

An appeal

- by -

Mark Taylor
("Taylor")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2002/547

DATE OF DECISION: March 11, 2003

DECISION

INTRODUCTION

This is an appeal filed by Mark Taylor (“Taylor”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Mr. Taylor appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director’s delegate”) on October 30th, 2002 (the “Determination”).

Mr. Taylor was employed by a company known as Merlin Software Technologies International, Inc. (“Merlin International”) under a formal written agreement dated September 6th, 2001. According to the information set out in the Determination, Merlin International and a second firm, Merlin Software Technologies Inc. (“Merlin Software”), jointly operated a software development firm that is no longer in business. By way of the Determination, the Director’s delegate held that Merlin International and Merlin Software were “associated corporations” as defined by section 95 of the *Act* and, accordingly, were jointly and severally liable for unpaid wages and section 88 interest in the total amount of \$493,287.03.

Although both Merlin International and Merlin Software made assignments into bankruptcy on November 22nd, 2002 (about 2 weeks after this appeal was filed), the trustee for both Merlin firms is aware of these proceedings and, through legal counsel, has advised that “[Merlin Software and Merlin International] take no position regarding the appeals commenced by...Mark Taylor”.

By way of a letter dated February 7th, 2003 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 (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). I have before me written submissions from Mr. Taylor and the delegate.

THE APPEAL

Mr. Taylor is one of approximately 40 employees whose unpaid wage claims are included in the total amount set out in the Determination. The Director’s delegate determined that Mr. Taylor was owed the sum of \$300.59 on account of unpaid vacation pay (\$300) and section 88 interest. Although Mr. Taylor accepts the Determination with respect to vacation pay, he asserts that he is in fact owed “compensation for lack of notice” (\$1,750) and a further \$104.38 on account of unreimbursed employment expenses.

ANALYSIS

I shall address each of Mr. Taylor’s two claims in turn.

Compensation for lack of notice

As previously indicated, Mr. Taylor’s employment was governed by a formal written agreement. Pursuant to that agreement, Mr. Taylor’s employment was to commence on September 15th, 2002 and was to continue for an indefinite period (Article 1.2). The first three months of his employment constituted a “probationary period” during which time Merlin International could “assess and determine the suitability of [Taylor]”.

Article 4.2(b) of the agreement states:

During the Probationary Period, Merlin may terminate the Employee's employment at any time without cause, upon providing to the Employee one week's notice or payment of one week's base salary in lieu of notice;

Mr. Taylor submits that based on the above provision (and his monthly salary of \$7,500) he is entitled to \$1,750 since his employment was terminated without cause or notice during his probationary period.

It may well be that as a matter of contract law Mr. Taylor is entitled to the sum he seeks. However, the delegate's jurisdiction is limited to enforcing the provisions of the *Act*. Section 63 of the *Act* provides for one week's pay as compensation for length of service (where no written notice of termination is given) if an employee is dismissed without cause but only "after 3 consecutive months of employment" [section 63(1)]. Mr. Taylor's service falls well short of that statutory threshold since he was only employed for about 4 weeks.

Further, the amount claimed does not constitute "wages" as defined in section 1 of the *Act* since the amount does not represent money payable for "work" nor is it otherwise required to be paid under the *Act* (as distinct from the employment contract). This claim ought to be pursued by way of a civil court action—the claim, I might add, would fall within the monetary jurisdiction of the Small Claims Court but, in light of the bankruptcy, will have to be pursued by filing a proof of claim with trustee for both Merlin firms pursuant to the provisions of the federal *Bankruptcy and Insolvency Act*.

Expense Claim

The expense claim represents automobile, accommodation and meal expenses incurred by Mr. Taylor while carrying out services on behalf of his employer. I have nothing before me from the employer calling into question either the amount claimed by Mr. Taylor or his entitlement to reimbursement (Article 2.2 of the employment agreement obliges the employer to reimburse certain business expenses including the sort of expenses that are presently in dispute).

As the delegate quite rightly points out in her November 1st, 2002 written submission to the Tribunal, "expenses" are excluded from the definition of "wages" in the *Act*. Accordingly, the delegate submits that "the Branch was unable to issue a determination for this amount". I disagree.

The statutory exclusion of "allowances or expenses" from the definition of "wages" only means that such amounts cannot be included as "wages" for purposes of calculating, for example, an employee's entitlement to vacation pay or compensation for length of service. However, section 21(2) of the *Act* prohibits the "offloading" of an employer's business costs onto an employee. Money paid by an employee contrary to section 21(2) is, despite the statutory definition, "deemed to be wages" and the "Act applies to the recovery of those wages" [section 21(3)]. Thus, in my view, the delegate erred when she disallowed Mr. Taylor's claim for reimbursement of business expenses.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be varied to include an additional claim in the amount of \$104.38 (together with section 88 interest) on account of reimbursement of business expenses pursuant to sections 21(2) and (3) of the *Act*. In all other respects, the Determination is confirmed as it relates to Mr. Taylor.

Mr. Taylor must now file a proof of claim with the bankruptcy trustee for the amount set out in these reasons.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal