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 -

Aspen Educational and Social Services Ltd. and Tinder Enterprises Ltd. and
The Wild McLeans Historical Interpretation Inc., operating the
Historic Hat Creek Ranch
("Aspen")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	David Stevenson
FILE NO.:	1998/713
DATE OF HEARING:	March 1, 1999
DATE OF DECISION:	March 10, 1999

DECISION

APPEARANCES

for the Appellant:	Dan Meakes
for the individual:	in person
for the Director:	Larry Bellman

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Aspen Educational and Social Services Ltd., Tinder Enterprises Ltd and The Wild McLeans Historical Interpretation Inc., operating the Historic Hat Creek Ranch, (collectively, "Aspen") of a Determination which was issued on November 6, 1998 by a delegate of the Director of Employment Standards (the "Director"). In the Determination, the Director found Aspen to be associated corporations under Section 95 of the *Act*, that Aspen had contravened Sections 18(1), 58(1) and 58(3) of the *Act* in respect of the employment of Marlene Chartrand ("Chartrand"), ordered Aspen to cease contravening the *Act* and to pay an amount of $2281.45. The Director also issued a penalty under Section 98 of the *Act* and Section 29 of the *Employment Standards Regulation* of $0.00.

Aspen takes issue with two aspects of the Determination: the hourly rate used to calculate the last week of wages and the vacation pay entitlement.

ISSUE TO BE DECIDED

The issue is whether Aspen has met the burden of persuading the Tribunal that the Determination ought to be varied or canceled because the Director erred in fact or in law.

FACTS

Aspen Educational and Social Services Ltd. was incorporated in 1991 and extra-provincially incorporated in this province in 1993. It provided employment counseling and educational services under contract to several departments and agencies of the federal and provincial governments. Tinder Enterprises Ltd. was incorporated in 1993 to be a holding company for the assets of Aspen Educational and Social Services Ltd. The Wild McLeans Historical Interpretation Inc. was incorporated in 1997 to assume operation of the Historic Hat Creek Ranch from Aspen Educational and Social Services Ltd. in 1997. Dan Meakes ("Meakes") was a director and officer of each of those companies.

Chartrand was employed by Aspen to manage the accounts for Aspen Educational and Social Services Ltd. and Tinder Enterprises Ltd. In 1997 she also assumed some duties in respect of The Wild McLeans Historical Interpretation Inc., primarily involving training and supervising the office staff on administering the accounts of that company's business.

Aspen ceased operating on February 20, 1998 and Chartrand's employment was terminated as of that date. She received no wages for the week of February 16 - 20, 1998 and in her complaint claimed wages for that week, payable at an hourly rate of $16.50. She also claimed that she was owed vacation pay for the period January 1, 1997 to February 20, 1998.

The Director agreed with her claim and ordered payment of regular wages for the week of February 16 - 20, 1998 on a rate of $16.50 an hour for a total amount of $660.00. As well, the Director ordered payment of 4% vacation pay on her gross wages for the period January 1, 1997 to February 20, 1998. The amounts upon which the calculation of vacation pay was made were supported by Chartrand's 1997 T-4 summary, a pay statement showing a year-to-date summary for the period January 1, 1998 to February 13, 1998 and the amount of wages ordered to be paid for the period February 16 to February 20, 1998.

Chartrand testified she did take one vacation day in 1997 and was paid for that day. At the time she was earning $16.00 an hour.

The Determination mis-stated the amount shown on Chartrand's 1997 T-4 summary by $1000.00.

ANALYSIS

The burden is on Aspen in this appeal to persuade me that, because of some error by the Director, the Determination ought to be varied or canceled. Meakes testified on behalf of Aspen and his evidence was generally vague and unsupported by any records or documents. Meakes introduced a letter from his former office manager, Deborah Kinahan, which expressed, "to the best of [her] memory", a belief that Chartrand had taken two weeks of vacation during 1997. Chartrand inroduced evidence calling into question whether Ms. Kinahan's recollection was an accurate one. Without any opportunity to test the strength of her recollection under oath against the evidence presented by Chartrand, I am unable to accept the contents of the letter provided by Meakes against the denial under oath by Chartrand that she had only one day of paid vacation in 1997.

Aspen has not shown that Chartrand's hourly wage rate was less than $16.50 an hour during the last week of her employment. The only documentary evidence relating to this area of the appeal, a pay statement for the period January 31, 1998 to February 13, 1998,

supports the conclusion made by the Director. Accordingly, that part of the appeal is dismissed.

While Aspen has not shown that Chartrand was not entitled to any vacation pay for 1997, they have shown an error in the vacation pay calculation. The error arises in two areas. First, the calculation of vacation pay entitlement for 1997 was based on an amount which was $1000.00 higher than what was stated to be Chartrand's actual gross earnings on her 1997 T-4 summary. The difference is $40.00 and the vacation pay entitlement will be reduced by that amount, together with whatever interest was calculated to have accrued on that amount. Second, Chartrand said she did receive one day vacation with pay in 1997. That amount was not deducted from the vacation pay calculation. She was receiving $16.00 an hour at the time she received that vacation pay and the vacation pay entitlement will be further reduced by $128.00 (8 hours at $16.00 an hour), together with whatever interest was calculated to have accrued on that amount.

In all other respects the Determination is confirmed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated November 6, 1998 be varied to reduce the amount of $2281.45 by $148.00, together with whatever interest was calculated to have accrued on that amount to the date of the Determination. The balance will continue to accrue interest from the date of issuance pursuant to Section 88 of the *Act*.

David Stevenson
Adjudicator
Employment Standards Tribunal