EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act

-by-

BWI Business World Incorporated

("BWI")

-of a Determination issued by-

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE NO.:	File No. 95/007
DATE OF HEARING:	March 15, 1996
DATE OF DECISION:	April 19, 1996

DECISION

APPEARANCES

John M. Olynyk	for BWI Business World Incorporated
Liisa Tia Anneli Niemisto	on her own behalf
David Rathbone	on his own behalf
Thomas F. Beasley	for The Director of Employment Standards

OVERVIEW

This is an appeal by BWI Business World Incorporated ("BWI") pursuant to section 112 of the Employment Standards Act (the "Act") from Determination No. CDET 000068 issued by the Director of Employment Standards (the "Director) on November 10, 1995. The Director determined that BWI owed Liisa Tia Anneli Niemisto and David Rathbone the sums of $4,195.94 and $7,285.93, respectively, on account of overtime, vacation and severance pay and unremitted health plan payroll deductions.

BWI's appeal came on for hearing on March 15, 1996. Prior to hearing any evidence, several motions were made by counsel for BWI and by counsel for the Director of Employment Standards. The various motions raise important questions of law that relate to this Tribunal's practices and procedures, and accordingly, as the parties were not fully prepared to argue their motions, I adjourned the hearing so that all parties could file written briefs on two principal issues, namely:

1. What is the proper status and role of the Director of Employment Standards at an appeal hearing conducted pursuant to section 112 of the Employment Standards Act?

2. What limits, if any, should be imposed on the Tribunal's authority to vary a determination under section 115(1)(a) of the Act?

The parties' Briefs were to be filed before Noon March 29, 1996; each party also had the right to file a Reply Brief by no later than Noon April 9, 1996. I have now reviewed the material that has been filed pursuant to my order and I wish to thank the parties for their submissions regarding the two issues now before me. I will deal with each of these two issues in turn.

What is the proper status and role of the Director of Employment Standards at an appeal hearing conducted pursuant to section 112 of the Employment Standards Act?

Counsel for BWI submits that the Director is not a party on an appeal filed pursuant to section 112 of the Act, although counsel concedes that the Director "may have the right to appear as an intervener" whose role "is limited to explaining the rationale for its decision and arguing that the Director was within its jurisdiction in making a determination" (BWI Brief, p. 2). Contrariwise, counsel for the Director of Employment Standards submits that the Director is the respondent party on all appeals and acts, in this case, as the "statutory agent" for the employees.

Legislative Framework

Prior to turning to my decision on this particular issue, I wish to highlight some of the provisions of the Act. The current Act was brought into force on November 1, 1995, culminating a process that began when Professor Mark Thompson was appointed as a Commissioner to review the province's employment standards legislation. Professor Thompson made numerous recommendations that were contained in a report entitled "Rights and Responsibilities in a Changing Workplace: A Review of Employment Standards in British Columbia" which was transmitted to the Minister of Skills, Training and Labour on February 3, 1994. In his report, Professor Thompson specifically criticized the internal appeal process that existed under the old Employment Standards Act and recommended that an appeal from a Director's order should be heard by an independent tribunal established for that purpose. Thus, the Employment Standards Tribunal was created.

Under the current Act, the adjudicative process is triggered by the filing of a complaint with the Director of Employment Standards under section 74. The Director also has the authority to conduct an investigation in the absence of a complaint [section 76(3)]. Once a complaint has been filed, the Director has both an investigative and an adjudicative role. When investigating a complaint, the Director is specifically directed to give the "person under investigation" (in virtually every case, the employer) "an opportunity to respond" (section 77). At the investigative stage, the Director must, subject to section 76(2), enquire into the complaint, receive submissions from the parties, and ultimately make a decision that affects the rights and interests of both the employer and the employee. In my view, the Director is acting in a quasi-judicial capacity when conducting investigations and making determinations under the Act [*cf. Re Downing and Graydon* 21 O.R. (2d) 292 (Ont.C.A.)].

All complaints result in a determination being made under section 79 of the Act. If the determination results in a pecuniary award in favour of the complainant, the Director is given various statutory powers to enforce the determination including the right to file the determination with the British Columbia Supreme Court in which case the determination can be enforced as an ordinary court judgment (section 91).

Once a determination has been made, the Director is obliged to "serve any person named in the determination with a copy of the determination" along with the reasons for making it (section 81). Any person so served (*i.e.*, the employer or the employee) may then appeal to the Employment Standards Tribunal under section 112. This now brings me to the central question: What is the role and status of the Director on an appeal hearing?

The Director's Role on Appeal

In my opinion, the Director is not the "statutory agent" for the employees named in a determination, nor is the Director the "respondent" party on the appeal. If the Director is the agent for the employees then it follows that, as agent, she has a fiduciary duty to her principal, in this case the two employees. I fail to see how the Director could meet a fiduciary obligation to the employees in her capacity as their agent while at the same time maintain the required neutrality called for in the Director's role as a quasi-judicial decision-maker. In my view, the Director's maintenance of her neutrality is a continuing obligation even after a determination has been made and an appeal filed, particularly when the Tribunal has the authority to remit the matter back to the Director for further investigation, mediation, or reconsideration (*cf.* sections 114 and 115).

I can see nothing in the Act declaring the Director to be the agent for an employee who files a complaint. Further, the complainant, if dissatisfied with the Director's determination (as I might note is apparently the case here), has the same right to appeal under section 112 as does the employer. Surely, in that latter circumstance, if not generally, the Director cannot purport to be the agent for a party to whom she is adverse in interest.

On the other hand, I conceive the Director's role on an appeal hearing to be somewhat wider than is suggested by BWI (*i.e.,* the Director is restricted to "explaining its decision and its jurisdiction to make its decision", BWI Reply p. 3). The role of the Director on an appeal hearing must be considered in the context of the overall investigative and adjudicative framework established by the Act.

Once a complaint is filed by an employee the Director conducts an investigation and, ultimately, may issue a determination. The investigation and adjudication of a complaint under the Act is markedly different from the review of an application for a rate increase that was at issue in *Re Northwestern Utilities Ltd.*[89 D.L.R. (3d) 161 (S.C.C.)], cited in BWI's Brief, or the judicial review of a decision made by the B.C. Industrial Relations Council to determine if the Council's decision was "patently unreasonable" that was at issue in *C.A.I.M.A.W. v. Paccar* [1989] 6 W.W.R. 763 (S.C.C.), also referred to in BWI's Brief. In both *Northwestern Utilities* and *Paccar,* the administrative tribunals in question were performing purely adjudicative functions. In both cases, an administrative tribunal's adjudicative order was subjected to judicial review. That latter fact, in my opinion, sets those decisions apart from the current case. The Director is not seeking status on an application for judicial review, rather, the Director is seeking status to appear and make submissions at an adjudicative hearing before an administrative tribunal.

However, even if it can be said that an appeal to the Employment Standards Tribunal is akin to an application for judicial review, Mr. Justice La Forest's opinion in *Paccar* suggests that the body from whom the appeal is taken (*i.e.,* the Director in this case) is entitled "to make submissions not only explaining the record before the court" (p. 700) but also to argue that it "had given reasoned [and] rational" consideration to the matters at issue between the parties (p. 702).

Several points should be noted in assessing the role of the Director at the hearing of section 112 appeals. First, an appeal hearing before the Employment Standards Tribunal will be, in almost every case, the first opportunity for the parties to face each other in an actual hearing. When

conducting an investigation, the Director will typically gather evidence from each of the parties but will rarely, if ever, convene a hearing at which both parties are present. Accordingly, neither the employer nor the employee will necessarily know precisely what the other has alleged or what particular documentation has been provided to the Director. Second, section 121 appears to contemplate a role for the Director at the appeal hearing at least to the extent of "giv[ing] evidence or produc[ing] records". Third, a purpose of the Act is to "provide fair and efficient procedures for resolving disputes over the application and interpretation of [the] Act" [section 2(d)]. Unduly constraining the role of the Director at an appeal hearing may have the undesireable effect of producing an unfair and inefficient dispute resolution process:

• Unfair, because neither the employee nor the employer will necessarily have all of the relevant information at hand that will be required by the Tribunal in order for it to make a fair decision; and

• Inefficient, because many parties will not be represented by legal counsel (this has been the overwhelming experience of the Tribunal to date), and the Director's presence and participation at the hearing can expedite the appeal process and provide needed clarity regarding the issues that need to be resolved by the Tribunal.

Therefore, in my view, the Director's status and role at a section 112 appeal hearing should be governed by the following principles:

1. The Director is not the statutory agent for the employee(s) named in the determination.

2. The Director is entitled to attend, give evidence, cross-examine witnesses and make submissions at the appeal hearing.

3. The Director's attendance and participation at the appeal hearing must be confined, however, to giving evidence and calling and cross-examining witnesses with a view to explaining the underlying basis for the determination and to show that the determination was arrived at after a full and fair consideration of the evidence and submissions of both the employer and the employee(s).

4. The Director must appreciate that there is a fine line between explaining the basis for the determination and advocating in favour of a party, particularly when one party seeks to uphold the determination.

5. It will fall to the Employment Standards Tribunal adjudicator in each case, given the particular issues at hand, to ensure that the line between explaining the determination and advocating on behalf of one or other of the parties is not crossed.

6. It will also fall to the adjudicator to ensure that all relevant evidence is placed before the Tribunal for consideration.

I now turn to the second issue before me.

What limits, if any, should be imposed on the Tribunal's authority to vary a Determination under section 115(1)(a) of the Act?

This issue apparently arises because counsel for the Director submits that the Director's own determination is in error because it only covers a six-month period prior to the employees' alleged termination (by way of constructive dismissal). Counsel for the Director submits that the determination should have covered a twenty-four month period as permitted by section 80 of the Act.

I must confess some puzzlement regarding this particular issue. If the Director is convinced that her own determination is in error then, it seems to me, the Director can solve this problem by simply varying the determination under section 86 of the Act. To put the matter another way, I do not believe that the Director need rely on the Tribunal's power to vary under section 115 to accomplish what the Director can directly do by way of section 86.

If the Director chooses not to vary the determination, then I am of the view, in the absence of an appeal filed by the employee(s) (I would note that in this case the two employees have each filed an appeal, although both appeals are, on the face of it, filed beyond the statutory time limit), the Tribunal's power to vary must be read in light of the written reasons for appeal set out in the appellant's originating appeal document. Both the employee and the employer named in the determination have the right to appeal. In my opinion, basic principles of fairness dictate that if one wishes to challenge the Director's determination, that party should file an appeal. The appeal process should not be used to essentially "open up" the determination for all purposes so that a party, who has not filed an appeal, can argue that the determination, rather than simply being upheld, should be varied in that party's favour.

In my opinion, counsel for BWI is correct in asserting that the Tribunal's power to vary a determination must be read in light of section 108(2) of the Act which refers to the Tribunal's power to "decide all questions of fact or law arising in the course of an appeal". The questions of fact and law that arise in the appeal will be determined by the written "reasons for appeal" that are mandated by section 112. If a party who has not filed an appeal does not agree with the determination, that party should not be permitted to engage in a form of "trial by ambush" by seeking to have the determination varied in their favour using section 115 as a springboard. In my opinion, when all parties are given advance notice as to the issues to be considered at the appeal, there will be fewer adjournment applications, the parties will be more likely to direct themselves to the particular issues at hand, and ultimately, the entire appeal process is more likely to be both "fair and efficient" [section 2(d)].

If, in appropriate cases, the would-be appellant is out of time to file an appeal, the Tribunal does have the authority under section 109(1)(b) to extend the time for filing an appeal. As this very issue will come before me in this case, I do not intend to say anything further about the principles that should govern the Tribunal's authority to extend time limits.

ORDER

I order that the hearing on the merits of BWI's appeal be set down forthwith and the parties will be notified as to the date and time of the hearing. The hearing on the merits will proceed as outlined in these Reasons.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal