Employment Standards TRIBUNAL

An appeal

- by -

Anchorage Holdings Co. Ltd.
("Anchorage" or "Employer")

- 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

ADJUDICATOR: Paul E. Love

FILE No.: 2002/555

DATE OF DECISION: January 28, 2003

DECISION

OVERVIEW

This is an appeal by an employer, Anchorage Holdings Co. Ltd.. ("Anchorage" or "Employer"), from a Determination dated November 4, 2002 (the "Determination") issued by a Delegate of the Director of Employment Standards ("*Delegate*") pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the "*Act*"). Anchorage incorrectly characterized Jeff Jordanov ("Jordanov" or "Employee") as a contractor, rather than an employee, while Jordanov worked as a commissioned salesperson in Anchorage's boat business. Anchorage argues that it was "induced" to treat Jordanov as a contractor as a result of advice given from the Nanaimo office of the Employment Standards Branch ("Branch"). Anchorage further argues that the Delegate erred in characterizing Jordanov as an employee when he was working pursuant to an agreement that he was a contractor, and where he held himself out as a contractor. Anchorage also argued that the Delegate erred in the calculations of wages by relying on the Employee's records, and by not "averaging wages" earned on a commission basis over a year. It was unnecessary to make any finding of fact concerning statements alleged by the Employer to have been made by the Branch, as "officially induced error of law" does not afford an Employer a defence to statutory claims for wages made by an employee under the *Act*. It is apparent that the Delegate correctly identified and analyzed the appropriate facts, and correctly determined that Jordanov was an employee, despite a written letter prepared by the Employer around the time of hire, characterizing Jordanov as a contractor. The Delegate did not err in relying upon the Employee's records in calculating wage entitlements, particularly where the Employer failed in its statutory duty to keep records of hours worked, because its characterization of Jordanov as a contractor. The Delegate applied the correct approach calculating entitlements based on a pay period basis. I corrected the Determination for a minor error in calculation identified by Anchorage and agreed to by the Delegate. Anchorage questioned the objectivity of the Delegate in relying upon employee records rather than compromising the employee's claim, however, this assertion was without foundation. Anchorage also alleged bias on the part of the Delegate in delaying the issuance of the Determination until the Legislature restored the "24 month" limit on wages under section 80 of the *Act*. The Delegate did not err in issuing a Determination based on the law that existed at the time the complaint was filed. I varied the Determination in the amount of $18,589.26 with interest calculated in accordance with section 88 of the *Act*.

ISSUES:

Can the Employer rely on a defence of "officially induced error of law" as a defence to Jordanov's claim for employment standards entitlements?

Did the Delegate err in finding that Jordanov was an employee?

Did the Delegate err in the calculation of Jordanov wage entitlement?

Did the Delegate act in bad faith by failing to compromise the Employee's complaint or by delaying the issuance of the Determination until the Legislature restored the "24 month" limit on wage recovery?

FACTS

I decided this case after considering the written submission of the Employer, Employee, and the Delegate. Jeff Jordanov, worked in the business of Anchorage Holdings Co. Ltd., which operates a boat sales, chandlery, parts service, and moorage business. Mr. Jordanov worked in the business as a boat salesman on a commissioned basis.

Jordanov commenced his employment in December of 1999, and worked until June 10, 2001. He worked pursuant to a letter dated December 13, 1999 which reads in part:

> Your job in boat sales will entail the following:-
>
> Sales people in the boat department operate as a "contractor" to the company. This allows the sales person to work flexible hours during boat shows and the busy season. The normal rate of pay is 20 % of the gross profit of the boat sale, the gross profit being denied as the selling price minus the cost, lot charge, and any options that may have been included in the deal.. The company pays the contractor his contract commission + GST monthly and remits WCB premiums on his behalf. We also sell brokerage boats, the commission rate for brokerage is 35 % of the total commission. the contract salesperson in turn pays the company a small fee for desk space and supplies.
>
> The hours of work vary with the season. During the busy part of the year we are open seven days a week and we participate in a number of boat shows on the Island. A schedule is drafted by the sales people involved which is fair and mutually agreeable to all.
>
> You are expected to track you customers from the time they arrive or phone until they buy a boat. Your records should allow you to look up any customer by the size of boat he wishes to purchase or by name.
>
> Being relatively unfamiliar with our products you have a good amount of learning to do. We will be happy to provide as much information as you require to bring our product knowledge to an adequate level. We will get you to any factory training courses that are put on by the various manufacturers which should also provide valuable information and sales tools available to you. As assistance while you are learning the trade we will give you $1,500 per month plus the 20 % of any units you sell. We will continue the $1,500 up to May/00 at which time you should be up to speed.
>
> Again welcome to Anchorage.

Anchorage treated Mr. Jordanov, and other commissioned salespersons, as independent contractors, and therefore did not keep records concerning hours of work. Anchorage set the hours for "coverage" of its shop or shows, but left it to the salespeople to arrange and agree to the scheduling of hours worked. During the course of the investigation, the Delegate came to the conclusion that Mr. Jordanov was an employee and not an independent contractor. The Delegate determined the entitlements of Mr. Jordanov based on diary records kept by Mr. Jordanov of his days and hours of work. The Delegate considered this a more reliable record than the only record kept by Anchorage, a schedule, prepared by all the salesman for the purpose of providing coverage to Anchorage's business.

Anchorage deducted a "desk rental fee" and withheld this amount from each of Jordanov's pay cheques.

On October 31, 2001 Jordanov served Anchorage with a small claims summons. On November 12, 2001 Jordanov was advised by an official of the Canada Customs and Revenue Agency ("CCRA") that the CCRA had issued a ruling that Jordanov's co-workers were employees, and the same ruling would apply to him. Jordanov filed a complaint with the Branch on November 14, 2001. Mr. Jordanov also proceeded with a civil claim for damages against Anchorage in small claims court. Jordanov left instructions with the Delegate not to investigate his claim, as he wished to settle all issues with the employer. Jordanov says that on March 26, 2002 he was advised by the CCRA that they had ruled he was an employee. On March 27, 2002 Jordanov made application to withdraw his claim for wages from the court's consideration, on the basis of a Canada Customs and Revenue Agency ruling that he was an employee and not a contractor, as he was lead to believe by Anchorage. That application was granted by the court on April 8, 2002.

The employment relationship was less than 2 years in duration (December 13, 1999 to June 10, 2001). The Delegate found that Mr. Jordanov was entitled to the sum of $18,646.55. This amount included overtime wages, vacation pay, as well as interest, for the period of the employment relationship. Anchorage had not paid overtime or vacation pay to Jordanov during the course of the employment relationship. In a submission to the Tribunal on appeal, the Delegate admits to an arithmetic error which makes the sum of $18,589.26 due and owing to Mr. Jordanov. The Delegate ordered the Employer to cease contravening Parts 3, 4, 5 and 7, Sections 16, 21, 28, 38, 40, 34 and 58 of the *Act*.

Employer's Argument:

Anchorage filed an appeal alleging an error in the facts, and other facts that were not considered by the Delegate in concluding that Mr. Jordanov was an employee of Anchorage. Anchorage argues that it was induced by representations made by the Nanaimo office of the Branch, to treat Jordanov as a contractor. The Employer says that Jordanov worked pursuant to a letter which set out that he was a contractor. The Employer argues that Jordanov was a contractor because he considered himself to be a contractor, because he argued with the CCRA that he was a contractor and because he was given an opportunity to negotiate his contract. Anchorage suggests that it was only after Jordanov unsuccessfully commenced action against Anchorage for commissions and the principal of Anchorage for assault, that he brought his employment standards complaint. The Employer admits that it did not keep any time records for the Employee but submits that "it would seem reasonable to strike a middle ground" because "Jordanov had no reason to documents hours worked" and "extensive overtime is suspect". The Employer suggests that the wage calculation should "received special interpretation" and wage rates should be calculated on a "yearly basis" rather than a "pay period" basis because of seasonal fluctuation in the amount of time worked. The Employer argues that interest was overstated, and that Jordanov's actions were responsible for delay. The Employer alleges "questionable objectivity" on the part of the Delegate, in relying solely on Jordanov's materials, and in delaying the Determination to a time after the coming into effect of a legislative amendment restoring a "two year liability" for wages.

Employee's Argument:

Mr. Jordanov supports the Determination. Jordanov says that he did not challenge the terms of the letter presented to him by Anchorage, as he was happy just to have the work. The Employee says that he was required to work excessive hours by the Employer, and that the Employer encouraged excessive hours by indicating that he would hire more salespeople if existing sales staff did not wish to work. Jordanov says that he filed his employment standards complaint after learning from a representative of the CCRA, that it

had determined that a number of Jordanov's co-workers had been deemed by the CCRA to be employees, and this ruling would apply to him.

Delegate's Argument:

The Delegate submits that the correct tests were applied in analyzing whether Jordanov was an employee. The Delegate submits that it relied properly upon records kept by Jordanov in the absence of proper records kept by Anchorage. The Delegate says that he applied the proper statutory approach in the calculation of wage entitlements of Jordanov.

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case, the Employer, to show that there is an error in the Determination, such that the Determination should be canceled or varied.

I note that this appeal is a challenge to the fact finding process of the Delegate, and raises an issue of the interpretation of the amendments to the *Act*.

Officially Induced Error of Law:

Anchorage alleges that it treated Mr. Jordanov as a contractor, because of advice received from the Nanaimo office of the Employment Standards Branch:

> After a previous employee received an award by the Employment Standards Branch in the early 1990's a Nanaimo delegate of the Director of Employment Standards counselled Anchorage. Given the unusual seasonal nature of the business and to accommodate work schedules at boatshows and peak times, he recommended in future to establish a "contract" relationship with salespeople. We are now being penalized for following that advice.

The Delegate has not responded to this allegation. In my view, the reasons why it treated Mr. Jordanov as a contractor are irrelevant to determine whether Anchorage is liable to Jordanov, for wages. It is unnecessary, for the purposes of this appeal, to make a finding that Anchorage was or was not "induced" by information provided by the Director's Nanaimo office to "treat Mr. Jordanov" as a contractor.

Anchorage's reasons for non-compliance with the *Act*, however, do not afford Anchorage a defence to payment of Mr. Jordanov's statutory claim for wages. The Tribunal has held on a number of occasions that "officially induced error of law" is a defence limited to a regulatory offence. Officially induced error of law is not an excuse that can be used by an Employer to evade the minimum standards under the *Act* to an Employee: Guthrie (c.o.b. Dianne & Don's Cleaning), BCEST #RD398/01; Canwest Countertops Ltd., BCEST #D016/99; 550635 B.C. Ltd. (c.o.b. Jack's Towing (1997), BCEST #D100/01; In Gulbranson Logging Ltd., BCEST #D337/97, Adjudicator Stevenson made the following comment, which I endorse:

> The significant limitation on the doctrine for the purposes of this case is it applies only to regulatory offenses: i.e. to a prosecution under the applicable statute. It does not operate to disentitle individuals for whose benefit the statute exists from enforcing their rights under that statute, see Libby Canada Inc. v. R. in right of Ontario (Ministry of Labour) and Anne Hoy, (1995) 34 Admin. L.R. (2d) 276.

For the above reasons, it is my view that Anchorage's reasons for treating Jordanov as a contractor do not afford a defence to payment of wages, if in fact, the Delegate correctly determined Jordanov was an employee, and entitled to wages. The key issue is whether Mr. Jordanov is an employee, and I have dealt with this issue in the section of this decision set out below.

Was Jordanov an Employee?

I note that in its letter of December 13, 1999, Anchorage notes a "business need to treat Jordanov as a contractor" in order to deal with "long hours" and hours which vary based on seasonal demand. The letter also expresses Anchorages intention to treat Jordanov as a contractor. Jordanov does not appear to have objected to this treatment, during the course of the relationship. Anchorage alleges that Jordanov may have considered himself to be a contractor at the time of entering into the relationship, or in dealings with Revenue Canada. This is denied by Jordanov who says that he was just happy to get a job with the Employer, and found out about his status as an employee as a result of the CCRA's investigation of the status of other co-workers.

An agreement between the parties that Jordanov was a contractor is not determinative of the issue of whether he was a contractor or an employee. In particular, the Delegate correctly concluded that section 4 of the *Act*, prevented the hiring letter from being considered as conclusive evidence that Mr. Jordanov was a contractor and not an employee. The fact that Mr. Jordanov accepted work on the basis of a letter drafted by Anchorage characterizing him as a "contractor" does not prevent the Delegate from analyzing the true facts. At best, the letter and performance of work pursuant to the letter can be said to be an agreement to waive the provisions of the *Act*, which is of no effect. Section 4 prevents the enforcement of agreements which are contrary to the *Act*:

> The requirements of this Act or regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

The issue of contractor-employee is an issue of mixed fact and law, depending largely upon a characterization arrived at considering the facts, and various legal tests. In the Determination, the Delegate considered the definitions of employee and employer in section 1 of the *Act*. The Delegate referred to the "four fold test", and the "integration test". The Delegate considered the relevant facts and concluded that Mr. Jordanov was an employee. The Delegate considered that there were no characteristics to signify that Mr. Jordanov was a contractor. The Delegate considered that the hiring letter or agreement confirmed that Anchorage had control over the existence of the relationship, including the setting of commission rates, when the company was open for business, the rate of commission, and calculation of commission, and the timing of payment of commission. Anchorage was responsible for advertising the business, and advertising materials including business cards, and sales agreements had the company logo, and Anchorage controlled the appearance and content of advertising and business forms of the company. The company provided the infrastructure in which Mr. Jordanov worked. The Delegate concluded that there was not any opportunity for profit or loss, as remuneration was based entirely on individual sales. The Delegate concluded that Anchorage owned, controlled and operated all aspects of the business. One example of this control is the remittance of WCB premiums to the WCB directly on behalf of Jordanov.

It is apparent that Mr. Jordanov was a commissioned salesperson, employed in Anchorage's business. He was not in business for himself just because he was paid a commission. At least one Adjudicator has held

that it is a "gross misunderstanding" of the *Act* to argue that an individual is a contractor and not an employee because he is paid on commission: *Sewak (c.o.b. South East Asia Post), BCEST #D424/97:*

> When I consider the findings contained in the Determination and the parties' written submissions I am unable to find any ground on which to vary or cancel the Determination. The central point of the Post's appeal is that because Lee was paid a commission he was not an employee. To be blunt, this reflects a gross misunderstanding of the scope of the Act. Section 1(1) of the Act defines an "employee" in very broad terms, none of which depend on the form of remuneration paid by the employer.

While Anchorage alleges that Jordanov initiated his claim with the Branch after "losing" a court case, it appears rather that the true facts are that Jordanov pursued certain claims against Anchorage or its principal, before the courts, and certain claims in the process under the *Act*, before the Delegate. It appears that Jordanov made an application and the court granted the application to withdraw any wage related issues from consideration by the provincial court.

In my view, the Delegate correctly considered the salient facts, legal tests, and correctly concluded that Mr. Jordanov was an employee. I am not satisfied that Anchorage has shown any error in the Delegate's analysis of the employment status of Jordanov. I note that while Anchorage deducted a "desk charge" from Jordanov's pay, rather than Jordanov's cost of doing business, it can be more properly characterized as an impermissible deduction of Anchorage's business costs and a violation of sections 21(2) of the *Act*:

> An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.

Any money deducted, is deemed to be wages, recoverable under the *Act*.

Did the Director Err in Relying Upon Jordanov's Documents:

I note that an Employer is charged with certain record keeping duties under the *Act*. Anchorage did not comply with those duties, because it apparently mistakenly believed Mr. Jordanov to be a contractor. Anchorage suggests that Mr. Jordanov did not keep records, and that it would be "unreasonable" for the Delegate to rely on records, if he kept records. In conducting an investigation the Delegate is entitled to gather information, and rely on information considered to be trustworthy and reliable. Mr. Jordanov has indicated in his appeal submission that it was his practice to keep records including journal entries of time worked. While Anchorage argues the Delegate erred it, it has not particularized the errors, or provided alternative records which show the Delegate erred. In my view, it is not an error for the Delegate to rely on available employee evidence in making a Determination. Delegates frequently rely on employee records, where an Employer fails to keep records as required by the *Act*. I note that if the Delegate was limited to relying only on Employer records, an Employer could defeat a legitimate claim of an Employee to wages by failing to keep records in accordance with the *Act*.

Method of Calculation:

Section 17(1) of the *Act* provides that wages, with certain exceptions none of which are applicable here, are to be calculated on a pay period basis:

> At least semi-monthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by the employee in a pay period.

Part 4 of the *Act* provides for overtime after certain hours of work, and specifies how overtime is to be calculated. Anchorage argues that there should be an exception for it, and that the regular wage should be calculated based on a "yearly average". If the Legislature had intended the Delegate to have "discretion" to permit "special case calculations", the Legislature would have used discretionary language in section 17. In my view, the clear words in section 17 call for calculations on a pay-period basis, and not an annual averaging basis. I see no statutory basis in the *Act* or *Regulation* for the approach suggested by Anchorage and therefore dismiss this ground of appeal.

I note that the Delegate has re-calculated liability for an arithmetic error for wages for January 2000. The corrected amount is $18,589.26.

Interest:

The *Act*, provides a method for the calculation of interest in sections 88(1) and (2):

> (1) If an employer fails to pay wages or another amount to an employee, the employer must pay interest at the prescribed rate on the wages or other amount from the earlier of
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> (a) the date the employment terminates, and
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> (b) the date a complaint about the wages or other amount is delivered to the director to the date of the payment.
>
> (2) No interest accumulates under subsection (1) from the date a determination is made under section 79 or a settlement agreement is made under section 78 requiring payment of the wages or other amount until 23 days after that date.

I note that the amount of time to investigate a complaint often depends on the availability of administrative or investigative resources. In the meantime, the Employee has been "kept out of his money", and the Employer has had the benefit of that money. It is unnecessary for a Delegate to inquire into the contribution of either party to "delay" for the purposes of calculating an interest entitlement under the *Act*. The Delegate did not err in the calculation of interest pursuant to the *Act*.

Objectivity of the Delegate:

The Employer presents two arguments related to the objectivity of the Delegate.

1. Failing to Compromise:

The Employer suggests that the Delegate expressed frustration and annoyance when the Employer was unable "due to an extremely busy schedule" to respond to requests for information and negotiate with the Delegate. The Employer indicates:

> Given that [the delegate] has not engaged in any compromise but rather ruled in favour of Jordanov on every issue (regardless of evidence to the contrary we cannot help but ask you to review whether he is exercising his duties in a fair and impartial way.
>
> I note that the Delegate is charged with an investigative duty under the *Act*, and must investigate complaints that are made, unless the complaint falls into a statutory exception, none of which apply here: see section 76 of the *Act*. A Delegate is not required to "compromise" the Employee's rights. There is no evidence of bias or lack of objectivity on the part of the Delegate, but rather a lack of any lawful or evidentiary basis for Anchorage to treat Jordanov as an contractor. I accept that the Employer's treatment of Jordanov as a contractor, has resulted in a failure to keep records, and a failure to comply with the *Act* which sets out requirements for employees. The Employer's lack of compliance with the *Act*, including record keeping requirements, has resulted in a significant liability to the Employer. Anchorage's error, however, in treating Jordanov as a contractor rather than an Employee does not afford Anchorage "any credit, reduction, or special deal" when it comes to calculations of entitlement under the *Act*.

2. Delaying Issuance of the Determination:

Anchorage further alleges bad faith against the Delegate because the Delegate issued the Determination on November 4, 2002. The text of this argument is as follows:

> Early in the summer Mr. Wallace informed us the liability period for unpaid wages had been reduced from 2 years to 6 months. Since numerous attempts at negotiation had failed, he supplied us with a wage calculation summary for the period concerned and was in the process of preparing his determination on that basis. His determination was received on November 4, 2002 which we now find out is coincidently 3 days after the liability period was changed back to 2 years. This naturally resulted in a much higher award to Jordanov than the 6 month amount. Given that Mr. Wallace has not engaged in any compromise but rather ruled in favour of Jordanov on every issue (regardless of evidence to the contrary) we cannot help but ask you to review whether he is exercising his duties in a fair and impartial way.

I note that the appellant argues that for a period of time (May 30, 2002 to October 30, 2002) had the Delegate issued a Determination, Anchorage would have had the benefit of a substantially reduced Determination limited to six months of wage adjustments. I have not been advised of this amount, but I accept that the "six month" amount is substantially lower than the amount determined by the Delegate. The Employer, in effect argues that the Delegate denied to him a proper application of the law, for an improper purpose.

In my view, the Employer's argument rests on an assumption, that the Employer was entitled to have the case determined on the basis of the *Employment Standards Amendment Act, SBC 2002 c. 42 ("Amendment Act")* . This assumption is incorrect. In my view, whether this Determination was issued at any date after the *Amendment Act*, came into force, Jordanov's rights fall to be determined on the basis of the law applicable at the time that he filed his complaint.

I note that at the time Jordanov filed his claim, the amount of wages that an employer may be required to pay was limited by section 80 of the *Act* to the amount that became payable in the 24 month period prior to the earliest of the date the complaint was filed or the employment was terminated. This section was amended effective May 30, 2002 to limit wage recovery to 6 months, by the *Employment Standards Amendment Act, SBC 2002 c. 42*. I note, however, that the original amendments to the *Act*, were introduced without providing for the transitioning of complaints in progress. For example, the *Amendment Act*, did not address how the new law, which reduced substantially an employee's entitlement, from 24 months to 6 months, applied to complaints already filed, or already under investigation at the time of the amendments came into effect.

On October 9, 2002, the Attorney General introduced as Bill 62, a miscellaneous amending statute, the salient portion of which provided as follows:

> **6 Section 80 of the Employment Standards Act, R.S.B.C. 1996, c. 113, is amended by adding the following subsection:**
>
> (1.1) Despite subsection (1) (a), for the purposes of a complaint that was delivered before May 30, 2002, to an office of the Employment Standards Branch under and in accordance with section 74, 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 24 months before the earlier of
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> (a) the date of the complaint, and
>
> (b) the termination of the employment,
>
> plus interest on those wages.

This bill received third reading on October 29, 2002, and was given Royal Assent on October 31, 2002, becoming the *Miscellaneous Statutes Amendment Act (No. 3), 2002, Stats. B.C. 2002, c. 63. s 6.* This amendment clarified that the six month limitation period did not apply to complaints which had been filed, but which had not yet been determined by the Branch, as of the date of the coming into force of the *Employment Standards Amendment Act.*

I note that the Honourable Gary Collins, the finance minister, after moving that Bill 62 be read a second time, is reported to have said in Hansard:

> The transition amendment to the Employment Standards Act is a housekeeping measure to ensure that wage complaints filed before the new employment standards legislation took effect are treated under the old rules.
>
> (Official Report of Debates of The Legislative Assembly (Hansard), Thursday, October 10, 2002, Afternoon Sitting, Volume 8, Number 17, 3rd Session 33 Parliament, page 3870)

It is apparent that Hansard can be used for the purpose of determining the "evil" to be remedied or defect for which the legislation was introduced: Wall & Redekop Corp. v. United Brotherhood of Carpenters & Joiners of America, [1986} B.C.J. N0 3170. I note that the statutory purpose can be inferred from an examination of the *Employment Standards Amendment Act* and the language of the miscellaneous amending statute. I view, the miscellaneous amending statute as remedial in effect, curing an uncertainty in the interpretation of the earlier *Employment Standards Amendment Act*.

This Tribunal has held that it will not revisit Determinations or Decision where the error alleged can be characterized as one requiring the "retroactive application of amending legislation when rights have vested at the time of the issuance of the Determination": Stanley D. Ginsburg, a Director or Officer of Express Punching Service Inc. operating as Gold Label Garments BCEST #D406/02, Oakcreek Golf and Turf Inc., BC EST # RD366/02; Botrokoff (c.o.b. The Cleaning Lady) (Re) ,BC EST # D478/02. Further in Botrokoff, the Adjudicator determined that "rights" vest at the time of the filing of the complaint, unless a clear contrary intention can be found in the amending statute. I agree with the statement set out by the Adjudicator in Botrokoff:

Notwithstanding no Determination had been issued, Starr had a right, the right to be paid four hours daily minimum, which was vested at the time the amendments came into force. There is no transitional language in the amendments that indicate it was the intention of the legislature to interfere with rights which had vested prior to the coming into force of the amendments. In the absence of such language, the presumption against retroactivity applies and the claim is to be 'judged' according to the law as it was when the right arose.

It is apparent, that the Legislature, with the *Miscellaneous Amendment Act*, intended that rights to wages should vest at the time of the filing of the complaint, or be determined on the law existing at the time of the complaint. There is no evidence that the Delegate deliberately delayed the issuance of the Determination until the *Miscellaneous Statutes Amendment Act (No.3.)* received Royal Assent. The Delegate did not address this argument raised by the appellant in submissions to the Tribunal. There was some delay in the investigation of the Employee's complaint, and I note that the delay can investigation can sometimes be attributable to the lack of administrative resources, or the availability of parties to participate in an investigation.

While the *Act* contains filing periods which if not met, bar the investigation of a complaint, the *Act* does not place any time limits on the Delegate to investigate a complaint or issue a Determination. Earlier Tribunal decisions have held that a lengthy delay may impact on the "fairness" of an investigation, and that the Tribunal in effect had a supervisory jurisdiction and could cancel a Determination based on delay in the issuance of the Determination. I note that in *542015 B.C. Ltd*., BCEST#D096/99, *Ramsey* (c.o.b. R & T Lead), BCEST #D117/99, *Tung* BCEST #D028/01, delay by the Delegate in investigating and issuing a Determination was rejected as a grounds for setting aside a Determination. The analysis in Tung, applies the case of *Blencoe v. British Columbia Human Rights Commission*, 2000 SCC 44 reversing (1989), 49 B.C.L.R. (3d) 216, 160 D.L.R. (4th) 303 (B.C.C.A.). *Tung* and *Blencloe* dealt with a substantially greater delay than the delay in the present case this case and the court in Blencoe held:

> To constitute a breach of the duty of fairness, the delay must have been unreasonable or inordinate. There is no abuse of process by delay per se. [It] must [be] demonstrate[d] that the delay was unacceptable to the point of being so oppressive as to taint the proceedings" (*Blencoe* at para. 121).

While the legislation was amended twice in the period of time from the date Jordanov filed the complaint, to the date the Delegate issued the Determination, there is only one correct answer to the question of the law applying to the complaint. The position advocated by Anchorage would result in an adjudication of Jordanov's complaint on law which did not exist at the time when the employee's rights arose, or the applicable law at the time the complaint was filed. This is not a correct approach. This is contrary to the Tribunal's approach in Botrokoff, and contrary to the transitional rules set out in *Miscellaneous Statutes Amendment Act (No. 3), 2002, Stats. B.C. 2002, c. 63. s6*, and contrary to the usual presumption against retrospective operation of a statute. In light of my analysis, had the Delegate reached

a decision applying a six month limitation period to Jordanov's wage claim during the period May 1, 2002 to October 30, 2002 this would have been an error. While it took some time for the Delegate to issue a Determination, if this was a "deliberate delay", the delay cannot be said to have been oppressive or tainted the process, particularly, where the Delegate reached the correct assessment of the rights of the Employee.

For all the above reasons I dismiss this appeal.

ORDER

Pursuant to s. 115 of the *Act* the Determination dated November 4, 2002 is confirmed in the amount of $18,589.26, with interest calculated in accordance with section 88 of the *Act*.

Paul E. Love
Adjudicator
Employment Standards Tribunal