

**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 -

Insulpro Industries Inc.  
("Insulpro")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Norma Edelman

**FILE NO.:** 97/914

**DATE OF DECISION:** March 11, 1998

## DECISION

### INTRODUCTION

This decision concerns the issue of whether a Determination dated November 28, 1997 is null and void given the absence of a conclusion in it respecting *quantum* (i.e. the amount of wages owing, if any).

I have considered the submissions of counsel for the Director of Employment Standards (the "Director"), counsel for Insulpro Industries Inc. ("Insulpro"), and Greg Matthews (one of the complainants affected by the impugned Determination).

I have decided that the November 28, 1997 Determination is null and void.

### BACKGROUND

On November 28, 1997 the Director issued a Determination re: Insulpro Industries Inc. and Insulpro (Hub City) Ltd. which dismissed a complaint by G. McIntosh on the basis that his complaint was filed outside the six month statutory time limit. The Director also found H. Christofferson, A. Berube, G. Matthews and C. Norton to be employees under the *Employment Standards Act* (the "Act"). The Director did not address the issue of *quantum* (the amount of wages owing, if any, to these employees) stating this may be addressed in a further Determination. The Director concluded that Insulpro Industries Inc. and Insulpro (Hub City) Ltd. were associated companies pursuant to Section 95 of the *Act* and that they had contravened Section 3 of the *Act*. The Director further ordered the companies to cease contravening and to comply with the *Act*.

The statutory deadline for filing an appeal of the Determination was December 22, 1997. On December 12, 1997 counsel for Insulpro requested an extension of the deadline to file an appeal of the Determination "until the expiry of the normal time period for requesting an appeal following a Determination of quantum". I decided "(i)n the particular and highly unusual circumstances of this case" to extend the time period for requesting an appeal to the expiry of the time period for requesting an appeal of the Determination respecting *quantum* which, it was understood, would be issued no later than January 9, 1998. I further decided that if the Determination was not issued by that date then I would consider submissions from the parties on the issue of whether the November 28, 1997 Determination was null and void given the absence of a decision respecting *quantum*.

On January 8, 1998 counsel for the Director requested an extension to January 30, 1998 to issue the Determination on *quantum*. The parties were given an opportunity to file submissions on this issue. In a letter dated January 19, 1998 I advised the parties that an extension would not be granted for the following reasons:

*I have considered the submissions of counsel for the Director and counsel for Insulpro Industries Inc. (“Insulpro”). I have decided not to grant an extension to the Director for the reasons set out below.*

*First, Mark Tatchell, the Director’s Regional Manager indicated that a Determination on quantum would be issued by January 9, 1998. Second, the Tribunal was not notified until one day prior to the deadline that there were factors which made it “difficult to impossible” to meet the deadline of January 9, 1998. Third, it is not established that Insulpro caused delays in record production. Fourth, I am not satisfied that staff absences is an adequate reason given the Director was aware as of December 16, 1997 of the deadline.*

*For these reasons, I decline to grant an extension to the January 9, 1998 date for the production of a Determination on quantum.*

I concluded by inviting the parties to file submissions by February 13, 1998 on the issue of whether the Determination issued on November 28, 1997 was null and void.

On January 23, 1998 the Director issued a Determination on *quantum* stating as follows:

*In a Determination dated November 28, 1997...the issue of whether or not the noted complainants were employees or independent contractors was addressed. In the same Determination, the issue of association between Insulpro Industries Inc. (“Insulpro”) and Insulpro (Hub City) Ltd. was also addressed.*

*In this Determination the issue of monies owing to the for (sic) four complainants...is addressed.*

The Director found that Insulpro Industries Inc. and Insulpro (Hub City) Ltd. had contravened Sections 16, 17, 21, 25, 27, 28, 34, 36, 40, 44, 46, and 58 of the *Act* and ordered them to pay a total of \$42,170.19 to H. Christofferson, A. Berube, G, Matthews and C. Norton. The deadline for filing an appeal of the January 23, 1998 Determination was February 16, 1998.

## **ARGUMENTS**

In a submission dated January 12, 1998 counsel for Insulpro argues that the Determination issued on November 28, 1997 is null and void and should be cancelled for the following reasons:

*The Determination is not a “determination” within the meaning of the Employment Standards Act. There is no decision of the Director under any of the sections referred to in the definition of “determination”.*

*The Director has purported to determine a violation of section 3 but that is not a provision that can be violated by any person; it is simply a scope provision defining the reach of the Act.*

*The Director has also purported to find that InsulPro Industries Inc. and InsulPro (Hub City) Ltd. are associated but s. 95 is not one of the sections listed that makes a decision of the Director a “determination”. In any event, such a decision can only be made “for the purposes of the Act” and in the absence of some consequence flowing from the finding of association there is no purpose being served.*

*Finally, the Director has purported to order a cease and desist. Again, there is no substance to such an order since the complainants have long since severed their relationship with InsulPro.*

In a further submission dated February 2, 1998, counsel for Insulpro states that the Determination issued on January 23, 1998 cannot exist without the foundation of the Determination issued on November 28, 1997. Counsel further states that it is impossible for the Tribunal to make a decision on the validity of the latter Determination prior to the deadline to file an appeal on the January 23, 1998 Determination. Counsel submits that the January 23, 1998 Determination is of no force and effect unless and until the first Determination is ruled by the Tribunal to be valid and operative and he assumes that the time for appeal of the January 23, 1998 Determination will not run unless and until a decision is made on the November 28, 1997 Determination. In a supplementary submission dated February 13, 1998 counsel again states that the November 28, 1997 Determination should be cancelled. Counsel also states as follows:

*It is now clear that the Employer has been subjected to repeated breaches of the express provisions of the Employment Standards Act and the principles of natural justice which govern the investigation of complaints and the issuance of determinations. In the result, the latest actions of the Branch must be seen as part of an ongoing abuse of process which is both manifestly unfair to the Employer and damaging to the integrity of the Act.*

In a submission dated January 16, 1998 counsel for the Director argues that the November 28, 1997 Determination should not be cancelled for the following reasons:

*In both the memo of the Tribunal and the correspondence of Mr. Phillips there is reference to the cancellation of the Director’s Determination issued on 27 November, 1997 (sic). It appears that such a cancellation would be done without written submission or oral hearing. The basis for this action is the suggestion that the Directors Determination is a nullity as it is silent as to quantum. I can find no provision in the ESA indicating that a determination must contain a dollar amount. A variance requires a determination however rarely deals with*

*issues of quantum. The November 27 Determination (sic) ... deals with an essential finding under the Statute, whether individuals are employees and hence entitled to statutory protections. If the Director is without power to make such a threshold Determination independent of questions of quantum, then serious consequences to the ability of the Director to enforce the statute result.*

*...A cancellation of the baseline Determination would work a substantial prejudice to the complainants, as it and a quantum Determination would have to be reissued by the Directors delegate. There is no indication that there would be substantial or any prejudice to the employer Insulpro by a delay of ten to fifteen days.*

*As Mr. MacIntosh's complaint was dismissed by the Director in the November 27 Determination (sic) a cancellation of the Determination would also nullify that decision.*

*It is the Director's position that the paramount concern in an administrative proceeding must be fairness, over expediency. The failure to allow a modest extension of time limits in this instance would seem to place those concerns in reverse order. Factors have intervened in the drafting of the quantum Determination, which while the fault of no one have slowed its completion. Such factors do not warrant the abandoning of all the works done by the parties to date.*

In a further submission dated February 13, 1998, counsel for the Director states as follows:

*1) What is the jurisdiction for the Tribunal to compel the Director or her delegates to produce a Determination? The Tribunal is a body of second instance. The Tribunal is not the decision maker of first instance, the Director is. The Director can find no authority in the ESA which allows the Tribunal to become involved in the decision making at first instance. It is therefore the Director's position that any Tribunal decision purporting to fetter the Director's exclusive first instance decision making authority is void as being without jurisdiction.*

*2) To the Director's best knowledge and information no Appeals have been filed against the Determination of November 28, 1997. While the Director does not dispute the Tribunal's sole authority to extend the time period for the filing of an appeal, the Director can find no authority for the Tribunal to make orders as to the substance of a Determination without there being an appeal of that Determination. Section 115 of the ESA says;*

“(1) After considering the appeal, the tribunal may, by order,

(a) confirm, vary or cancel the determination under appeal...”

*The Tribunal is a body of second instance, the threshold for their jurisdiction to make orders concerning the substance of a Determination is their receipt of an appeal. The Tribunal has not received an appeal of the November 28, 1997 Determination so they are without jurisdiction to order that the Determination is “null and void”, or cancelled.*

...

*The two Determinations dated November 28, 1997 and January 23, 1998 are as yet unappealed. The Tribunal, pursuant to section 109(1)(b) has broad authority to extend the time period for requesting an appeal. The Director submits that it would be fair and equitable if the Tribunal used that authority to extend the appeal period for both Determinations to the same date. Once appeals have been filed by any concerned party, then submissions and if necessary a hearing may proceed in the usual manner.*

In a submission dated February 13, 1997 G. Matthews (one of the complainants) gives his response to this issue by stating:

*I feel that the issue of whether the Determination issued on November 28, 1997 is null and void given the absence of a conclusion respecting quantum is a moot point considering the fact on January 23, 1998 the “ESB” issued the quantum.*

*To further drag the highly unusual circumstances of this case any further would be a serious error in judgment, considering the longer for a conclusion to this matter, the longer Canadian families will be denied their rights under the “ESA”, “EMPLOYMENT STANDARDS ACT”, by this company, “INSULPRO”.*

*The fact, I have been waiting for over a year now after filing a complaint for justice, is not a moot point and causes serious concern that the “system” of the “ESB” and the “ESA” to protect workers is becoming a farce of large magnitude.*

## ANALYSIS

I am satisfied that there is an appeal of the November 28, 1997 Determination before the Tribunal and that the Tribunal has jurisdiction in this matter. The issue on appeal at this time concerns the

validity of the November 28, 1997 Determination which lacks a conclusion respecting *quantum*. This issue was brought before the Tribunal by way of the December 12, 1997 letter from counsel for Insulpro. Subsequently, counsel for Insulpro has argued that the Determination is not valid and should be cancelled.

In the November 28, 1997 Determination the Director dismissed a complaint as it was filed outside the statutory time limit set out in Section 74(3) of the *Act*. The Director also declared that two corporations were associated pursuant to Section 95 of the *Act*; declared four complainants to be employees; concluded that Section 3 of the *Act* was contravened; and ordered the corporations to cease contravening and to comply with the *Act*.

Under Section 1 of the *Act*, a determination is defined as follows:

*“determination” means any decision made by the director under section 9, 22(2), 37(3), 66, 68(3), 69(6), 73, 76(2), 78(3), 79, 83(2), 85(1)(f), 98, 100, or 119.*

The November 28, 1997 Determination does not refer to any of the sections listed in the definition of a determination. The sections which are cited by the Director are not included in the definition of a determination. Decisions made under Sections 3, 74(3) and 95 of the *Act* do not constitute a determination.

The Director’s conclusion respecting the dismissal of a complaint should have been made under Section 76(2) of the *Act* which states as follows:

*The Director may refuse to investigate a complaint or may stop or postpone investigating a complaint if*

*(a) the complaint is not made within the time limit in section 74(3) or (4).*

The Director’s other decisions should have been made pursuant to Section 79 of the *Act* as none of the other sections listed in the definition of a determination are relevant to the issues raised in the November 28, 1997 and January 23, 1998 Determinations.

The pertinent parts of Section 79 of the *Act* read as follows:

*Determination*

*(1) On completing an investigation, the director may make a determination under this section.*

*(2) If satisfied that the requirements of this Act and the regulations have not been contravened, the director must dismiss a complaint.*

(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 thrust of Section 79 of the *Act* is whether the Director has found, following an investigation, a contravention of the *Act* or not. If the Director determines that the *Act* had not been contravened she must dismiss the complaint. If the Director determines that there has been a contravention then she may, at a minimum, require a person to comply, remedy, cease doing the act, or impose a penalty.

In the November 28, 1997 Determination, after finding that four complainants were employees, and two corporations were associated pursuant to Section 95 of the *Act*, the Director concluded that Section 3 of the *Act* was contravened and ordered Insulpro to cease contravening and to comply with the *Act*. The Director's finding that four complainants were employees and that two corporations were associated are important threshold decisions. However, a finding under Section 95 of the *Act*, is meaningful only if there is also a finding regarding *quantum*. Furthermore, Section 3 is the scope provision of the *Act*. This section concerns coverage under the *Act* and it cannot be contravened in and of itself. Moreover, the order made by the Director has no practical consequence. There was no order that anything be done to remedy the particular situation of the four complainants. To order Insulpro to cease contravening and comply with the *Act* is of no substantive value to the four complainants. I agree with counsel for Insulpro that the "cease and desist" order was a moot issue given the complainants were no longer employed at Insulpro.

The November 28, 1997 Determination is incomplete and lacking in the kind of finality expected under Section 79 of the *Act*. That is, the conclusions made by the Director in the January 23, 1998 Determination should have been incorporated into the November 28, 1997 Determination. In the January 23, 1998 Determination the Director concluded that the two associated corporations named in the November 28, 1997 Determination had contravened various sections of the *Act* pertaining to the payment of wages and she ordered them to pay \$42,170.19 to the four employees also named in the November Determination. The sections of the *Act* cited by the Director in the January 23, 1998 Determination have the capacity to be contravened and an order of real consequence was made with respect to the employees.

Section 81(1) (a) and (b) of the *Act* mandates that a determination must contain reasons for the decision and if a person is required to pay wages, the amount and how it was calculated. To ensure that the principles of natural justice are met, a person named in a determination is entitled, therefore, to know the decision resulting from an investigation, the basis for that decision, and the extent, if any, of liability. Without this information, a person cannot properly understand the consequences of the determination and cannot make a rational decision whether to appeal the



determination. It also means that where a determination involves potential liability for a person and it is silent on *quantum*, the filing of an appeal will almost always have to be held in abeyance pending the issuance of a *quantum* determination. By truncating the process the Director has effectively limited a person's opportunity to file a full appeal in the first instance.

There is no apparent benefit to splitting determinations up into two parts and the Director gives no reasons, in her submissions, for doing so. One of the purposes of the *Act* is to provide for fair and efficient dispute resolution procedures (Section 2). A bifurcated process such as that adopted by the Director in this case makes it unnecessarily difficult to accomplish this purpose of the *Act*.

In summary, I conclude that the November 28, 1997 Determination is not a determination within the meaning of the *Act*. Decisions made under Sections 3, 74(3) and 95 of the *Act* do not constitute a determination. Had the Director indicated that she made her Determination under Sections 76(2) and 79 of the *Act* (as I believe it should have been) it would still, in my view, be deficient because it lacks the completeness expected under Sections 79 and 81 of the *Act*. Although the Director decided important threshold questions in the November 28, 1997 Determination it was a major omission not to make a conclusion on whether Insulpro had contravened the *Act* regarding the payment of wages and to decide the issue of *quantum*. Moreover, bifurcating determinations in the way that was done in this case impedes one of the purposes of the *Act*: to ensure fair and efficient resolution of disputes.

For the above reasons I find the November 28, 1997 Determination to be null and void. I make no decision respecting the January 23, 1998 Determination. Section 86 of the *Act* confers a power to "vary or cancel a determination" on the Director. In an earlier decision (*Devonshire Cream Ltd.* B.C. EST #D122/97) the Tribunal decided that once an appeal is filed the Director's jurisdiction ceases under Section 86. There has been no appeal of the January 23, 1998 Determination. Therefore, in light of this decision, the Director could cancel and issue a new determination or vary the January 23, 1998 Determination. In either case, the time period for filing an appeal on the merits would commence anew.

## ORDER

I order pursuant to Section 115 of the *Act* that the Determination dated November 28, 1997 be cancelled.

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**Norma Edelman**  
**Registrar**  
**Employment Standards Tribunal**