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 -

John Chorney
(“ Chorney ”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: David B. Stevenson

FILE No.: 2000/310

DATE OF DECISION: July 26, 2000

DECISION

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by John Chorney ("Chorney") of a Determination that was issued on February 8, 2000 by a delegate of the Director of Employment Standards (the "Director"). The Determination addressed a complaint that had been filed by Chorney against his former employer, New Chelsea Society ("New Chelsea"), for money alleged to be owing to him. The Determination found that the only matter in the complaint falling within the jurisdiction of the *Act* was Chorney's claim for annual vacation pay on money paid to him for the period from August 6, 1997 to August 31, 1998. Claims for unpaid car allowance and for benefits and a pay raise Chorney alleged New Chelsea had promised but reneged on were determined by the Director to be outside the jurisdiction of the *Act* and were not investigated. In respect of the claim for vacation pay, the Director concluded that the money paid to Chorney during this period was not wages for the purposes of the *Act* and consequently no vacation pay was owed on it.

Chorney has appealed the Determination. He says it is wrong, and he should have been entitled to receive vacation pay on the money paid to him from August 6, 1997 to August 31, 1998.

In the appeal, Chorney asked for an oral hearing. His request appeared to be directed toward what he alleged was misinformation that had been generated by representatives of New Chelsea. This appeal, however, does not turn on any assessment of the disputed facts. This appeal turns on an interpretation of the *Act* to facts that are not in dispute. The Tribunal has concluded, therefore, that an oral hearing is not required to address the issue raised in the appeal.

ISSUES TO BE DECIDED

The issue in this case is whether the Director was wrong to conclude that Chorney was not entitled to vacation pay on the money paid to him between August 6, 1997 and August 31, 1998.

FACTS

New Chelsea is a society having, as one of its purposes, to manage affordable rental housing for seniors and families. It is sponsored by the Royal Canadian Legion and Vancouver Zone Councils. From September 9, 1985 to August 5, 1997, Chorney was employed by New Chelsea as its Secretary/Manager.

On July 18, 1997, Chorney was suspended from his employment by the Board of Directors of New Chelsea. On July 31, 1997, the Board of Directors met and resolved to terminate Chorney's employment within 30 days of that meeting. In a letter dated August 25, 1997, the president of New Chelsea wrote to Chorney, advising him that his employment with New Chelsea was being terminated effective July 18, 1997. The letter also included the following paragraph:

> Although it is our view that your conduct in the circumstances of the Leo Deverrau incident demonstrated sufficient lack of judgment and called into question the integrity and reputation of the Society to such a degree, that it

> amounts to cause for dismissal without notice, the Society is prepared to proceed in the following way: . . .

New Chelsea committed itself to several matters, including, as the Determination notes, to pay Chorney "twelve month's pay in lieu of notice", by continuing to pay Chorney on his regular pay days for a 12 month period commencing September 1, 1997 and ending August 31, 1998. Chorney accepted this money but performed no work for New Chelsea after August 5, 1997. The full amount contemplated by the agreement, $46,350.00, was paid out to Chorney.

Chorney's annual vacation entitlement was 8% at the time his employment ended.

The Director concluded that there was no annual vacation pay payable on the amount paid to Chornay after August 5, 1997 because the amount was not wages under the *Act*. As well, the Director concluded that he had been paid well in excess of what he was entitled to under Section 63 of the *Act*.

ANALYSIS

Chorney says the Director should have concluded that the amount of money he received from New Chelsea after August 6, 1997 was wages. In the *Act*, "wages" is defined:

> ***"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 a determination 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.*

The meaning of work is also provided in Section 1 of the *Act*:

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

The money paid to Chorney does not fit within any of the matters that would be included as "wages" under the *Act*. It was not paid for work, it was not paid as an incentive related to hours of work, production or efficiency, it was not money that was required to be paid under the *Act* or pursuant to a Determination and it was not money required to be paid under a contract of employment. It was an amount paid as compensation in lieu of notice of termination of employment. The Determination reaches this conclusion and there is nothing in the appeal or in any other material in the file that would suggest that conclusion was anything other than correct. That conclusion effectively disposes of the issue raised in this appeal.

I will, however, add one more comment on the decision. The Determination notes subsection 68(3) of the *Act*, which states:

> *68. (3) If an employee is not covered by a collective agreement, the director may determine that a payment made to the employee in respect of termination of employment, other than money paid under section 64, discharges, to the extent of the payment, the employer's obligation under Section 63.*

The Determination then notes that if New Chelsea was obligated to pay Chorney length of service compensation under Section 63, the payment made to Chorney by New Chelsea between September 1, 1997 and August 31, 1998 was well in excess of any amount payable in respect of that obligation. I agree with that conclusion completely. The reason for my additional comment has to do with the approach of the Director in calculating the amount the amount Chorney would have been entitled to under Section 63.

That amount was calculated as "8 weeks wages plus 8% for annual vacation pay". That was not quite correct. The amount Chorney would be entitled under Section 63 would have been 8 weeks wages. Chorney's entitlement to vacation pay on that amount arises from the definition of "wages", paragraph (c), and Section 58, not under Section 63. However, because in this case the effect of subsection 68(3) was to completely *discharge* New Chelsea's obligation under Section 63 (as the amount paid in respect of Chorney's termination was well in excess of that obligation), the reference to "8% annual vacation pay" was unnecessary. The Determination correctly concluded there was no liability under Section 63. That being so, there was nothing on which annual vacation pay was required to be paid..

ORDER

Pursuant to Section 115, I order that the Determination dated February 8, 2000 be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal