EMPLOYMENT STANDARDS TRIBUNAL

In the matter of six appeals pursuant to section 112
of the *Employment Standards Act*, R.S.B.C. 1996, c. 113

- by-

Robert Bell, Timothy Brock, Martin Holt, William LaRue,
F. George Orr and Herbert Sinnen
("the Appellants")

- against Determinations issued by -

The Director of Employment Standards
("the Director")

ADJUDICATOR: Frank A.V. Falzon

FILE NO.: 96/797

DATE OF DECISION: February 19, 1998

DECISION

APPEARANCES

Adam S. Aldbright	Counsel for the Appellants
Adele Adamic	Counsel for the Director

OVERVIEW

At the outset, I wish to emphasize that these appeals have not yet been considered on their merits. Consequently, nothing that follows in this section should be construed as findings of fact that would bind me or any other adjudicator after considering the appeals.

These appeals arise from six determinations rendered by the Director of Employment Standards on November 26, 1996. The Determinations - directed separately to each appellant but otherwise identical in form - found each of the six appellants to be personally liable for wages owing to 22 former employees of a Victoria firm known as EPS Essential Planning Systems Ltd. ("EPS").

The asserted basis for the Determinations was that EPS failed to pay wages owing to the employees for the period April 1-15, 1996, that the Director had issued two previous Determinations against EPS (not appealed), that EPS did not pay pursuant to those Determinations and that it was therefore appropriate to make these Determinations against each of the Appellants personally, as Directors of EPS at all relevant times: *Act*, s. 96. The Determinations contain descriptions of the nature and history of the company, its inability to meet payroll for the period April 1-15, 1996 and the employees' cessation of employment. Each determination sets out the basis for the s. 96 determinations as follows:

> In view of the fact that the actions taken against EPS have not resulted in the payment of the outstanding wages, it now seems appropriate for actions to be taken against the directors of EPS.

After the appeals were filed, hearing dates were set first in May and then in July, 1997. Those hearings were adjourned to accommodate settlement discussions.

In his July 9, 1997 letter in support of an adjournment, counsel for the Appellants asserted additional facts pertaining to the existing Determinations and ongoing settlement discussions. These "facts" related to the involvement of a firm known as PCI Enterprises Ltd. ("PCI"), whose alleged actions both before and after the collapse of EPS were in the Appellants' view relevant to questions of their liability for the wages owed the employees for the period in question. On January 16, 1998, counsel for the Appellants alleged further facts in connection with PCI, related corporate entities and a PCI director personally.

Based on these alleged facts, including the allegation that the employees in question have in fact been paid by PCI, he submitted that the Determinations against his clients should be cancelled in favour of determinations against PCI and the named individual as associated or successor employers. It is apparent from the Determinations (and it was not disputed before me) that these factual allegations and the legal issues now raised were not fully considered in the Determinations under appeal.

ISSUE

The narrow issue before me at this early stage is whether these appeals should merely be adjourned or whether I should make an order under s. 114(2) of the *Act*:

> 114(2) Before considering an appeal, the tribunal may
> (a) refer the matter back to the director for further investigation, or
> (b) recommend that an attempt be made to settle the matter.

ANALYSIS

Counsel for the Appellants, counsel for the Director and the Officer who issued the Determinations appeared before me on February 12, 1998 in Victoria. None of the employees appeared. Counsel agreed that the appeals could not proceed on that date, but an issue arose as to whether the appeals should merely be adjourned, or whether I should make an Order under s. 114(2)(a) of the *Act*.

Consistent with his January 16, 1998 submission, Appellants' counsel submitted that I should refer these appeals back to the Director for investigation based on the additional facts he has asserted. In his submission, once the Director has had the opportunity to consider those facts in light of any response from counsel for PCI, she will be in a position to reconsider whether his clients are obligors for the monies in question, or at least to revise the amount owing in that capacity.

Counsel for the Director agreed that the appeals should not proceed at this time. However, she expressed concern about an Order referring the matter back to the Director under s. 114(2)(a). Having recently reviewed the Determinations in conjunction with later decisions of this Tribunal in *Invicta Security Systems Corp.*, (BC EST #D349/96)and *Adrenalin III Sports Ltd.*, (BC EST #D110/97), the Director is considering whether further Determinations are in order against PCI and others under ss. 95 of the *Act*. Counsel has advised that delicate discussions are presently underway between her office, PCI, the Receiver for EPS, the Appellants and the employees. These discussions arise in the context of the existing Determinations under appeal and pending Determinations against PCI and others. She is concerned that an Order under s. 114(2)(a) might throw the existing Determinations into question, thus disrupting settlement prospects.

In my view, the present circumstances are ideally suited for an Order under s. 114(2)(a). Among other things, that sub-section is clearly intended to permit a reference back to the Director in cases where theTribunal concludes, before considering the appeal, that further investigation is warranted based on new and significant factual allegations which, if accepted, might reasonably impact on the Determinations and issues under appeal.

This appeal has not yet been considered. The original Determinations expressly founded the personal liability of the Appellants on the basis that the employees' outstanding wages have not been paid. In arguing that those wages have in fact been paid by those responsible for them, the Appellants' recent submissions assert a complex factual background involving PCI. These factual allegations are not reflected in the original Determinations. Whether and to what extent they are well-founded would require investigating and hearing from PCI and possibly relevant employees. Depending on the result of those inquiries, the question might arise as to whether the original Determinations should be altered. I do not presume to comment on that question one way or the other. The very point, however, is that one should not at this stage make assumptions about whether, had the Director "known" then what the Appellants assert now, identical Determinations would have been made: *Act*, ss. 96, 79(1).

A further factor commending a reference back to the Director under s. 114(2)(a) is that to embark on these appeals now would effectively require the Tribunal to conduct these hearings as appeals *de novo.* This Tribunal has previously stated that it is loathe to engage in such hearings. This reluctance is based in part on recognizing significant advantages to the parties, the Director and this Tribunal where the Director has had an opportunity to investigate and consider the questions under appeal. All those advantages would be realized by a further investigation in this matter.

Both counsel agree that the new facts alleged militate strongly against hearing these appeal now, particularly where further Determinations are pending which arise from the same facts. To avoid duplication of effort and expense, and to avoid inconsistent findings and decisions on separate appeals, appeals arising from such Determinations should be heard together with these appeals. In this context, a reference back to the Director now will allow her consider the proper obligations of all persons in a global fashion, allowing her to issue any additional Determinations while at the same time determining whether revision of the existing Determinations is appropriate based on the facts known to her.

ORDER

I therefore conclude that the appropriate disposition at this stage is to refer these matters back to the Director under s. 114(2)(a) of the *Act* for further investigation of the facts alleged by the Appellants and their impact on the Determinations under appeal.

I specifically confirm that nothing in this Order is intended to affect the validity of the existing Determinations, or to bind the Director to any different Determination after completing her further investigations. I should add that counsel for the Appellants gave his

undertaking before me that he would not take the position that an Order under s. 114(2)(a) affected the extant status of the present Determinations. Having made this Order, I am also prepared to accede to counsel's request that I recommend that an attempt be made to settle this matter: *Act*, s. 114(2)(b).

Having made Orders under s. 114(2), it follows that these appeals are adjourned until the Director has had a fair opportunity to investigate further and/or settle the matter. For certainty, I would set a period of 60 days as being a reasonable time for those efforts to complete, one way or the other.

Consequent on this Order, I specifically request the Director to notify the Tribunal in writing no later than April 17, 1998 regarding (a) whether settlement has been achieved; (b) the status of these Determinations; and (c) whether any further Determinations have been issued. In the event that the appeals have not been settled and the present Determinations remain in effect, the appeals will be promptly set for hearing, consistent with the status of any appeals from any other related Determinations.

Should a hearing proceed, the employees in question will be notified of their right to appear, as will PCI in view of the arguments asserting its liability for the wages owing. The decision whether to appear of course lies with the person in receipt of notification, understanding that if they fail to appear decisions adverse to their interest might be made in their absence.

Frank A.V. Falzon
Adjudicator
Employment Standards Tribunal