the issue of the true employer was identified by the delegate and Bero Investments, Jersak and Ms. Lynds were alerted to that issue in the May 23, 2005 letter from the delegate. Bero Investments was provided with all of the material that was before the delegate at that time, was asked for certain information and was allowed an opportunity to make a submission on that particular issue, as well as on the issue of the status of Jersak under the *Act* and on the claim generally.

32. There is no specific or set level of procedural protection that must accompany a function of the Director. What is required is that the parties know the case being made against them and be given an opportunity to reply. It is not required that a party be provided with the full particulars of the claim. It is sufficient that the person under investigation be provided with enough details of the claim to make the opportunity to respond meaningful (see *Cyberbc.com AD & Host Services Inc.*, BC EST #RD344/02 (Reconsideration of BC EST #D693/01)).

33. The above comments are consistent with the view taken by the Courts of the general duty of fairness required of administrative bodies such as the Employment Standards Branch. The decision of *Martineau v. Matsqui Disciplinary Board*, [1980] 1 S.C.R. 602 stresses that the attributes of natural justice that apply in a given context will vary according to the character of the decision being made. In *Insulpro Industries Inc.*, BC EST #D405/98, the Tribunal adopted the following comment from the Ontario Court of Appeal in *Downing v. Graydon*, (1978) 21 O.R. (2d) 292 (C.A.) in the context of the policy considerations implicit in a flexible approach to the general duty of procedural fairness:

> There are no rigid rules of procedure which must be followed to satisfy the requirements of natural justice. Courts have been careful not to place the decision-making officials and tribunals in a procedural strait-jacket, and, in particular, not to require them to hold judicial type hearings in every case. **The purpose of beneficent legislation must not be stultified by unnecessary judicialization of procedure.** The presentation of this case suffered from the initial misconception that the right to know and to reply required a full scale hearing. This is not so. The

> appropriate procedure depends on the provisions of the statute and the circumstances in which it has to be applied.
>
> (page 310, emphasis added)

34. The *Act* contains a provision that specifically addresses the scope of procedural protection to be applied in the context of an investigation under the *Act*. Section 77 provides:

> ***77.*** *If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.*

35. The conduct of the delegate in this case provided ample opportunity for Bero Investments to know the case of the claimant and to respond to the complaint and the information acquired by the delegate during the investigation. Whatever concerns about procedural fairness that may have been caused by the absence of Bero Investments at the January 13, 2005 complaint hearing were addressed by the process adopted by the delegate subsequently. The suggestion that procedural fairness demanded that Bero Investments was entitled to know "the entirety" of the evidence presented by Jersak and have the opportunity to cross-examine her is inconsistent with both the level of procedural protection contemplated by the *Act* and with the more flexible application of the general duty of procedural fairness on administrative bodies adopted by the Courts.

36. Based on the provisions of the Act and the above comments, I conclude the delegate did not fail to observe applicable principles of natural justice in making the Determination. The *Act* says the delegate needed only to make reasonable efforts to give Bero Investments an opportunity to respond. The general duty of procedural fairness required that the delegate provide Bero Investments with sufficient particulars of the claim to make the opportunity to respond effective. The delegate met that requirement and Bero Investments was given that opportunity.

37. This ground of appeal is dismissed.

Errors of Law

(i) Finding of employment status under the Act

38. Bero Investments says the delegate erred in finding Jersak was an employee under the *Act*. The argument of counsel for Bero Investments on this point focuses on two specific aspects of the Determination on that issue: the alleged failure by the delegate to refer to evidence that Jersak also performed business manager duties at another automobile dealership; and the refusal by the delegate to require Jersak to produce her personal income tax and GST returns. I have already commented on the general relevance of the production of Jersak's tax returns on the finding made by the delegate of Jersak's status under the *Act* and will not address this aspect of the argument any further.

39. On the other matter, I fail to see any relevance in this argument. The question being considered by the delegate was Jersak's relationship with Bero Investments and/or Ms. Lynds, not her relationship with the other automobile dealership. No complaint had been made concerning that relationship and no investigation of that relationship had been conducted by the Director. There was no concession or finding that Jersak was an independent contractor *vis* the work she performed at the other automobile dealership

and, in my view, no inference to that effect can be drawn simply from the fact she performed the same work at another dealership.

40. Counsel for Bero Investments also submits the delegate seriously misconstrued the evidence presented. It is unclear from the appeal submissions whether this submission is intended to refer to the alleged failure by the delegate to give effect to the two aspects of the Determination considered above or is only intended to be a general invitation to review and re-assess the findings and conclusions of fact made by the delegate. If it is the former, I have considered those above, and have not accepted they represent an error of law by the delegate. If it is the latter, the appeal does not identify the defect in the Determination in the context of the alleged misconstruing of facts.

41. My view of the analysis done by the delegate on the issue of the status of Jersak under the *Act* does not show any error of law, although I am not entirely in agreement with what appears to be an over-emphasis on common law tests that historically were developed for purposes other that administering minimum employment standards legislation. In *683115 B.C. Ltd. operating as Certified Drywall*, BC EST #D197/05, I emphasised the need to focus on the relevant statutory provisions and purposes when deciding an individual's status under the *Act*:

> The definitions of employee and employer are inclusive, not exclusive. While it has been noted by the Tribunal that the legislative provisions are somewhat circular, it has been accepted that the *Act* is remedial legislation and should be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects, see *Machtinger v. HOJ Industries Ltd.* (1992) 91 D.L.R. (4th) 491 (S.C.C.) and *Helping Hands v. Director of Employment Standards* (1995) 131 D.L.R. (4th) 336 (B.C.C.A.). I agree with the following comment from *Machtinger v. HOJ Industries Ltd.*, supra, that:
>
> > . . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible is favoured over one that does not.
>
> Whether a person is an employee under the *Act* or an independent contractor is predominantly fact driven. While common law tests may be helpful, in the final analysis, it is the *Act* that must be interpreted and applied. The statutory definition of "*employee*" casts a somewhat broader net than the common law tests (see *Project Headstart Marketing Ltd.*, BC EST # D164/98).

42. In this case, the delegate considered the definitions of "employee" and "employer" in the *Act*, viewed the relationship as a whole, determined for whose business the work was performed and applied elements of traditional common law tests. As a matter of law, these are all proper and correct considerations for determining the issue of employment status under the *Act*. My concerns about the relative weighting of the considerations do not manifest an error of law in this case.

43. The argument made in this appeal by counsel for Bero Investments has failed to show any error of law.

(ii) Timeliness of the complaint against Bero Investments and awarding wages for period longer than allowed by the Act

44. Counsel for Bero Investments contends the complaint is out of time as against his client because Jersak's employment with Bero Investments ended June 23, 2004 but Bero Investments was not notified until March 3, 2005 that it was being considered as the employer. This argument is based on the assumption

that the complaint was filed against Ms. Lynds only and does not recognize the possibility that the information provided by Jersak in the "Self Help Kit" and on the complaint form did not accurately identify the true employer.

45. This objection was raised during the complaint process and was addressed in the Determination, where the delegate relied on a decision of the Tribunal, *Grab Bag Emporium Ltd., operating as The Grab Bag*, BC EST #D057/04 (Reconsideration denied, BC EST #D134/04) in finding the complaint was not out of time.

46. In the *Grab Bag* decision, the Tribunal made the following statement:

> The *Act* does not require an employee to correctly name the employer, but only requires that the complaint must be in writing, and contain a complaint that "a person has contravened" the *Act*. I note that *Act* is remedial legislation which ought to be given a broad and liberal interpretation, in consonance with the purposes set out in section 2 of the *Act*.

47. The above comment was grounded in the conclusion that the wording in subsection 74(1) of the *Act*, which allows a complaint that a "person" has contravened the *Act*, was broad enough to permit the delegate to commence an inquiry into who the "person" was. The Tribunal also noted that:

> . . . many employees are unsophisticated, cannot be expected to identify correctly the name of the employer, and the Director often spends a substantial effort ascertaining the identity of the true employer.

48. The Tribunal rejected a suggestion that a complaint form should be held to the same level of technical precision as pleadings in a lawsuit:

> The assumption underlying the appellant's argument is that an employment standards complaint is like a pleading in a lawsuit. The appellant argues that the correct employer must be identified within the limitation period set out in the Act. I see no useful purpose in comparing an employment standards complaint to a legal pleading in a lawsuit. The process under the Act, is an administrative process, and is an investigatory process. There were sufficient details given by Bell and Jack to raise a complaint that the Act was violated by a person. Newcomb, as a director of Grab Bag, has certain obligations under section 96 of the Act, and can be held liable as a director under section 96 of the Act. Given that the complaint was filed within six months, the Delegate was obliged to investigate the complaint filed. One of the investigations made by the Delegate, in addition to other issues, was "who" violated the Act. Grab Bag ultimately was determined by the delegate to be the "correctly named party", and a person liable to pay the Determination. That is precisely one of the facts for the Delegate, to determine, in the ordinary course, during any investigation under the Act.

49. I agree completely with the view that the Tribunal, and the delegate, has taken of the proper interpretation and applicator of Section 74 of the *Act* as it relates to the identity of the employer and its relation to the timeliness of a complaint.

50. Counsel for Bero Investments also says that in any event the delegate erred in law in awarding wages to Jersak reaching back farther than the six month period allowed in Section 80 of the *Act*. Specifically, counsel says Jersak was awarded annual vacation pay reaching as far back as April 28, 2002 and awarded wages for the "charge back" which had been deducted more than six months before her last day of employment. The assertion that the "charge back" had been deducted more than six months before her

last day of employment does not accord with information found in the record. Based on that information, the "charge back" referred to was deducted from Jersak's final pay, which was given to her in July 2004.

51. On the question of the calculation of wages owing for annual vacation pay, I find no error in the calculation done by the delegate of the wages owed. It is well settled that while annual vacation pay is "earned" in each year of employment, it is not "payable" until the year following the year in which it is "earned" (see *The Khalsa Diwan Society*, BC EST #D114/96 (Reconsideration denied BC EST #D199/96)). On an application of the statutory provisions, annual vacation pay can be "payable" for up to two years less a day after it is "earned" (see, for example, *Allstar Dental Laboratories Ltd.*, BC EST #D148/97 and *Tumbleweed Transport Ltd.*, BC EST #D301/01). Accordingly, it is possible, in the right circumstances - such as those that exist here - for annual vacation pay to be "earned" outside of the limitation period, but to be "payable" within the period described in Section 80.

52. In this case, Jersak "earned" annual vacation pay from her first day of employment in April 2002. Annual vacation pay "earned" in her first year of employment - April 28, 2002 to April 27, 2003 - is "payable" in the following year - April 28, 2003 to April 27, 2004. Since it was never paid, the annual vacation pay entitlement remained "payable" throughout that year. Jersak's last day of employment was June 23, 2004. Applying paragraph 80(1)(a), all amounts "payable" in the period from January 23, 2004 were the proper subject of a Determination.

53. There was no error of law by the delegate finding annual vacation pay earned from April 28, 2002 was owed.

(iii) Multiple penalties

54. Lastly, counsel for Bero Investments says the delegate erred in law by imposing multiple penalties in what amounts to a single circumstance. The Tribunal's decision in *Marina Management Services Inc., operating as Brothers Restaurant*, BC EST #D160/04 is relied on in support of this argument. Counsel says the penalties involve, in essence, only vacation pay. I disagree with that characterization. The administrative penalties involve contraventions of Section 17, which addresses not just the obligation to pay wages earned, but also contains requirements relating to the timing of such payments, Section 21, which prohibits an employer from withholding, deducting or requiring payment of an employee's wages for any purpose, Section 57, which contains the statutory obligation to give an employee annual vacation time off, and Section 58, which requires an employer to pay an employee annual vacation pay. The last two matters represent distinct statutory obligations, as was stated by the Tribunal in *Wolfe Chevrolet Oldsmobile Ltd.*, BC EST #D212/03:

> Turning to the issue of whether the Director erred in law in reaching the conclusion that the business managers were entitled to annual vacation pay, I will start by correcting what I perceive to be a misconception about the relationship between the obligation to give an employee an annual vacation and the obligation to pay annual vacation pay. Those obligations are, in fact, two separate obligations. The *Act* does not require an employer to provide an employee with a paid annual vacation. Section 57 says an employer must give an employee an annual vacation of at least two weeks after 12 consecutive months of employment - increasing to at least three weeks after five consecutive years of employment. Section 58 says an employer must pay an employee annual vacation pay, after 5 calendar days of employment, of at least 4% of the employee's total wages during the year of employment entitling the employee to vacation pay - increasing to 6% of total wages after 5 consecutive years. Subsections 57(2) and (3) tell an employer when an employee

> must take annual vacation and subsection 58(2) tells the employer when annual vacation pay is required, or by agreement is allowed, to be paid.

55. The statutory obligation in Section 57 does not, as suggested by counsel for Bero Investments, have to do with vacation pay. It deals with vacation time off and represents a different statutory obligation than providing annual vacation pay.

56. The administrative penalty for a contravention of Section 21 relates to the "charge back" for the computer software. It is unrelated to Bero Investments' failure to pay annual vacation pay. Requiring employers to pay its employees all wages owed at least semi-monthly serves a different legislative purpose than requiring payment of annual vacation pay. In fact, Section 17 does not apply to vacation pay.

57. Each of the administrative penalties appear to relate to contraventions of different obligations under *Act*. In such circumstances, it was not an error of law for the delegate to have imposed multiple administrative penalties.

58. It should be also be noted that in any event some doubt has been expressed by this Tribunal about the scope of review by the Tribunal relating to the imposition of administrative penalties by the Director. In *Kimberly Dawn Kopchuk*, BC EST #D049/05 (Reconsideration denied, BC EST #RD114/05), the Tribunal made the following comment:

> . . . absent circumstances amounting to bad faith or abuse of process (neither of which occurred here), once the Director or one of his delegates has found multiple contraventions of the Act or Regulation, then the Tribunal may only set aside these penalties to the extent that it can set aside the underlying contravention based on the grounds of appeal in s. 112 of the Act. Even if I am wrong and the Kienapple principle applies, its scope is quite narrow.

59. This argument is dismissed and, for all the above reasons, the appeal is dismissed.

ORDER

60. Pursuant to Section 115 of the *Act*, I order the Determination dated December 14, 2005 confirmed in the amount of $6,290.69, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal