Employment Standards TRIBUNAL

An appeal

- by -

Mark Bridge
("Bridge")

- 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 (as amended)

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2007A/59

DATE OF DECISION: September 25, 2007

DECISION

SUBMISSIONS

Mark Bridge	on his own behalf
Patrick Gilligan-Hackett	on behalf of the Friends of UVic Law Society and the University of Victoria
Robert (Scotty) Morrison	on behalf of the Director

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the *"Act"*) by Mark Bridge ("Bridge") of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on May 18, 2007.

2. The Determination was made on a complaint filed by Bridge against the Friends of UVic Law Society and the University of Victoria ("the "Society" and the "University", respectively, and collectively, the "respondents") on August 28, 2004. The complaint alleged the Society and the University had contravened the *Act* by failing to pay "Contract remuneration + Administrative Pay + Vacation pay", which Bridge claimed was "unpaid salary due under a term contract to teach law at the University of Victoria." Later, Bridge added a claim for length of service compensation to his complaint.

3. The complaint was dismissed because the Director concluded it was not filed within the time limit set out in Section 74 of the *Act*.

4. Bridge says the Determination is wrong in several respects and seeks to have the Tribunal cancel the Determination and refer the matter back to the Director for the following purposes:

   (a) a meeting on the question of the breach of mediation privilege with the director; and

   (b) fresh consideration of his claim, "free of the error of process and law" described in the appeal submission and with the "benefit of the evidence of the University of Victoria payroll records for the period preceding the filing" of the claim.

5. Alternatively, Bridge seeks to have the Tribunal adjudicate his claim and in that event requests an oral hearing. It is not necessary to consider this request, as the Tribunal will not consider adjudicating his claim. The Tribunal will consider the appeal and decide whether Bridge has shown there is any reason for the Tribunal to cancel the Determination and refer the matter back to the Director, as he has requested. However, in the event the Tribunal agrees the Determination should be cancelled and the matter referred back to the Director, the authority of the Tribunal under Section 115 of the *Act* does not include requiring the Director to meet with Bridge concerning an alleged breach of "mediation privilege".

6. In respect of the process for conducting an appeal, Section 36 of the *Administrative Tribunals Act* ("*ATA*"), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal's Rules of Practice and Procedure provide that the Tribunal may hold any combination of written, electronic and oral hearings. See also *D. Hall & Associates v. Director of Employment Standards et al.,*

2001 BCSC 575). The Tribunal has reviewed the appeal, the arguments submitted by all of the parties and material in the file and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

7. The issue is whether Bridge has shown an error in the Determination requiring the intervention of the Tribunal under Section 115 of the *Act*.

ARGUMENT

8. Bridge says the Director erred in law and failed to observe principles of natural justice in making the Determination. He also says evidence has come available which was not available at the time the Determination was made. This last point relates to payroll records from the University, which Bridge seems to feel are relevant to his claim, and to unspecified evidence which Bridge says he could have provided if he had "been afforded the same opportunity in April 2007 to provide further evidence or clarify evidence as was offered and accepted by the respondents".

9. Bridge argues the Director committed the following errors of law:

- failing to follow the principle of issue estoppel in respect of the issues between the parties, particularly on the issue of whether the Society and the University should be "associated" under Section 95 of the *Act*;
- incorrectly interpreting the contract of employment in respect of the payment of wages at the completion of work and the application of Section 80 of the *Act* to the claim for unpaid wages;
- incorrectly interpreting the contract of employment in respect of its provision for a minimum wage and the application of Section 16 of the *Act* to the claim for unpaid wages;
- determining his employment was terminated without evidence of termination, despite evidence to the contrary and despite the provisions of paragraph 67 (1) (b) of the *Act*;
- incorrectly applying the definition of "work" in Section 1 of the *Act* to the claim for unpaid wages;
- incorrectly stating conclusions of fact in the absence of evidence, sufficient evidence, and/or in the face of contradictory evidence and making assertions contrary to the evidence, principles of law and/or provisions of the *Act*;
- failing to address the claim for liability for length of service accrued to August 2004 when the claim for unpaid wages was made; and
- failing to address the claim for liability for vacation pay accrued to August 2004 when the claim for unpaid wages was made.

10. Bridge says the Director failed to observe principles of natural justice in the following respects:

- by breaching mediation privilege and not hearing Bridge on that matter; and
- by not providing him with the same opportunity to make submissions and clarify evidence that was given to the respondents.

11. Bridge says evidence has come available that was not available at the time the Determination was made.

12. In response, the Director says Bridge has failed to address the salient part of the Determination: the issues of whether there was an error in deciding the complaint was filed outside of the time period for filing a complaint under the *Act* and whether he performed any work in his capacity as Director of the Business Law Clinic for the Society in the six months preceding the filing of his complaint. The Director argues that many of the alleged errors are unrelated to the timeliness issue, which is the basis for denying the claims made by Bridge.

13. The Director says Bridge was given an opportunity in January 2007 to provide further evidence but subsequently chose not to participate in the investigation process. While the respondents were given an opportunity to clarify a point of evidence in April 2007, no new or additional evidence was added and, in any event, the clarification had no bearing on the final decision.

14. The Director says nothing in his investigation turned on any matter previously discussed between Bridge and any other person from the Employment Standards Branch. The Determination was based on whether Bridge had filed his complaint in time and whether wages had become payable in the six months preceding the filing of the complaint.

15. The Director has provided the Section 112 (5) record.

16. The Society and the University have filed a joint reply. They say the appeal is without merit. Generally, they say the Determination turns on findings of fact, not questions of law. The Determination is grounded in one central finding of fact: when did Bridge cease to be employed by the Society. In the view of the Society and the University, the facts support the finding that the complaint was filed beyond the time permitted under Section 74 of the *Act*; Bridge had ceased to be employed as the Director of the Business Law Clinic for the Society as of December 31, 2003 and the complaint was filed on August 28, 2004.

17. The Society and the University also say the allegations of breach of natural justice relate to a matter that is unrelated to the basis for the Determination and to a matter that did not give rise to any procedural unfairness.

18. The Society and the University have responded to each point raised by Bridge. They have grouped the alleged errors of law "thematically", in three groups. The first includes point 1, above, and those arguments which relate to the alleged failure to follow the principle of issue estoppel. They say the Director was correct to determine whether the complaint was filed in time before considering whether to associate the Society and the University under section 95 of the *Act* and that the question became irrelevant once the Director decided the complaint was filed out of time.

19. In any event, they say the basis for the "issue estoppel" argument – a letter from Revenue Canada, Tax Services in October 1999 relating to pensionable earnings – has no connection to the status of the respondents as potential associated employers under the *Act* and do not satisfy the conditions for the existence of issue estoppel.

20. The second area of response covers points 2 to 6. The Society and the University say that collectively these points do nothing more than express a disagreement with and a challenge to the conclusions reached by the Director on the evidence made available by the parties.

21. They say these points are made without specificity to the alleged errors, without analysis of the nature of the error and without reference to the effect that such alleged error had on the Determination. They say in some cases the submissions made by Bridge simply ignore findings of fact made in the Determination and in some cases mischaracterizes the reasons given by the Director.

22. The third area of response by the Society and the University says that points 7 and 8 raise matters which the Director had neither the jurisdiction nor the obligation to address once he found the complaint was untimely.

23. They say that point 9 is irrelevant to the issues considered by the Director in the Determination and the assertions made in point 10 do not give rise to a breach of natural justice. They note that the complaint process was conducted by way of an investigation which was carried out in a manner that was entirely consistent with the obligation on the Director to ensure the level of procedural protection provided to the parties is appropriate to the circumstances.

24. The Society and the University say Bridge has not met the conditions for the admission of new evidence on the appeal, if in fact the evidence sought to be admitted has not already been provided during the investigation.

25. Bridge has filed numerous responses to the reply submissions of the Director and the respondents. Some of these responses address issues in the appeal, while other correspondence relates to procedural questions for the Tribunal. He raises a concern that the Section 112(5) record provided to the Tribunal includes material which he contends is protected by "mediation privilege", including virtually all of the documents supporting his claim. He has asked the Tribunal to provide him with some direction in how to assert "mediation privilege" in this appeal. Without finally deciding whether there is any merit to his "mediation privilege" argument, the Tribunal does not consider it necessary to address his request. The central question in respect of the claim of "mediation privilege" is whether Bridge has shown any notion of "mediation privilege" is applicable to the evidence relied on to decide the issues in this appeal. The Tribunal has asked Bridge to identify the specific material that he considers is subject to "mediation privilege" and he has purported to do that. More will be said on this later in this decision.

26. He has also requested the Tribunal to tell him how to ask for orders requiring disclosure of payroll records from the University and disclosure of additional material that was before the Director when the Determination was made. In respect of the latter point, Bridge has not identified any additional material which might have been before the Director when the Determination was made and which might not have been disclosed, nor does the appeal contain any reference to such material. The request for advice on how to compel the payroll records of the University is an aspect of the "new evidence" ground of appeal. That ground of appeal is considered below.

27. In any event, this request has been pre-empted by an application by Bridge under section 109 of the *Act* asking the Tribunal to order production of payroll records from the University and "the whole record . . . of the Director of Employment Standards" at the time the Determination was issued. I will address this application later in this decision.

28. In reply to the submission of the Director, Bridge says the Tribunal should accept his submissions relating to errors of law as the Director has chosen not to respond to them. He joins issue with the Director and the respondents on the question of timeliness.

ANALYSIS

29. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to show an error in the Determination under one of the statutory grounds.

30. Against the backdrop of the arguments raised by Bridge, one particular aspect of the complaint process, which is set out in the following paragraphs of the Determination, warrants comment:

> Mr. Bridge and I met on June 23, 2006. Mr. Bridge was informed that as part of the investigation, I could also try to facilitate a settlement if one was possible. We discussed the difference between the investigation process and the mediation process, in which he had participated previously. Mr. Bridge had come to this meeting prepared to present further evidence. He agreed that I first try to resolve the matter by discussing a settlement proposal with the other parties. He was told that he would be given an opportunity to present further evidence if the settlement discussions failed.
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> . . .
>
> The parties were asked if they had further evidence to present prior to the writing of this Determination.
>
> Mr. Bridge indicated, in a fax, which was sent December 27, 2006, he would provide further evidence. He suggested he would need about three weekends to assemble a complete written submission. I wrote to Mr. Bridge on January 11, 2007 and told him I would meet with him on January 26, 2007. I asked that he have the "booklet of evidence and answers to questions I raised in my letter of November 7, 2006 available for this meeting." On January 24, 2007 I received a letter, sent by fax, requesting an adjournment of the January 26, 2007 meeting. On January 25, 2007 I received a fax from Mr. Bridge that informed me he was unable to meet due to illness. He further wrote, "If you are still willing to suspend writing a decision for two weeks, I will submit all the evidence that I would have given you tomorrow in writing, including oral evidence, within that period." I wrote to Mr. Bridge on January 28, 2007 and requested he submit all evidence by February 9, 2007. Mr. Bridge has not provided the requested information.

31. In his appeal submission, except for a reference to the penultimate sentence of the first paragraph above, to not being asked to "waive mediation privilege", Bridge does not challenge the above recitation of facts. On the basis of those facts, I find the requirements of Section 77 of the *Act* have been met. It follows that the responsibility for what Bridge sees as the absence or deficiency of "evidence" relating to his claim, the Determination and, consequently, the appeal, must fall on him. He was given more than enough opportunity to show there was a sound factual and evidentiary basis for his claims. The respondents submitted a substantial body of evidence in the complaint process. In addition to the opportunity provided to Bridge by the Director in the complaint process, the Tribunal has provided him with the opportunity to identify what documentary evidence might be considered in the appeal. His response has been to invoke "mediation privilege" over all but 19 pages of the Section 112(5) record. More will be said on this point.

32. I shall now address each of the grounds of appeal in the order they have been presented, but not necessarily in the order they have been arranged within the respective grounds of appeal. As well, depending on the result of my analysis, it may not be necessary to provide a detailed answer to the arguments made under some of the grounds of appeal.

Errors of Law

33. This appeal cannot succeed unless Bridge can show the Director erred in law in finding Bridge's complaint was filed outside of the time limits for filing appeals set out in Section 74(3) and, even if filed in time, that there were "wages" owing to him under the *Act* in the six months preceding the filing of the complaint. These two matters are addressed in the first six errors of law identified in the appeal submission. The following analysis deals with those six points.

34. Unless Bridge succeeds on the above matters, there is no need to address the arguments raised in Points 7 and 8, as they presuppose a timely complaint.

(a) Statutory Provisions

35. The Director identified three provisions in the *Act* that were considered relevant to these matters. The first is the definition of work in Section 1, which reads:

> ***"work"*** *means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.*

36. The relevance of this provision relates to the finding that between March 1, 2004 and the date on which the complaint was filed, August 28, 2004, Bridge performed no work for the Society in the capacity of Director of the Business Law Clinic and was therefore owed no wages. For completeness, "wages" is defined in Section 1:

> ***"wages"*** *includes*
>
> *(a) salaries, commissions or money, paid or payable by an employer to an employee for work.*
>
> *(b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency.*
>
> *(c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act.*
>
> *(d) money required to be paid in accordance with*
> *(i) a determination, other than costs required to be paid under section 79(1)(f), or*
> *(ii) a settlement agreement or an order of the tribunal, and*
>
> *(e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefits, to a fund, insurer or other person.*
>
> *but does not include*
>
> *(f) gratuities,*
>
> *(g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,*
>
> *(h) allowances or expenses, and*
>
> *(i) penalties.*

37. It should be noted that on the facts of this appeal, the only parts of the above definition that would apply to the wages claimed by Bridge are paragraph (a): "*salaries, commissions or money, paid or payable by an employer to an employee for work*"; and paragraph (c). There is no suggestion in the complaint or in

any submissions filed by Bridge that he is claiming money paid or payable as an incentive, money required to be paid as part of a Determination, a settlement agreement or Tribunal order or money required to be paid under a contract of employment to a fund, insurer or other person.

38. The second relevant provision is subsection 74(3), which sets out the time limit within which a complaint by an employee whose employment has been terminated must be filed. That provision reads:

> *74. (3) A complaint relating to an employee whose employment has terminated must be delivered under subsection (2) within six months after the last day of employment.*

39. The relevance of this provision relates to the finding by the Director that Bridge's employment with the Society was terminated on December 31, 2003 and, consequently, the complaint, filed August 28, 2004, was out of time.

40. The third relevant provision is paragraph 80(1) (a), which reads:

> *80. (1) 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*
>
> *(a) in the case of a complaint, 6 months before the earlier of the date of the complaint or the termination of employment, . . .*

41. The relevance of this provision is in the conclusion of the Director that wages are only payable for "work or services" performed and that Bridge performed no "work or services" for the Society in the six months preceding the date of the complaint.

(b) The Determination

42. In order to effectively address the arguments raised by Bridge, I will set out those portions of the Determination that contain the findings on the two matters identified in this ground of appeal:

> There is no question Mr. Bridge knew his employment as Director of the Business Law Clinic would end on December 31, 2003. He knew through correspondence with Andrew Petter, that he would not be employed after the end of December, 2003 in his capacity as Director of the Business Law Clinic.
>
> Mr. Bridge filed his complaint on August 28, 2004. To successfully argue his complaint was filed in a timely manner, Mr. Bridge must prove he performed work, in his capacity as the Director of the Business Law Clinic, in the period March 1, 2004 to August 28, 2004. Mr. Bridge knew his position as Director of the Business Law Clinic ended on December 31, 2003. Therefore, Mr. Bridge's claim for wages hinges on whether the Act contemplates the situation where someone claims wages under the terms of a contract, where no work was performed. If it did Mr. Bridge could claim he was employed during the period in question and his complaint filed in a timely manner. I looked to the definition of work in the Act to answer that question. Section 1 of the Act defines "work" to mean *the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.* Mr. Bridge did not perform labour or services for the University or the Society as the Director of the Business Law Clinic during the period in question. The complaint was not filed in accordance with Section 74 of the Act.
>
> With regard to Mr. Bridge's assertion that the Society and the University are associated employers, pursuant to section 95 of the Act; I find this matter to be a moot point.

> Regardless of whether the employers are associated or not, Mr. Bridge did not perform work in the six months prior to filing his complaint, for either employer in his capacity as Director of Business Law Clinic. Section 80(1) (a) would apply to Mr. Bridge's contention that he continued to work in 2004, due to the fixed term contract. I have determined no work was performed during the 6 months prior to his complaint, in his capacity as Director of the Business Law Clinic.
>
> Section 74(3) contemplates the situation where someone must file their complaint within 6 months from termination. Mr. Bridge was terminated from his job as Director of the Business Law Clinic on December 31, 2004 [sic]. I find that Mr. Bridge's complaint filed against the Society and the University was not filed in accordance with Section 74 of the Act.

(c) Decision on the Errors of Law

43. It is appropriate at this stage to consider the specific challenges raised by Bridge to the above findings. These challenges are listed in items "h." through "n." in the sixth point of his appeal submission.

44. Bridge says the first paragraph above is "inconsistent with the provision of Section 67(1) (b) of the Act". That provision states:

> ***67*** *(1) A notice given to an employee under this Part has no effect if*
>
> . . .
>
> *(b) the employment continues after the notice period ends.*

45. The appeal does not elaborate on the alleged inconsistency. Notwithstanding, I do not find there is any inconsistency between the first paragraph, above, and that provision. In fact, I find Section 67(1) (b) has no application to the issues in this appeal at all. Bridge does not deny or challenge the central finding in the challenged paragraph; that he knew his employment as Director of the Business Clinic for the Society would come to an end on December 31, 2003. There is also uncontroverted evidence in the material provided by the respondents that Bridge's employment with the Society was terminated on December 31, 2003. Section 67(1) (b) only speaks to the effect that continued employment has on a notice of termination given under the *Act*. There is no evidence of continued employment after December 31, 2003 and this provision does not have the effect of statutorily continuing employment that has been ended.

46. Bridge says the second sentence of the second paragraph "misapplies s. 80 of the Act, the principle of issue estoppel in respect of the employer identity, and paragraph 67(1) (b) of the Act." Once again, Bridge does not elaborate on the alleged errors contained in that sentence. And once again, I am unable to find there is a misapplication of either Section 80 or paragraph 67(1) (b) in that sentence. The assertion made in respect of both of those provisions seems to infer Bridge's employment with the Society was not terminated on December 31, 2003, as the Director found it to be. There is nothing to indicate that finding was wrong. It should be noted in any event that the Director's findings relating to Section 80 of the *Act* are based on the date of the complaint, a fact about which there can be no possible dispute.

47. The "issue estoppel" argument relates to Bridge's assertion that the respondents are associated entities and, for the purposes of his claim, are the "employer". It is quite incorrect to say the Director erred in law by failing to apply the principle of "issue estoppel" in respect of this issue, when there is no indication the principle or any argument relating to its application to the complaint was ever advanced by Bridge during the complaint process. Based on the failure of Bridge to advance this argument, it would be within my discretion to ignore it in this appeal. Nevertheless, for the sake of completeness I will consider the merits

of this argument, as it relates to the Section 95 issue and the identity of the "employer" for the purposes of the Bridge's claim under the *Act*, and decide whether the principle applies in the circumstances of this case.

48. The basis for Bridge's argument on this point is a decision made by Revenue Canada, Tax Services, which is contained in a letter dated October 1, 1999 from Mr. Fred Vivash, who is identified in the letter as the Director of the Vancouver Island Tax Office, together with Bridge's contention that the decision was accepted by the parties – the Society, the University and him.

49. Bridge does not claim "mediation privilege" in respect of the decision of Revenue Canada, Tax Services and its inclusion with the complaint and Bridge's reliance on it to support appeal arguments would in any event make such a claim untenable. I note that the "issue estoppel" argument is also raised as an error of law in the first point in the appeal submission and in item "b." of the sixth point. This aspect of my decision also addresses those points.

50. The requisites for the application of the principle of issue estoppel have been described by the Supreme Court of Canada in *Angle v. Minister of National Revenue* (1974), 47 D.L.R. (3d) 544 (S.C.C.) as follows:

> . . . (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

51. The doctrine does not apply unless the essentially *identical* legal issue was previously, and finally, decided by a legally competent decision-maker: *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2) [1967] 1 A.C. 853*. The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceedings: *Hoystead v. Commissioner of Taxation*, [1926] A.C. 155.

52. The Tribunal has considered the doctrine in several decisions, including *Oriental Interiors Ltd.*, BC EST #D281/02 and *J.F. Ventures Ltd. and J.F. Bioenergy Ltd.*, BC EST #D131/05, *Super Save Disposal Inc. and Actton Transport Ltd.*, BC EST #D128/05 (Reconsideration denied, BC EST #RD001/07). Applying the considerations accepted in those decisions, which include those stated above, I find the doctrine does not apply in this case.

53. On the face of the document enclosing the decision, Bridge had asked Revenue Canada, Tax Services for a ruling regarding the "insurability and pensionability of [his] employment with the Friends of UVic Law Society for the period of September 1, 1999". Revenue Canada, Tax Services was not asked to decide whether the Society and the University were associated employers, for any purpose, and the decision does not express any view on that matter. The letter does not express any view on whether the University was Bridge's employer, which makes sense since there was no request to decide that question.

54. As well, the decision was made by a Director in the Regional Tax Services Office. Such decisions have not been accepted by the Tribunal as final judicial decisions subject to the doctrine (see *J.F. Ventures Ltd. and J.F. Bioenergy Ltd., supra.*).

55. No error of law on the application, or more precisely the non-application, of "issue estoppel" has been shown, and this argument is accordingly dismissed. The question of whether the Society and the University were associated employers for the purposes of the *Act* was not decided when Bridge's complaint was filed and there was simply no basis, on a proper interpretation and application of Section

95, for associating the Society and the University as one employer under the *Act* at any time after the complaint was filed.

56. The requisites for associating entities as one employer under Section 95 of the *Act* were identified in *Invicta Security Systems Corp.*, BC EST #D349/96. One of the requisites for association is that each of the entities sought to be associated must be carrying on a business, trade or undertaking. The Society had ceased to carry on any business or undertaking as of December 31, 2003, well before the complaint was made and the position that the respondents were one employer under the *Act* was first raised by Bridge to the Director. The provision also requires there to be some statutory purpose for treating the respondents as one employer under the *Act*. The apparent purposes for seeking to associate the respondents in this case are to create liabilities under the *Act* which would not otherwise exist, rather than to enforce established liabilities[1], and to avoid the statutory time limit for filing a complaint under the *Act*. Neither of those is a legitimate statutory purpose for associating entities.

57. It follows that there was no error made when the Director decided the complaint based only on Bridge's employment with the Society.

58. Next, Bridge says the penultimate sentence of the second paragraph "is not supported by the evidence and is contradicted by the evidence." Bridge does not say to what "evidence" he is referring, either in terms of why the evidence provided could not support this finding or what evidence contradicts this finding. If this argument is simply intended to challenge findings of fact made by the Director, as it seems to be, it should be noted now that the *Act* does not provide for an appeal based on errors of fact, and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact, unless such findings raise an error of law (see *Britco Structures Ltd.*, BC EST #D260/03). To successfully challenge findings of fact on the ground of "error of law", as he purports to do, Bridge must persuade the Tribunal that the Director has made findings of fact without any evidence or acted on a view of the facts which could not reasonably be entertained. More particularly, if Bridge contends that he did perform "work or services" for the Society as the Director of the Business Law Clinic in the six months preceding the filing of the complaint, he has the burden of showing that.

59. Bridge says the final sentence of the second paragraph is "a misapplication of section 74 of the Act." Bridge does not say how that provision has been misapplied, but his assertion is only as valid as any suggestion that his employment with the Society did not terminate on December 31, 2003. Since there is no basis for disturbing the finding made by the Director in that respect, I can find no possible validity to this alleged error of law.

60. Bridge says the third paragraph is "inconsistent with Director's duty to investigate the relationship once a complainant has provided prima facie evidence of an association." Bridge cites *Donald Healey*, BC EST #D207/04 in support of that proposition. While the principle for which the *Healey* decision stands is unassailable, it is unnecessary to review its application in the circumstances of this case because I find on a proper application of the requisites for associating entities under Section 95 of the *Act*, the Society and the University could not be associated as one employer for the purposes of the *Act*. That is the legal result on the facts, regardless of whether Bridge had established a *prima facie* case or the Director has a duty to investigate in the circumstances.

[1] I note in this respect that Section 95 is found in that Part of the *Act* dealing with enforcement.

61. Bridge says the final sentence of the fourth paragraph is "contradicted by the evidence put to the decision-maker". He does not say what the evidence was. My comments above, relating to the authority of the Tribunal to consider appeals based on alleged errors in findings of fact and the burden on Bridge to show an error of law in such findings of fact also applies to this argument. On that basis, I dismiss it.

62. Bridge says the second sentence of the fifth paragraph "is not supported in evidence and is contradicted by evidence put to the decision-maker which is not considered in his reasons." Once more, Bridge does not say to what "evidence" he is referring, either in terms of why the evidence provided could not support this finding or what evidence contradicts this finding. In any event, the contention that the conclusion found in that sentence was an error has also been addressed above in my findings that the Society and the University could not be associated under the *Act* and that Bridge bears the burden of showing he performed "work or services" as the Director of the Business Law Clinic in the six months preceding the filing of the complaint.

63. In sum, I find no merit to any of the arguments asserting an error of law in the findings and analysis set out in the Determination.

64. I will briefly address the other alleged errors of law listed as item "a." and items "c." through "g." in the sixth point of the appeal submission. Except for the reference to "mediation privilege" in item "e." all of the alleged errors of law do nothing more than challenge findings of fact, asserting "no evidence in support" or not fairly stating the evidence, without any analysis or explanation of the basis for these assertions. They fall far short of showing an error of law or meeting the burden on Bridge to show an error allowing and justifying the Tribunal's intervention under Section 115 of the *Act*.

65. In respect of the reference to "mediation privilege", and while the Tribunal respects and has protected the confidentiality of communications made during a mediation conducted by the Director, the claim of privilege made here relates to "evidence" provided in that process. The term "evidence" used in this context is ambiguous, since by its nature mediation is not an evidentiary process. If "evidence" simply means facts, I have some reservation about whether any claim of privilege can attach to facts disclosed (as distinct from communications made) during a mediation process. Nevertheless, accepting for the moment that such a privilege can exist, Bridge has not shown in this appeal to what "evidence" that privilege applies, in respect of what "evidence" there was a breach of this privilege and what, if any, relevance that breach had to the Determination. In the context of the issues relevant to this appeal, I have not been able to identify any "evidence" that might be included in Bridge's claim of "mediation privilege". I reiterate that the respondents have submitted a substantial body of material to the Director during the investigation. I make this point because the facts relating to the issues decided by the Director were within the knowledge of all the parties directly involved in this dispute. They are few and unremarkable in nature: Bridge was terminated from his employment with the Society on December 31, 2003; the Society did not continue to exist as an entity after December 31, 2003; and Bridge did not perform any work for the Society in the six months preceding the complaint. It defies logic to suggest one party can claim a privilege over such facts and through that claim effectively keep them from a decision-maker.

66. Before I would consider any claim of privilege relating to "evidence", I would, at least, need to be satisfied that such "evidence" was exclusively in the possession of Bridge, that its disclosure was clearly a breach of an assurance given to Bridge that the particular "evidence" in question would be kept confidential and that its disclosure and use was prejudicial to a fair consideration of his claims. Bridge has made no effort to show any of that. In a response to the Tribunal requesting him to "identify the specific material [in the Section 112(5) record] that you say is subject to mediation privilege", Bridge

stated, "from the 19th sheet onwards, all of the "Director's Record" which you sent me July 23, 2007 is material provided only for mediation purposes." That is an inadequate response which fails to acknowledge or address the material submitted to the Director by the respondents during the investigation.

67. Regardless of the views expressed in the preceding paragraph, nothing that has been considered in making this decision involves a consideration of "evidence" that could even remotely be included within Bridge's claim of "mediation privilege". I am supported in this conclusion by the submissions of the Director, who says that the Determination involved only a consideration of the issues of timeliness and whether wages were payable in the six months preceding the date of the complaint. The Director says the Determination did not turn on any matter previously discussed between Bridge and any other person from the Employment Standards Branch.

68. In point 2 of the appeal submission, Bridge says the Director erred in interpreting the written contract of employment in respect of its provision for payment of wages at the completion of work. There are several difficulties with this argument. First, and most obvious, is that Bridge has failed to establish the existence of a "written contract" that could be applicable to the relevant period of time, *i.e.*, to the last six months preceding the filing of the complaint. Second, and nearly as obvious, is that if there is arguably such a contract, he has not identified what "provision" of that contract has the effect he propounds. Third, if there is such a contract and it contains provision for payment of wages at the completion of "work", he has failed to identify what "work" was performed for the Society in the six months preceding the filing of the complaint that would require the payment of wages under the *Act*. Fourth, Bridge has failed to indicate what possible relevance this alleged error could have on his claim. I have already found there was no misapplication of Section 80. Findings of fact have not been successfully challenged in this appeal. In sum, Bridge has failed to establish any basis for his argument that the Director committed the alleged error of law.

69. The same response is made to the argument in Point 3 that the Director erred in interpreting the written contract of employment in respect of its provisions for minimum wage and the application of Section 16 of the *Act*. I would add the following comments in respect of this argument: minimum wage, like other wages under the *Act*, is payable by an employer for "work", and Bridge has not shown any error in the finding by the Director that he performed no work for the Society during the relevant period of time. In any event, no minimum wage claim has been made by Bridge.

70. I have already responded to the argument raised in Point 4. There is uncontroverted evidence in the material provided by the respondents that Bridge's employment with the Society ended on December 31, 2003. Bridge has not shown that finding was wrong or reviewable under Section 112 of the *Act.* Bridge has not shown that paragraph 67(1) (b) has any application to the circumstances of this case. That provision does not operate to statutorily continue employment that has been terminated. It only negates written notice of termination if employment continues past the notice period. Bridge has not shown his employment with the Society continued after December 31, 2003.

The Natural Justice Issues

71. Bridge has alleged a breach of principles of natural justice in the context of "mediation privilege" and an alleged failure to provide him with "rights of equal participation and reply". The burden of showing the Director failed to comply with principles of natural justice in making the Determination is on Bridge (see

James Hubert D'Hondt operating as D'Hondt Farms, BCEST #RD021/05 (Reconsideration of BCEST #D144/04)).

72. I have already addressed the matter of "mediation privilege". To reiterate, Bridge has not shown what "mediation privilege" is, what it applies to, that, if it applies to facts, or "evidence", it was breached and that the breach, if it occurred, affected the fairness of the process, in particular his opportunity to be fairly heard. I also restate my view that the facts on which the Determination was based could not be included in Bridge's claim of "mediation privilege" because they are facts within the general knowledge of all the parties to the dispute and are addressed in the evidence provided by the respondents during the investigation.

73. The assertion that the Director failed to provide Bridge with "equal rights of participation and reply" relates to the indication in the Determination that the respondents were asked to clarify some of the evidence they had already provided and he was not afforded the same opportunity. The Determination expressly states the respondents did not provide any new evidence. Bridge does not say he was not provided with the evidence submitted by the respondents in response to his claims. He has received the material provided by the respondents as part of the Section 112(5) record. There is some indication in the record that he had also received this material earlier as part of a pre-hearing document disclosure. In this appeal, he has not expressed any surprise over that material submitted by the respondents nor sought to "clarify" any parts of it.

74. There is no basis in the evidence for any suggestion that he did not receive a full opportunity to present his case and respond to the position taken by the respondents. In this respect, I agree with the views expressed by the Director and the respondents in their replies to this point. There is nothing in the file indicating the investigation was not carried out in a manner that was entirely consistent with the obligation on the Director to ensure the level of procedural protection provided to the parties was appropriate to the circumstances. Bridge's argument on this matter also ignores the fact that from December 2006 until May 2007, Bridge failed, or refused, to provide the Director with any additional information or submission relating to his claims, even after assuring the Director he would do so. Bridge has failed to show the Director breached principles of natural justice in making the Determination failing to afford him an opportunity to clarify evidence or notify him of the clarification of evidence made by the respondents.

New Evidence

75. Bridge has not actually provided new, or additional, evidence with the appeal. He identifies two areas where it would be appropriate to allow additional evidence: payroll records from the University; and unidentified evidence that he "would have" provided if given that opportunity in April 2007.

76. He contends that payroll records respecting his employment with the University prior to August 28, 2004 are relevant and asks the Tribunal to require disclosure of those records.

77. He says he was not given the same opportunity as the respondents to provide "further evidence" and to clarify evidence that was given to the respondents.

78. Bridge has not met the test for seeking the introduction of new, or additional, evidence on appeal (see *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03).

79. In this case, Bridge has failed to show the payroll records from the University are relevant to a material issue arising from the complaint. As I have indicated several times already in this decision, the University is not, and cannot, be associated with the Society as one employer under the *Act*. The Director did not err in deciding the issues that were addressed in the Determination without reference to Bridge's employment with the University.

80. In respect of the suggestion that Bridge should be allowed to provide the evidence he "would have presented" if given that opportunity in April, 2007, the only appropriate response is that he did have that opportunity, between December 2006 until May 2007, and passed it by. The Tribunal has consistently resisted efforts by parties who fail or refuse to participate in an investigation to use the appeal procedure to make a case that should have and could have been made to the During in the complaint process (see *Tri-West Tractor Ltd.*, BC EST #D268/96).

81. Bridge has established no basis for the request to have the Tribunal order production of the "whole record". In the absence of any evidence to the contrary, I accept the "whole record" has been provided by the Director, as required by Section 112(5). Also, in light of my disposition of the appeal, such an order would be irrelevant and abusive.

Summary

82. At the outset of the analysis on the errors of law Bridge has alleged, I indicated that he could not succeed in this appeal unless he could show the Director erred in law in finding his complaint was filed outside of the time limits for filing appeals set out in Section 74(3) and, even if filed in time, that there were "wages" owing to him under the *Act* in the six months preceding the filing of the complaint. He has done neither. Accordingly, the appeal is dismissed.

83. I will make one final comment. In a letter delivered to the Tribunal as this decision was being written, Bridge expresses his "understanding" and expectation that he would "receive an invitation from the Tribunal to make submissions on the matters noted in the Appeal form" and wonders "when or if he will receive such a letter".

84. The short answer is that he has already received such an invitation. In a letter to all of the parties, including Bridge, dated July 23, 2007, Ms. Edelman, the Vice-Chair of the Tribunal, wrote:

> The Tribunal has received the enclosed submission and record from Robert (Scotty) Morrison, delegate of the Director of Employment Standards, dated July 17, 2007 and a submission from Patrick Gilligan-Hackett, counsel for the University of Victoria and Friends of UVic Law Society, dated July 17, 2007.
>
> If you wish to make a **final reply**, please do so no later than **4:30 p.m. on August 07, 2007.**
>
> Once the final replies have been received, the Tribunal will assign a Member to decide this appeal.

85. As I have outlined above, the submission Bridge filed with the appeal set out all of the issues and his arguments under each of the grounds of appeal on which he sought review. The reply submissions of the Director and counsel for the respondents put Bridge on notice of the areas of disagreement and their perception of the deficiencies with his appeal. The letter from the Tribunal put Bridge on notice that he had one opportunity for final reply to those submissions before the appeal would be decided.

86. Bridge does not identify the source of his "understanding", but in light of the very clear directions he was receiving from the Tribunal, it was an unreasonable one which does not justify any further delay in deciding this appeal.

ORDER

87. Pursuant to Section 115 of the *Act*, I order the Determination dated May 18, 2007 be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal