EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the *Employment Standards Act* R.S.B.C. 1996, C. 113

- by -

Jastsa Holdings Ltd. and Polmateer Enterprises Ltd.
operating PennySaver Marketing & Distribution
("Jasta")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 1998/151

DATE OF DECISION: March 10, 1999

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Jasta Holdings Ltd. and Polmateer Enterprises Ltd. operating PennySaver Marketing & Distribution ("Jasta/Polmateer") of a Determination which was issued on February 16, 1998 by a delegate of the Director of Employment Standards (the "Director"). In the Determination, the Director found that Jasta/Polmateer had contravened the *Act* in respect of the employment of 30 drivers employed by Jasta/Polmateer, ordered Jasta/Polmateer to cease contravening the *Act* and ordered compliance with the requirements of the *Act* in respect of the employment of the 30 drivers.

Jasta/Polmateer has appealed the Determination on a number of grounds:

1. There was no "complaint" for the Director to investigate;

2. The Determination was a form of declaration or declaratory order and the Director is not empowered under the *Act* to issue a declaratory opinion;

3. The subject matter of the "complaint", the status of drivers employed by Jasta/Polmateer, was a matter in the complete purview of the Labour Relations Board of British Columbia exercising a jurisdiction under the *Labour Relations Code*;

4. The "complaint" was frivolous, vexatious and was not made in good faith and the Director should have exercised her discretion under subsection 76(2) to refuse to investigate it;

5. The Director erred in findings of fact relating to four of the 30 drivers.

On March 11, 1998 Jasta/Polmateer also filed a request under Section 113(1) of the *Act* to suspend the effect of the Determination. That application has never been adjudicated and I will consider, at the conclusion of this appeal, whether there is any continuing relevance or requirement to address it.

The Tribunal has decided an oral hearing is not necessary.

ISSUE TO BE DECIDED

The issue is whether Jasta/Polmateer has met the burden of persuading the Tribunal that the Determination ought to be cancelled because the Director exceeded or failed to properly exercise her jurisdiction under the *Act*, or alternatively, ought to be varied or cancelled because the Director erred in fact or in law.

FACTS

On September 8, 1997, the Communications, Energy and Paperworkers of Canada (the "Union") filed a complaint relating to the employment of 30 drivers working for Jasta/Polmateer. At the time of the complaint, the Union was the certified bargaining agent for a unit of dependent contractors at Jasta/Polmateer. The 30 drivers were included in that bargaining unit. The complaint included the following statement:

> There are a number of matters under which the Union believes it could file complaints, however, for clarity, the Union will cite only two examples that are in no way meant to restrict the scope of an investigation.
>
> 1. Drivers are required to report for work to the Times-Colonist loading dock 15 minutes before a designated "load" time. If the papers are late, as they frequently are, the driver receives no additional pay until the papers are one hour late. Then they are paid in $10 an hour in 15 minute increments.
>
> 2. Drivers do not receive any vacation pay and there is no provision for them to "book" vacation. There are spare drivers, who are assigned by the company. The company roster of spares is only five or six. All spares are pressed into service on two or three nights a week when drivers runs are "split" to facilitate earlier delivery. Drivers can not hire their own outside spares, therefore there is no possibility of them making more than one or two days off for vacation at any one time.
>
> The Union believes these matters are substantive enough to constitute grounds for a complaint on behalf of these drivers under the *Employment Standards Act*. As noted above however, the Union believes there are other employment practices at this worksite which would similarly constitute violations of the *Act*.

The Union followed this complaint with correspondence dated December 1, 1997, which also attached information relating to the working arrangement between Jasta/Polmateer and the drivers. Included in this information were several allegations of fact which, if correct, would constitute violations of the *Act*.

On December 5, 1997, the Director notified Jasta/Polmateer of the fact of a complaint from the Union and specifically noted that:

> The complaint alleges that the company is contravening the requirements of the Employment Standards Act (the "Act"). Specifically, the complaint alleges that persons engaged as bulk delivery drivers are *employees* pursuant to the Act, and that the company is improperly treating these individuals as self employed "contractors".

The letter from the Director attached a copy of the complaint. On December 18, 1997, Jasta/Polmateer responded to the letter. They responded in detail to the specific allegations raised in the complaint and to the assertion by the Union that the drivers were employees for the purposes of the *Act*.

On January 4, 1998, the Union replied to that correspondence and, among other things, elaborated further on the specific allegations that Jasta/Polmateer was in contravention of the *Act* in respect of the employment of the drivers. Jasta/Polmateer replied January 12, 1998 to the allegations that they had contravened the *Act* and to the question of the status of the drivers. The Union replied on January 15, 1998. That reply focuses primarily on the factual differences between the parties on matter relating to status under the *Act*, but some of the reply addresses the facts relating to the complaint.

Jasta/Polmateer filed a brief reply with the Director on February 2, 1998. The Determination was issued February 16, 1998. The Determination contains an extensive factual analysis of the work performed by the drivers, which I do not intend to reproduce in this decision, and reaches the conclusion that the drivers are employees as contemplated by the *Act*, that Jasta/Polmateer had contravened the *Act* by not considering them to be employees, that Jasta/Polmateer cease contravening the *Act* and that Jasta/Polmateer comply with its requirements. The Determination also noted that no request for financial compensation had been sought in the complaint and so none was ordered.

The appeal was delivered to the Tribunal March 10, 1998.

On March 17, 1998, the Tribunal summarily referred the matter back to the Director "for further investigation" under Section 114(2) of the *Act*, indicating that the Tribunal did not consider the Determination to be in compliance with the requirements of the *Act* because it did not include a conclusion respecting quantum.

Reconsideration under Section 116 of the *Act* of that order was sought by Jasta/Polmateer and the Union and on October 29, 1998, the Tribunal issued a reconsideration decision, BC EST #D497/98, cancelling the March 17, 1998 order of the Tribunal. In doing so, the Adjudicator in the reconsideration stated:

> Given my conclusion that consideration of Jasta's more fundamental objections must precede consideration of whether the March 11, 1998 *Insulpro* decision was either applicable or correctly decided, it would be inappropraite for me to render findings on those two issues in this decision. It obviously makes much greater sense for that issue to be addressed, if it is necessary to do so, in conjunction with the appeal as a whole and in the context of complete submissions on those issues.

Following the reconsideration decision,Jasta/Polmateer was asked whether it intended to continue with its appeal. When Jasta/Polmateer indicated a wish to do so, all parties were notified and given an opportunity to file supplementary submissions in light of the conclusion reached by the Adjudicator in the reconsideration. The Union, the director and Jasta/Polmateer filed additional submissions on the appeal.

ANALYSIS

I will deal with each ground of appeal separately.

Counsel for Jasta/Polmateer bases his first ground of appeal on the assertion that there was no complaint for the Director to investigate. The essence of the argument is found in the following comment from the appeal:

> . . . the Union has not alleged any breach of Parts 2 to 8 or any other applicable provision.

That statement is not factually correct. The Union clearly identified two areas of complaint on September 8, 1997: they alleged facts which, if established, constituted a contravention of Part 3 and of Part 7 of the *Act*. Specific allegations were added in the Union's correspondence of December 1, 1997. The allegations were clear enough to Jasta/Polmateer to allow them to respond in detail, which they did on December 18, 1997. If the complaint did not specifically identify the provisions of the *Act* that were alleged to be breached that omission is at best a technical irregularity to which Section 123 would apply:

123. A technical irregularity does not invalidate a proceeding under the Act.

The responses by Jasta/Polmateer on December 18, 1997 and January 12, 1998 joined issue on the merits of the specific complaints raised by the Union and on the central issue, which was whether the drivers on whose behalf the complaint was made were employees for the purposes of the *Act*.

The view of counsel for Jasta/Polmateer is that there was no proper complaint because the Union had "not alleged a breach of Parts 2 to 8 or of any other applicable provision" in its initial correspondence. That view is overly technical and generally inconsistent with the objects and purposes of the *Act*. Apart from the requirement to be in writing, there are no statutory provisions relating to the form or content of a complaint to the Director. 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.).

On a fair reading of the initial correspondence from the Union in a manner consistent with the purposes and objects of the *Act* I conclude there was a proper complaint under Section 74. I adopt a broader policy oriented approach to this question rather than the technical approach pressed by counsel for Jasta/Polmateer. Support for this approach is also found in subsection 76(3) of the *Act* which allows the Director to conduct an investigation to ensure compliance with the *Act* without receiving a complaint. One must ask why the degree of technical perfection suggested by counsel for Jasta/Polmateer should be demanded in a complaint while the *Act* authorizes the Director to investigate to ensure compliance without any complaint at all. The only possible rationale for requiring some particularity in a complaint is to allow the Director and the party against whom the complaint is made to focus their investigation or response. The complaint made by the Union achieved that objective. There was no indication from Jasta/Polmateer that they were confused or misled about the nature of the complaint by the substance of the material that came from the Union.

The first ground of appeal is dismissed.

Counsel for Jasta/Polmateer also argues that the Director has no authority to make a "declaration" or to issue a "declaratory opinion". It is apparent on the face of the Determination that the Director found Jasta/Polmateer to be in contravention of several provisions of the *Act* because it did not consider the drivers to be employees. The relevant part of the Determination reads:

> Based on my investigation, I find that Jasta Holdings Ltd. and Polmateer Enterprises Ltd. operating PennySaver Marketing & Distribution have contravened the Employment Standards Act by not considering bulk delivery drivers as employees pursuant to the Act.

I do not read that paragraph as saying anything more than the refusal or failure by Jasta/Polmateer to consider the drivers to be employees under the *Act* has resulted in a contravention of the *Act*. In fact, there are elements of the submissions of Jasta/Polmateer that admit a contravention of the *Act*. The following statement, for example, is contained in its December 18, 1997 correspondence:

> Drivers are not assigned daily hours of work. Drivers are contracted to complete a designated route. Hours are not a factor and when their route is completed they have no further responsibility to the Company for that day.

At a minimum, that statement admits to a failure to display or record hours of work for the drivers, which, in the context of statutory requirements relative to the employement of an employee, is a contravention of Section 31 and 28 of the *Act*, respectively. It defies logic to accept that an employer who refuses to recognize an individual as an employee for the purposes of the *Act* would comply with its requirements in any event and it is evident Jasta/Polmateer has not complied with the *Act* in respect of the drivers.

A conclusion that Jasta/Polmateer has contravened the *Act* , a conclusion that the drivers are employees under the *Act* and an order to comply with the *Act* in respect of those employees are all aspects of the authority given to the Director under subsection 79(3), which reads:

79. (3) If satisfied that a person has contravened a requirement of this Act or the regulations, the director may do one or more of the following:

(a) require the person to comply with the requirement;

(b) require the person to remedy or cease doing an act;

(c) impose a penalty on the person under section 98.

The Determination was an exercise of that authority and I do not accept that it was merely a "declaration" or that it was a "declaratory opinion".

That does not, however, end the matter. While I have concluded that the Determination is not simply a "declaration" or "declaratory opinion", I am not convinced it satisfies the statutory requirements of subsection 81(1)(a) of the *Act*, which says a determination must include the *"reasons for the determination"*. As I stated above, it is logical to conclude from the circumstances and from the material on file that Jasta/Polmateer had not complied with the requirements of the *Act* for the drivers, but there is a specific requirement imposed by subsection 81(1) to provide reasons for that conclusion. That statutory requirement is not met by simply stating there has been a contravention of the *Act* because the persons on whose behalf a complaint has been made are employees. The requirement to provide reasons is fundamental to the scheme of the *Act* and to the right of Jasta/Polmateer to appeal the Determination. The material discloses some dispute about the matters raised in the complaint. If the reasons for the conclusion that Jasta/Polmateer contravened the *Act* is based on disputed allegations,Jasta/Polmateer should know that and have an opportunity to appeal that conclusion. As the Tribunal noted in *Teamwork Property Solutions Ltd.*, BC EST #D441/97:

> This requirement [to provide reasons] is not merely technical, but is fundamental to a proper administration of Part 13 of the *Act*, including the Rules of Procedure of the Tribunal. The Tribunal has established, in part, a requirement for appellants to identify the specific determination being appealed and to describe the reasons for the appeal. Without comprehensible reasons, these requirements are difficult to address. More substantively, it has recently been stated by the Tribunal in **Ray Chamberlin and Sandy Chamberlin, Operating as Super Save Gas**, BC EST #D374/97, August 18, 1997, at page 7:
>
> > . . . the principles of natural justice also speak in favour of there being clear set out reasons within the Determination.
>
> It is fundamental to the concept of natural justice that a person determined to be liable for a contravention of the *Act* have a clear understanding about the reasons why the delegate reached that conclusion. That information is basic to knowing the case they have to meet if they choose to exercise their right to appeal that conclusion.
> (pages 4-5)

On that basis, the Determination cannot stand. The appropriate response is to exercise our authority under subsection 115(1)(a) and cancel the order.

Although it not necessary to do so, I will address the remaining arguments made by counsel for Jasta/Polmateer.

The Director has a discretion to refuse to investigate or to continue an investigation of a complaint for reasons outlined in subsection 76(2). Counsel for Jasta/Polmateer says the Director should have exercised this discretion under paragraphs (b), (c), (e), (f) or (g) of subsection 76(2). Whether or not the Director refuses to commence, discontinues or postpones investigation of a complaint is a matter of discretion. The Tribunal has expressed its view on a number of occasions about the circumstances under which it would interfere with the exercise of discretion by the Director. In *Jody L. Goudreau*, BC EST #D066/98, the Tribunal said, at page 4:

The Tribunal will not interfere with the exercise of discretion unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:

> . . . a general description of things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably".
> *Associated Provincial Picture Houses v. Wednesbury Corp.,*
> [1948] 1 K.B. 223 at 229

This view was adopted by another panel of the Tribunal in *Takarabe and others*, BC EST #D160/98, who also added:

> In *Boulis v. Minister of Manpower and Immigration* [(1972) 26 D.L.R. (3d) 216 (S.C.C.)] the Supreme Court of Canada decided that statutory discretion must be exercised within "well established legal principles". In other words, the Director must exercise her discretion for *bona fide* reasons, must not be arbitrary and must not base her decision on irrelevant factors.
> (page 15)

This ground of appeal is without merit.

First, I do not accept the argument that the matter complained of and investigated by the delegate was a matter that was within the "complete purview" or touched on matters that were in the exclusive jurisdiction of the *Labour Relations Board*. The "matter" was a complaint that the minimum requirements of the *Act* were being contravened in respect of the employment of the drivers at Jasta/Polmateer. Based on my conclusion that the correspondence filed with the Director by the Union was a "complaint" under the *Act*, not only did the Director have the authority to investigate it, she had the statutory duty to do so. Consequently, subsection 76(2)(b) has no application as a reason to stop or postpone the investigation and the Director was not required to consider it.

Similarly, the circumstances necessary to an exercise of discretion under subsections 76(2)(e), (f) and (g) did not arise on the facts. Neither the fact of certification nor the existence of a collective agreement affects the scope of application of the *Act*, which is succinctly stated in Section 3:

> *3. This Act applies to all employees, other than those excluded by regulation, regardless of the number of hours worked.*

There is no reference in that section, nor in any other part of the *Act* or *Regulations*, to a general exclusion from the minimum standards established by the *Act* for employees included in a certification or engaged in collective bargaining. The conclusion of the *Labour Relations Board*, that the drivers were dependent contractors for the purposes of the *Labour Relations Code*, was made for the sole purpose of the administering the certification process under that legislation. It strains credulity to suggest that the *Labour Relations Board* was examining whether the drivers were employees under the *Act* and whether they were receiving at least basic standards of compensation and conditions of employment. The *Labour Relations*

Board has no jurisdiction to resolve any question about the status of the drivers for the purposes of the *Act* or to remedy contraventions of the *Act*.

Finally, counsel for Jasta/Polmateer argues the Director should have refused to investigate or discontinued the investigation because the complaint was not made in good faith and was frivolous and vexatious. That judgement would also be a matter of discretion for the Director. While it is obvious that Jasta/Polmateer disagrees with the decision of the Director to commence and continue to investigate the complaint, they have not shown in this appeal any circumstances that would justify an interference with the Director's discretion by the Tribunal. All of the facts asserted by Jasta/Polmateer in support of their argument in this appeal were known at the time the investigation commenced or were brought to the attention of the Director during the investigation. In the absence of some new and relevant fact or factor the Tribunal would only be second guessing the Director and, in effect, quite improperly assuming her role under the *Act*.

Lastly, counsel for Jasta/Polmateer says the Director made errors of fact, or of mixed fact and law, in reaching a conclusion of employee status under the *Act* in respect of four of the drivers. The appeal on this point states:

> The Delegate made an error in finding facts, or in applying the employment status tests to the facts, in respect of four drivers, Brian Auger, John Entrop, Richard Munro and Kevin Smith. Those drivers are not told how to do their tasks and are not required to follow strict time lines regarding completion of their tasks. They determine their own timing and routing of delivery. They have approximately 36 hours within which to complete a four hour task, within that time frame, they control how and when they do that task. As a result, these four drivers are closer to contractors than they are to employees.

Jasta/Polmateer also takes issue with two other findings of fact made by the Director in the analysis of whether the drivers were employees under the *Act*.

Jasta/Polmateer has not demonstrated any error by the Director in the conclusion the drivers employed at Jasta/Polmateer were employees under the *Act*. The *Act* defines employee as follows:

> ***"employee"*** *includes*
>
> *(a) a person, including a deceased person, receiving or entitled to wages for work performed for another,*
>
> *(b) a person the employer allows, directly or indirectly, to perform work normally performed by an employee,*
>
> *(c) a person being trained by an employer for the employer's business,*
>
> *(d) a person on leave from an employer, and*
>
> *(e) a person who has a right of recall;*
>
> ***"employer"*** *includes a person*
>
> *(a) who has or had control or direction of an employee, or*

> *(b) who is or was responsible, directly or indirectly, for the employment of an employee;*

Both of those definitions are inclusive, not exclusive. I refer again to *Machtinger v. HOJ Industries Ltd.*, *supra*, where the Court stated 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.

Common law tests used to identify employment status, while a helpful guide, are not determinative when the question of employment status is considered in the context of the definitions and objectives of the *Act* (see also: *Project Headstart Marketing Ltd.*, BC EST #D164/98). In the context of the *Act*, a broad and remedial approach is both justified and directed. The Director approached the question of the status of the drivers under the *Act* correctly. There is no indication on the face of the determination that the Director, in concluding the drivers were employees under the *Act*, was influenced at all by the defintion of "dependent contractor" in the *Code*.

Jasta/Polmateer has not shown the Director made any error in reaching the conclusions of fact contained in the Determination, but even accepting the bare assertion made by counsel for Jasta/Polmateer, the remaining facts and factors applied to the definitions and objectives of the *Act* continue to support a conclusion that the drivers are employees.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated February 16, 1997 be cancelled.

David Stevenson
Adjudicator
Employment Standards Tribunal