

An appeal

- by -

Jeffrey Coolen
("Coolen")

- 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.: 2002/554

DATE OF DECISION: March 11, 2003

DECISION

INTRODUCTION

This is an appeal filed by Jeffrey T. Coolen (“Coolen”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Mr. Coolen 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. Coolen was employed by one or both (this is not clear from the material before me) of two companies known as Merlin Software Technologies International, Inc. (“Merlin International”) and Merlin Software Technologies Inc. (“Merlin Software”). These latter two firms apparently jointly operated a software development firm that is no longer in business.

Although both Merlin International and Merlin Software made assignments into bankruptcy on November 22nd, 2002 (less than 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 Jeffrey Coolen...”.

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.

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).

THE APPEAL

Mr. Coolen is one of 40 employees whose unpaid wage claims are included in the total amount set out in the Determination. The Director’s delegate determined that Mr. Coolen was owed the sum of \$2,026.44 on account of unpaid regular wages (\$884.60), vacation pay (\$1,121.80) and section 88 interest accrued as of October 31st, 2002.

So far as I can gather, Mr. Coolen does not take exception to any of the above amounts but, in addition, claims that he ought to have been awarded 2 weeks’ wages as compensation for length of service (see section 63 of the *Act*) since his employment was terminated without cause or written notice. Mr. Coolen says that he was employed for over one year prior to his termination.

ANALYSIS

In a written submission to the Tribunal dated December 2nd, 2002, the Director’s delegate advised that Mr. Coolen’s claim was included in the Determination which was issued following the receipt of a complaint from another employee. The delegate further advised that there was some urgency to the

matter in light of the fact that the firms had, or were about to, cease operations and that other creditors (such as the firms' landlord) were intending to take immediate action to secure their positions.

The delegate advises that Mr. Coolen's claim was determined based on information provided by the company that this information was not independently verified. Accordingly, the Director "takes no position on this issue" [*i.e.*, Mr. Coolen's claim for compensation for length of service]. The employer apparently took the position before the delegate that Mr. Coolen "quit" but that position is wholly inconsistent with the Record of Employment ("ROE") that was issued by "Merlin Software Technologies" on July 31st, 2002. The ROE states that it was issued for a reason described as "Other" (code "K" on the form), namely, "Lack of Funding".

Mr. Coolen says that he commenced employment on August 1st, 2001 (as set out in the ROE) but that his employment was not terminated until August 7th, 2002 (the ROE says his employment ended on July 31st, 2002). In the absence of any submission from the employer, I am satisfied, on the balance of probabilities, that Mr. Coolen's service with the employer exceeded one year and, accordingly, he is entitled to 2 weeks' wages as compensation for length of service under section 63(2)(a) of the *Act*.

Unfortunately, I do not have any payroll information before me that could be utilized to calculate Mr. Coolen's entitlement. Further, and in any event, since the two Merlin firms are not bankrupt, Mr. Coolen will have to file a proof of claim for unpaid wages with the trustee for the two Merlin firms. Accordingly, I do not propose to either refer this matter back to the delegate or to require further submissions from the parties on the matter of quantum.

ORDER

Pursuant to section 115(1)(a) of the *Act*, I order that the Determination be varied to reflect an additional amount payable to Mr. Coolen representing 2 weeks' wages as compensation for length of service.

Mr. Coolen must now file a proof of claim with the bankruptcy trustee for the amount set out in the Determination as varied by these reasons.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal