Employment Standards TRIBUNAL

An appeal

- by -

Jordan Enterprises Limited
("Appellant")

- 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: Rajiv K. Gandhi

FILE No.: 2016A/35

DATE OF DECISION: September 13, 2016

DECISION

SUBMISSIONS

Donald L. Richards	counsel for Jordan Enterprises Ltd.
Philip McCourt	on behalf of Abakhan & Associates Inc.
Seamus Farnan	on his own behalf
Gail Cote	on her own behalf
Dawn Rowan	on behalf of the Director of Employment Standards

OVERVIEW

1. On January 27, 2016, a delegate of the Director of Employment Standards (the "Director") issued a determination (the "Determination") in which, by way of section 95 of the *Employment Standards Act* (the "*Act*"), Jordan Enterprises Ltd. (the "Appellant") was deemed to be a company associated with W. Kreykenbohm Corporation ("WKC"), Nordstar Kitchens Ltd. ("NKL"), and International Modern Laminate Ltd. "(IMLL") and, accordingly, liable to pay to twenty-four employees outstanding regular wages, overtime wages, vacation pay, compensation for length of service, and interest, in the aggregate sum of $524,844.39.

2. The Director also imposed a $500 administrative penalty under section 18 of the *Act*.

3. From this Tribunal, the Appellant seeks an order cancelling the Determination under section 115(1)(a) of the *Act*, on the basis that the Director:

    (a) erred in law; and

    (b) failed to observe the principle of natural justice,

    both permitted grounds for appeal according to section 112(1)(a) and 112(1)(b). Failing that, the Appellant asks the Tribunal to return this matter to the Director under section 115(1)(b).

4. Separately, the Appellant made submissions in support of a suspension of the Determination according to section 113 of the *Act*. In light of the Director's agreement to hold any collection action in abeyance pending a decision in this appeal, the Tribunal declined to make an Order on the suspension issue.

5. In considering this appeal, I have reviewed approximately 900 pages of materials, including:

    (a) the Director's record of proceedings supplied on March 31, 2016 (the "Record", 379 pages);

    (b) submissions from counsel for the Appellant, dated March 7, 2016 (384 pages), April 11, 2016 (3 pages), June 22, 2016 (1 page), and July 4, 2016 (135 pages);

    (c) submissions from the Director, dated April 14, 2016 (2 pages), June 9, 2016 (8 pages) and August 9, 2016 (3 pages);

    (d) submissions from Abakhan & Associates Inc., trustee in bankruptcy for each of WKC, NKL, and IMLL, received April 1, 2016 (2 pages);

(e) submissions from Mr. Farnan, a complainant, dated June 8, 2016 (26 pages); and

(f) submissions from Ms. Cote, another complainant, dated June 10, 2016 (1 page).

6. Before addressing the substance of this appeal, I find it necessary to make two comments -

(a) Firstly, an appeal to the Tribunal is not a *trial de novo*. It is not my function to hear evidence, or to make findings of fact in place of, or in addition to, findings made by the Director.

(b) Secondly, the Appellant does not appeal the Determination on the basis that evidence is now available that was not available at the time the Determination was made (the third permitted ground under section 112(1)(c) of the *Act*.)

7. I make these comments because submissions from the Appellant and two of the complainants - Mr. Farnan and Ms. Cote - appear to include "new" evidence in the sense that it was not, from what I can see, before the Director during the period of investigation.

8. In deciding this appeal, I have not considered this "new" evidence in any respect other than to note that it exists (and in doing so I make no comment about relevance or admissibility), nor have I considered any of it under the four-part test established in *Davies et. al.*, BC EST # D171/03. It is, simply, evidence that I interpret the submitting party to say that it, he, or she would have put before the Director, given the opportunity, in order to answer the evidence or argument of an opposing party.

FACTS AND ANALYSIS

9. The facts underlying this appeal may be summarized as follows:

(a) The Appellant is a British Columbia company, incorporated in 1960.

(b) WKC, NKL, and IMLL (together, the "Kreykenbohm Companies") are British Columbia companies, incorporated respectively in 1978, 1974, and 2013.

(c) The Kreykenbohm Companies have a common director and officer, namely, Wilhelm Kreykenbohm. The directors of NKL and IML are Mr. Kreykenbohm and Maria Kreykenbohm.

(d) The Kreykenbohm Companies collectively engage in the design, fabrication, and sale of kitchen cabinets, laminates, and stone facades.

(e) The Appellant's directors and officers are Jeff Bickerstaff and Ralph Jordan.

(f) The Appellant carries on a number of businesses, including lending money, owning and managing real estate, property development, and the operation of several restaurants.

(g) There is no evidence that the Appellant and the Kreykenbohm Companies have common shareholders. Similarly, there is no evidence that Bickerstaff or Mr. Jordan have a familial or other personal connection to either Mr. Kreykenbohm or Ms. Kreykenbohm.

(h) The Kreykenbohm Companies operated, at least in in part, from premises at 18788 – 96 Avenue, Surrey, British Columbia (the "Business Premises").

(i) Between 2004 and 2012, the Appellant provided credit facilities to WKC and a related company, W. Kreykenbohm Industries Ltd. ("WKIL"), guaranteed in part by IMLL, and several affiliated parties (but not, apparently, NKL). According to a forbearance agreement (the "Forbearance

Agreement") between the Appellant and several other parties, a copy of which is included in the Record, the total amount outstanding as at May 19, 2015 was $12,682,395.90 (the "WKC – WKIL Debt").

(j) In November 2012, the Appellant purchased the Business Premises and, in doing so, also became the landlord of the Kreykenbohm Companies.

(k) The Forbearance Agreement includes, in part, an acknowledgement from WKC and WKIL that each is in default of their respective obligations as it relates to the WKC-WKIL Debt. The Forbearance Agreement also contains covenants on the part of WKC, WKIL, IMLL, and several other parties (but not NKL) that the assets of WKC or WKIL would not be sold without the Lender's "specific consent" and that the proceeds of any such sale, if approved, would be applied to reduction of the WKC-WKIL Debt. I point out that forbearance arrangements are generally preceded by a debtor's default, or anticipated default. In the eyes of the debtor, forbearance agreements are, by nature, one-sided, draconian, and intrusive. This Forbearance Agreement does not appear to me to be unusual.

(l) On July 6, 2015, the Appellant issued a letter to the Kreykenbohm Companies, in which reference is made to a request, from the Kreykenbohm Companies, for a further loan in the aggregate amount of up to $5,000,000 to be advanced between July 15, 2015 and December 31, 2015, subject to the satisfaction of several conditions (the "Letter of Understanding").

(m) A signed copy of the Letter of Understanding does not appear to be included in the Record. However, the Appellant's chief executive officer, Mr. Bickerstaff, delivered to the Director on about November 26, 2015, a sworn statutory declaration in which he confirms that the aggregate sum of $1,635,000 was loaned to the Kreykenbohm Companies between July 10, 2015 and August 4, 2015, repayable with interest at the rate of 9.75 percent per annum. According to that same statutory declaration, $550,000 was also advanced to the Kreykenbohm Companies on June 29, 2015. If correct, the aggregate principal sum due from the Kreykenbohm Companies to the Appellant would have been $2,185,000.

(n) The Kreykenbohm Companies ceased business operations on September 4, 2015 and, at that time, terminated the employment of approximately 81 employees, including 29 non-unionized employees.

(o) By way of a letter sent to the Appellant on October 1, 2015, in the Appellant's capacity as the registered owner of the Business Premises and landlord of the Kreykenbohm Companies, the Director asserted a lien over the assets of the Kreykenbohm Companies under section 87 of the *Act*.

(p) On October 28, 2015, the Director issued a determination (the "Original Determination") in which the Kreykenbohm Companies were found to be associated employers according to section 95 of the *Act* and, as such, jointly and severally liable to pay to the complainants named in that matter, wages, overtime wages, vacation pay, and compensation for length of service, totalling $494,902.69, plus interest calculated according to section 88 of the *Act*.

(q) The complainants named in the Original Determination are also named as complainants in the current Determination. The current Determination names two additional complainants - Ms. Siemens and Mr. Ryan.

(r) The Original Determination was not appealed.

(s) According to a memorandum from Abakhan & Associates Inc., trustees in bankruptcy, dated January 7, 2016, (a copy of which is not included in the Record but was mentioned in the

Determination and was supplied to the Tribunal by the Director on August 9, 2016), the Appellant acquired the assets of NKL some time before November 6, 2015, and subsequently resold them at auction for approximately $158,000 ("NKL Asset Sale Proceeds"). It is suggested that the NKL Asset Sale Proceeds were applied to the debt due and owing to the Appellant, although I am not so sure – it appears from my review of the materials that the bankruptcy trustee appears to assert an interest in the NKL Asset Sale Proceeds.

(t) The Kreykenbohm Companies claimed bankruptcy on December 23, 2015, after a proposal to creditors under section 50.4(1) of the *Bankruptcy and Insolvency Act (Canada)* was rejected. (In the Kreykenbohm Companies' Notice of Intention to Make a Proposal, the total amount alleged to be due to the Appellant was approximately $14,581,000. For the purposes of this appeal I do not think anything turns on it, but I do not think that is accurate based on the materials before me, in that NKL does not appear to be liable to the Appellant for any part of the WKC-WKIL Debt).

10. In the face of the Director's lien asserted on October 1, 2015, according to section 87 of the *Act*, it does seem to me that there is a question involving the priority of completing claims to the NKL Asset Sale Proceeds. I understand that the Director has filed a proof of claim in those proceedings, and any recovery for the benefit of the complainants may need to be set-off against any wages or other amounts owed to them. I have no information with respect to the current status of that matter.

11. In considering this appeal, I am left with:

(a) the Original Determination (in respect of which I can make no order), assessing liability against the Kreykenbohm Companies to twenty-two employees on account of wages, vacation pay, compensation for length of service, and interest, in respect of which and by reason of the currently appealed Determination, the Appellant is now also liable;

(b) the current Determination (which is the subject of this appeal), assessing liability against the Appellant to the same twenty-two employees of the Kreykenbohm Companies, for the same wages, vacation pay, compensation for length of service, and interest, plus wages, compensation for length of service, and interest to Ms. Siemens and Mr. Ryan, in respect of which and by reason of the current Determination, the Kreykenbohm Companies are also liable.

Did the Director err in law?

12. An "error of law" exists where:

(a) a section of the Act has been misinterpreted or misapplied;

(b) an applicable principle of general law has been misapplied;

(c) the Director acts in the absence of evidence;

(d) the Director acts on a view of the facts which can not reasonably be entertained; or

(e) the Director adopts a method of assessment which is wrong in principle.

(see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (BCCA) at paragraph 9).

13. On this point of the appeal, the Appellant contests the Director's interpretation and application of section 95 of the *Act* to the evidence in hand.

14. According to section 95, the Director may treat the Appellant and the Kreykenbohm Companies as one employer if the Appellant and the Kreykenbohm Companies are carrying on businesses, trades or undertakings under common control or direction. In those circumstances, each would be liable for payment of the amount stated in a determination.

15. The Tribunal has considered section 95 previously. Its purpose is to ensure that employees are not unfairly disadvantaged where individuals organize their business affairs in order to limit legal risk or to maximize tax advantages, by conducting business through separate legal entities (*0708964 B.C. Ltd.*, BC EST # D015/11, at paragraph 27). It was not intended, however, to make unrelated parties liable for those debts - "[A] section 95 declaration cannot be made against an entity that was completely independent from the business to whom the employee provided services…" (*0708964 B.C. Ltd., supra,* at paragraph 28).

16. In *Remko'B Investments Ltd. v. Director of Employment Standards,* 1994 CanLII 168 (BCCA), the British Columbia Court of Appeal considered section 20 of the *Employment Standards Act,* S.B.C. 1980, which was similar if not identical to section 95 of the *Act*. In that matter, the companies that the Director sought to associate were, admittedly, under common control and direction. The issue on appeal was whether or not the business conducted by the primary company was carried on by or though the appellant. In dismissing the appeal, a majority of the Court found that the appellant had no business activity other than financially supporting the primary company, and that the primary company could not operate absent that support:

> *Where company A carries on its business with the financial support of company B, and cannot continue to do so without that support; and where company B has no business activity other than the provision of financial support to company A, then it can reasonably be said that the business of company A is carried on by or through company B.* (*Remko'B*, at paragraph 9, emphasis added).

17. Interestingly, in his dissenting opinion the esteemed Chief Justice McEachern, as he then was, opined that while it was necessary for the Director to show that the business of the primary company was being carried on by or through the appellant company, it was irrelevant that the latter had no business interests other than investment in the primary company.

18. In *Ewachniuk v. British Columbia (Director of Employment Standards)*, 1998 CanLII 6454 (BCCA), the British Columbia Court of Appeal held that the mere fact that one of the two persons provides needed financial support to a business does not, in turn, make him a "partner" with the principal of that business. Of relevance to this appeal are the words of the trial judge, adopted by Hollinrake, J.:

> *In the end, the most that can be said is that the appellant was a landlord, investor, and shareholder. None of that necessarily leads to the conclusion on a balance of probabilities that he exercised control of the character necessary to bring him within s. 20. Evidence of the appellant being involved in the design or direction of the renovations, of the advertising, of strings attached to the advances of those sums of money, or of participation in the management of the company or restaurant would bring him within s. 20. There is no such evidence.*

19. In *0708964 B.C. Ltd.*, *supra*, at paragraph 32, the Tribunal considered the following to be critical factors when associating companies under section 95:

(a) "the entities must be jointly carrying out some business, trade or other activity although the business, trade or activity in question need not necessarily be the only one that each entity is carrying on"; and

(b) "common control or direction may be determined based on financial contributions from one entity to another (although this factor, standing alone, in not determinative); the fact that one entity is economically dependent on another entity, interlocking shareholdings and directorships;

> common management principals (e.g., corporate officers and other key employees); sharing of resources (including human resources) among the various entities; asset transfers at non-market transfer prices; operational control by one entity over the affairs of another entity; joint ownership of key assets and operational integration"

20. My understanding is that these requirements are not disjunctive – associating companies under the *Act* requires evidence of a common business and common control and direction.

21. With respect to the first, the Tribunal and the Court of Appeal agree that, in considering the phrase "businesses, trades or undertakings", it is not sufficient to say that the parties to be associated are carrying on business. They must be carrying on business together.

22. I accept the Director's finding that the Appellant was carrying on business as the financier and lender to the Kreykenbohm Companies. However, in view of both *Remko'B Investments Ltd.* and *0708964 B.C. Ltd.*, this does not mean that the Appellant and the Kreykenbohm Companies were carrying on a common business enterprise.

23. The Appellant was incorporated some fourteen years before NKL, eighteen before WKL, and fifty-three before IMLL. Evidence demonstrating that the Appellant had any real involvement in the design, construction, or sale of kitchen cabinets, laminates, or stone facades is lacking and, as noted previously, the Appellant has other business interests independent of acting as a lender, for eleven years, and as landlord, for six, to the Kreykenbohm Companies.

24. In my view, the evidence before the Director does not sufficiently confirm, on a balance of the probabilities, a common business between the Appellant and the Kreykenbohm Companies. On the contrary, evidence included in the Record establishes that the Appellant carries on a business that is entirely different from, and independent of, the Kreykenbohm Companies.

25. Whether or not there is common control and direction is less certain. Certainly, there is no commonality between the directors or shareholders of the Appellant and any of the Kreykenbohm Companies. There is no evidence of joint ownership of key assets, or joint financing of debts.

26. There is evidence of economic dependence (at least on the part of the Kreykenbohm Companies) and, in the months leading to the insolvency of the Kreykenbohm Companies, some operational control. However, I believe that this is attributable not to a common business but, rather, to a creditor aggressively seeking to secure one or more loans made, or to be made, to a troubled business, and a defaulting debtor on the brink of bankruptcy.

27. In both the Determination and submissions made to the Tribunal, the Director acknowledges conflicting evidence regarding the extent of control exercised by the Appellant, but expresses a preference for the evidence of Richard Hall, interim chief executive officer of the Kreykenbohm Companies from the end of June 2015 to the end of August 2016. I address the Director's preference below, in the context of the Appellant's argument on the second ground of appeal.

28. From the Director's summary of Mr. Hall's evidence, I glean the following:

> (a) Mr. Hall and Mr. Bickerstaff had a prior passing acquaintance, but Mr. Hall otherwise had no prior relationship with, and was never employed or contracted by, the Appellant.

(b) Mr. Bickerstaff introduced Mr. Hall to Mr. Kreykenbohm and Ms. Kreykenbohm in June 2015. By that point, the Kreykenbohm Companies were in trouble, and the intention was to have Mr. Hall act as chief executive officer of the Kreykenbohm Companies.

(c) Mr. Kreykenbohm and Ms. Kreykenbohm accepted Mr. Hall's involvement, perhaps reluctantly.

(d) Mr. Bickerstaff told Mr. Hall to treat the Kreykenbohm Companies as if they were his own.

(e) Mr. Bickerstaff asked Mr. Hall to draft the Letter of Understanding, under which Mr. Hall was to be appointed as the Appellant's representative and given wide latitude to reduce cost and to turn the companies around.

(f) Mr. Hall was instructed to report to both Mr. Kreykenbohm and Mr. Bickerstaff. Mr. Hall and Mr. Bickerstaff had regular telephone discussions with Mr. Hall concerning the affairs of the Kreykenbohm Companies, and Mr. Bickerstaff was the one to approve decisions or give direction, as needed.

(g) Mr. Hall says he achieved cost savings, in part by terminating approximately six employees. Nonetheless, Mr. Bickerstaff was unsatisfied with Mr. Hall, and Mr. Hall says that he was terminated on August 31, 2015.

(h) The Appellant's chief financial officer reviewed the accounting books of the Kreykenbohm Companies in June or July, and again in August, and assisted in releasing loan proceeds from the Appellant to the Kreykenbohm Companies, following approval by Mr. Bickerstaff.

29. Other witnesses gave evidence of Mr. Bickerstaff exercise of control:

(a) Seamus Farnan suggested that Mr. Bickerstaff gave direction to Mr. Hall to limit orders or commitments made by the Kreykenbohm Companies;

(b) Glynis Weatherly confirmed that she was asked by Mr. Bickerstaff to stay on after the Kreykenbohm Companies ceased to operate, in order to determine outstanding payroll due to terminated employees.

30. Accepting this evidence at face value, and in a vacuum, it is easy to see how the Director concluded that there was evidence of common control and direction, at least in the period after June 2015. However, in context, I do not think that interpretation is a reasonable one.

31. The involvement of the Appellant's chief financial officer and Appellant's demand that the companies rein in costs are clearly tied to the need for a further advance of funds from creditor to debtor, as contemplated by the Letter of Understanding and the Forbearance Agreement. Direction given to the Human Resources Manager post shutdown cannot stand as evidence of common control or direction of a business operated by the Kreykenbohm Companies, when that business is no longer operated.

32. In my view, the evidence shows only that steps were taken by a creditor to force a troubled debtor to make several concessions, many unpalatable, in order to protect the creditor's past loans and to justify the advance of new loans, all under the authority of the Letter of Understanding, a forbearance, and one or more registered security interests.

33. Accordingly, I conclude that in associating the Appellant with the Kreykenbohm Companies, the Director acted on a view of the facts that cannot reasonably be entertained.

34. I point out, once again, that the conclusion I draw does not consider any evidence included in the submissions tendered in this appeal.

Did the Director violate the principles of natural justice?

35. The Appellant further challenges the Determination on the basis that the Director has failed to observe the principles of natural justice.

36. Those principles require the Director, at all times, to act fairly, in good faith, and with a view to the public interest (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48 at paragraph 2). Fairness, in turn, means that all parties involved have the right to notice, the right to know the case to be met and the right to answer it, the right to cross-examine witnesses, the right to a decision on the evidence, and the right to counsel (*Tyler Wilbur operating Mainline Irrigation and Landscaping*, BC EST # D196/05 at paragraph 15).

37. The Appellant says, firstly, that the Determination was tainted by an apprehension of bias. The Appellant submits that the test to determine whether or not a reasonable apprehension exists, is set out in *Committee for Justice and Liberty v. National Energy Board* [1978] 1 SCR 369, at page 394: "What would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude" ?

38. I find that anyone who is realistic and practical would conclude, having regard to the evidence, that there is no apprehension of bias; there is only a dispute with respect to the Director's recording of evidence collected on September 23, 2015, subsequently addressed by statutory declaration. There is no evidence that the Director ignored the latter in favour of the former, all of which is addressed in the Determination. Preferring one body of evidence over another does not, in and of itself, constitute bias or give rise to an apprehension of bias, and I see no merit in the Appellant's argument on this point.

39. I do see merit, however, in the Appellant's second argument with respect to the Director's reliance on the evidence of Mr. Hall in associating the Appellant with the Kreykenbohm Companies under section 95.

40. The Determination was issued following an investigation conducted under section 76(2) of the *Act*.

41. According to section 77 of the *Act*, "[if] an investigation is conducted, the Director must make reasonable efforts to give a person under investigation an opportunity to respond."

42. The chronology of relevant investigative steps is as follows:

(a) The Director engages in discussions with the Appellant's representatives and solicitors between September 23, 2015 and December 2, 2015.

(b) Telephone discussions and correspondences between the Director and Mr. Hall take place between December 1, 2015 and January 12, 2016.

(c) The Director's telephone conversation with Mr. Hall on December 1, 2015 is summarized in an electronic mail message sent by the Director to Mr. Hall on December 2, 2015. On December 7, 2015, Mr. Hall indicates that the Director's electronic mail message has errors. On January 12, 2016, the Director and Mr. Hall appear to have a telephone conversation, which is followed by a second electronic mail message sent by the Director to Mr. Hall on the same day. Mr. Hall does not appear to respond to that message.

(d) None of the communication between the Director and Mr. Hall is disclosed to the Appellant before issuance of the Determination.

43. In the Determination, the Director clearly prefers the summary of the unsworn evidence of Mr. Hall over the statutory declarations of Mr. Bickerstaff and Mr. Kreykenbohm.

44. The problem, as I see it, is that the Director's failure to put Mr. Hall's evidence to the Appellant amounts to a *prima facie* contravention of section 77 of the *Act*. Had the Director conducted a hearing, rather than investigation, the Appellant would have had an opportunity to challenge the accuracy of Mr. Hall's evidence by way of cross-examination. At the very least, the Director should have disclosed Mr. Hall's evidence to the Appellant.

45. The Director's response to this argument can be summarized as follows:

(a) on November 12, 2015, the Director wrote a comprehensive letter to the Appellant, which describes Mr. Hall's involvement;

(b) on November 27, 2015, Mr. Bickerstaff supplied a comprehensive statutory declaration in response;

(c) on receipt of the statutory declaration, the Director contacted Mr. Hall to obtain evidence, but did not share that evidence with the Appellant;

(d) the fact that Mr. Hall's evidence differed from the evidence of Mr. Bickerstaff did not require that the Appellant have another opportunity to respond;

(e) the Appellant has not articulated the evidence it would have tendered, and the new evidence included with the Appellant's submissions should not be accepted because it does not meet the criteria set out in the test established in *Davies et. al.*, BC EST # D171/03 (namely, that it would not have led to a different conclusion.)

46. The Appellant has the right to know the case against it. Mr. Hall's evidence is central to the Director's determination that the Appellant should be associated with the Kreykenbohm Companies under section 95. I do not see how it is appropriate to say that disclosure of Mr. Hall's evidence was unnecessary.

47. In the context of a hearing, each side would have an opportunity to hear all of the evidence of the other side, and to test it by way of rebuttal evidence or cross-examination. In the context of an investigation, there is no mechanism to directly cross-examine a witness. For that reason alone, it is imperative that the Director discloses all evidence received, particularly when, as in this case, it goes at least in part to credibility, and is determinative of a material issue

48. If the Director does not do that, I do not see how the objective of section 77 has been satisfied.

49. Accordingly, I accept the Appellant's argument. Mr. Hall's evidence should have been disclosed to the Appellant. The Director's failure to do so, in my opinion, amounts to a procedural unfairness and a material breach of the principles of natural justice.

50. For reasons I gave previously, I decline to consider or to make any findings with respect to any "new" evidence submitted by the Appellant or any other party.

Other Matters

51. I wish to make one additional observation.

52. Section 95 makes associated companies liable for amounts payable by one company under a determination.

53. On October 28, 2015, the Director ordered the Originating Companies to make specific payments to twenty-two former employees. Liability under the Original Determination stands, and if the Determination issued by the Director on January 27, 2016, is permitted to stand, the Appellant would also be liable under the Original Determination.

54. At the same time, the Determination issued on January 27, 2016, renders the Appellant directly liable to twenty-four employees (including all twenty-two employees named as complainants in the Original Determination), and by reason of the section 95 declarations, makes the Kreykenbohm Companies liable for that same amount as well.

55. That is, there are two equally enforceable, yet independent determinations, covering the same subject matter, against the same parties, for effectively the same wages.

56. For that reason, I believe the Determination issued on January 27, 2016, to be technically flawed.

57. In my view, after associating the Kreykenbohm Companies with the Appellant under section 95 of the Act, the Director should have:

(a) declared the Appellant liable under the Original Determination according to section 95(2) of the *Act*, instead of undertaking a fresh calculation of amounts due to each of the original complainants; and

(b) declared both the Appellant and the Kreykenbohm Companies jointly and severally liable, as associated companies, for wages, vacation pay, compensation for length of service, and interest due to the two additional employees not named in the Original Determination.

The result would have been a unified requirement for payment against the Appellant and the Kreykenbohm Companies, in favour of each of the affected employees, and two determinations readable and enforceable (subject only to this appeal) as a cohesive order of the Director. While I am sure that is what the Director intended, that was not, in my humble opinion, the outcome.

Remedy

58. I have concluded that the Director erred, based on the evidence in hand, in finding that there was a common business enterprise conducted under common control or direction.

59. I have also concluded that the Appellant did not have the benefit of being able to consider all of, or otherwise to respond to, the evidence.

60. Based upon submissions received in this appeal, I think it fair to say that some of the parties have more evidence to adduce and would have done so during the original investigation given the opportunity.

61. To the extent that my function is not to engage in a fact finding mission or otherwise to deal with the complaint *de novo*, I am not in a position to assess how any additional evidence submitted with the Appellant's

materials, or anything that might be construed as new evidence from Mr. Farnan, Ms. Cote, or any other complainant, is relevant, admissible, or would otherwise affect a declaration under section 95.

62. There is no appeal with respect to, and I confirm, that portion of the Determination finding the Kreykenbohm Companies liable to Ms. Maria Siemens and Mr. Shawn Ryan for wages, vacation pay, compensation for length of service, and interest.

63. I am referring back to the Director, for further investigation, the question of whether or not the Appellant should be associated with the Kreykenbohm Companies under section 95 of the *Act* and therefore jointly liable with the Kreykenbohm Companies under the Original Determination or the current Determination, as the case may be, to the twenty-four former employees of the Kreykenbohm Companies.

64. Except as noted above, I am cancelling the current Determination. For clarity, the Kreykenbohm Companies remain liable to the remaining twenty-two complaints under the Original Determination.

65. I am proceeding in this fashion because fairness to all interested parties demands that each has a full opportunity to consider the evidence and where appropriate to make submissions or offer rebuttal. I am not satisfied that has happened.

ORDER

66. Pursuant to section 115(a) of the *Act*, the Director's determination issued on January 27, 2016, that W. Kreykenbohm Corporation, Nordstar Kitchens Ltd., and International Modern Laminate Ltd. are liable to pay to Ms. Maria Siemens and Mr. Shawn Ryan, respectively, wages, vacation pay, and compensation for length of service, the sum of $9,600.03 and $14,676.93, plus interest under section 88 of the *Act*, is confirmed.

67. Pursuant to section 115(a) of the *Act*, the balance of the Director's determination issued on January 27, 2016, is cancelled.

68. Pursuant to section 115(b) of the Act, I am referring back to the Director for further investigation the question of whether or not the Appellant should be associated with the Kreykenbohm Companies under section 95 of the *Act*.

Rajiv K. Gandhi
Member
Employment Standards Tribunal