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 -

Murray White
(" White ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No: 2000/040

DATE OF DECISION: March 31, 2000

DECISION

OVERVIEW

This is an appeal filed by Murray White ("White") on January 25th, 2000 pursuant to section 112 of the *Employment Standards Act* (the "*Act*"). *These reasons address only the question of whether or not this appeal is properly before the Tribunal.* Among other concerns, it would appear that the present appeal--regardless of what particular determination is being appealed--was not filed within the statutory 15-day appeal period. By way of a letter dated January 26th, 2000 from the Tribunal's Acting Chair, all interested parties were requested to file written submissions regarding the timeliness issue. Douglas Bensley (the respondent employer) opposes the application for an extension of the appeal period; the Director has apparently not taken any position with respect to the extension request.

Further, and this point also relates to the timeliness issue, it is not immediately apparent from a perusal of White's appeal documents precisely what determination or determinations White is purporting to appeal.

FACTUAL BACKGROUND

There is an extensive history to this matter--including three separate determinations and three separate decisions by this Tribunal. I have endeavoured to summarize, in chronological order, these various proceedings below:

> • On July 16th, 1998, a delegate of the Director of Employment Standards (the "Director") issued a Determination under file number 17969 against Smoother Movers Limited in favour of White for $120.63 on account of unpaid regular wages, statutory holiday pay and interest.
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> • Smoother Movers Limited appealed the July 16th determination (as well as another determination involving another employee). Among other issues, Smoother Movers Limited alleged that Adjudicator Petersen (to whom the appeal was assigned) was biased, that the complainants' employer was not Smoother Movers Limited but rather Douglas Bensley who operated the business as a sole proprietor (under the firm name "Smoother Movers") and that, in any event, the employer fell under federal, rather than provincial, jurisdiction. The

appeal hearing occupied 3 days. In a written decision issued on March 10th, 1999 (B.C.E.S.T. Decision No. D094/99), Adjudicator Petersen declined to disqualify himself on the ground of bias (either actual or apprehended) and ruled that the employer's business operations were governed by provincial rather than federal employment standards legislation. Adjudicator Petersen was satisfied, based on the evidence before him, that the proper employer was Doug Bensley operating as a sole proprietor rather than Smoother Movers Ltd. Accordingly, pursuant to section 115(1)(b) of the *Act*, the matter of the complainant employees' unpaid wage claims were referred back to the Director.

• On May 27th, 1999, a delegate of the Director of Employment Standards (the "Director") issued two determinations, both under file number 17969. In the first determination, "Douglas Bensley operating as Smoother Movers" was ordered to pay White the sum of $128.51 on account of unpaid regular wages, statutory holiday pay and interest. By way of the second May 27th, 1999 determination, "Smoother Movers Limited" was declared to be "associated" (see section 95 of the *Act*) with Douglas Bensley and was, therefore, also jointly and separately liable for White's unpaid wage claim of $128.51.

At this juncture, I should note that the initial July 16th, 1998 determination was not ordered cancelled by Adjudicator Petersen [see section 115(1)(a) of the *Act*] nor, so far as I can gather, was that determination ever formally cancelled by the Director (see section 86). However, one can reasonably conclude that the two May 27th, 1999 determinations were intended to (and, in my view, did in law) supersede the original July 16th determination.

• Both May 27th, 1999 determinations were appealed by the respective employers, namely, Douglas Bensley and Smoother Movers Limited. The two employers advanced a common position arguing that: i) White was not entitled to statutory holiday pay because he was a "manager" (see section 36 of the *Employment Standards Regulation*) as defined in section 1 of the *Regulation;* ii) the delegate erred in finding the two appellants to be "associated corporations" as defined by section 95 of the *Act;* and iii) the delegate incorrectly calculated White's unpaid wage entitlement. In a decision

> issued on August 11th, 1999 (B.C.E.S.T. Decision No. D325/99) Adjudicator Stevenson dismissed the first and third grounds but ruled in favour of the appellants on the section 95 issue. Adjudicator Stevenson was not satisfied that the delegate correctly applied the section 95 fourfold test formulated by the Tribunal in *Invicta Security Systems Corp.* (B.C.E.S.T. Decision No. D349/96). With respect to the section 95 issue, Adjudicator Stevenson held that: "The Director is not foreclosed from revisiting whether a Determination under Section 95 is necessary to protect or effect some statutory purpose (provided the other preconditions can also be established), but at present all of the preconditions for the associated corporation Determination have not been established and the appeal on that Determination succeeds." Accordingly, Adjudicator Stevenson confirmed the determination issued against Douglas Bensley but cancelled the determination issued against Smoother Movers Limited.

On September 13th, 1999, Doug Bensley filed an application with the Tribunal for reconsideration (see section 116 of the *Act*) of Adjudicator Stevenson's August 11th, 1999 decision confirming Bensley's $128.51 unpaid wage liability to White. Among other assertions, Bensley suggested that the Director was not entitled to take any enforcement proceedings pending the outcome of the reconsideration application. The application also raised, yet again, various other matters (none of which were supported by any corroborating evidence) including adjudicator bias, the delegate's failure to comply with section 77, the "manager" issue and the alleged calculation errors all of which issues had previously been adjudicated by the Tribunal. Bensley asked the Tribunal to set aside Adjudicator Stevenson's decision "with costs" (N.B., the Tribunal has no statutory authority to make an order for costs).

Reconsideration is a discretionary statutory authority vested in the Tribunal. In *Milan Holdings Ltd.* (B.C.E.S.T. Decision No. D313/98), the Tribunal established a two-part test governing section 116 applications. First, has the applicant demonstrated, at least on a *prima facie* basis, that there are significant questions of fact, law, policy or procedure that need to be addressed? Second, and only if the first hurdle has been cleared, the Tribunal will then consider the merits of the application for reconsideration.

- In a decision issued on December 2nd, 1999 (B.C.E.S.T. Decision No. 526/99)

> Adjudicator Orr held (quite properly, in my view) that Bensley's application did not pass the first of the two "hurdles" established in *Milan Holdings* and, accordingly, declined to reconsider the merits of Adjudicator Stevenson's August 11th, 1999 decision: "...this is not a case which warrants the exercise of the reconsideration discretion. Bensley has used the process of the Tribunal to delay and avoid paying to White what has consistently found to be owing to him. Any further delay of this matter would not be consistent with the purposes of the *Act.* In essence Bensley seeks to have the Tribunal re-weigh the evidence. The application for reconsideration alleges no significant new information and raises no substantial points of law. The grounds set out by Bensley do not provide any reasonable basis upon which a review would likely be successful. It is clear that Bensley has been an active participant in this matter and has had ample opportunity to be heard. He misapprehends the burden of proof. His allegations of bias are frivolous and vexatious and his arguments about White being a manager have all been heard and dealt with before."

THE PRESENT APPEAL

As noted at the outset of these Reasons, it is not immediately apparent precisely what determination (or determinations) White is purporting to appeal. His appeal documents refer only to an "Appeal of Determination--Murray White and Douglas Bensley of Smoother Movers". White's "reasons for appeal" are reproduced below:

> "1. The tribunal has failed to respond to my many requests that this hearing be heard by an adjudicator, and all aspects of the specifics of the original hearing be properly heard.
>
> 2. The tribunal did not respond to my many requests of additional funds, even though these requests were hand delivered to your office, in all cases prior to any deadlines.
>
> 3. It was brought to my attention...that aspects of my appeals may not have been addressed, at the discretion of any number of adjudicators. I feel that had all information has been reviewed as I requested, a determination would have been made, that truly reflects the amount that Mr. Bensley DID NOT PAY ME. These amounts include overtime wages, amounts deducted from my wages at Mr. Bensley's wim, and holiday pay for statutory holidays. [sic]
>
> 4. That the detailed calculations that I submitted to both the Tribunal, and the Branch were never reviewed, or responded to."

I do not propose to address the merits of the present appeal in any substantive fashion but I would nonetheless observe that the first "reason" is manifestly frivolous inasmuch as three separate adjudicators have adjudged the dispute between the parties and their respective written decisions have addressed all of the issues raised by the parties. As for the quantum of the employer's liability to White, I note that White's claim seems to be a moving target--originally he claimed some $228 which sum, over time, has climbed to $324 to $600 to his present claim of some $700. However, it should also be noted that White did not appeal the initial $120.63 award in his favour; that award was only appealed by the employer. I must query why White did not appeal the July 16th, 1998 determination in a timely fashion if he was of the view that he ought to have received a larger monetary award.

ANALYSIS

As I previously observed, I am of the view that the initial July 16th, 1998 determination was superseded by the two May 27th, 1999 determinations. Thus, inasmuch as one cannot appeal a nullity, this appeal cannot go forward as an appeal of the July 16th determination. Further, and in any event, the present appeal has been filed so far outside the 15-day statutory appeal period [see section 112(2)(a)] that I cannot possibly conceive that an extension of the appeal period [see section 109(1)(b)] is appropriate. If, by way of the present appeal proceedings, it is White's intention to have this Tribunal reconsider (see section 116) Adjudicator Petersen's March 10th, 1999 decision, I decline to do so since the issues addressed in that decision have now, for the most part, been rendered moot (or, at the very least, have been superseded) by subsequent determinations and Tribunal decisions.

Accordingly, in my view, White's appeal can only properly concern the two May 27th, 1999 determinations. Of course, those two determinations have already been appealed (albeit by Bensley and Smoother Movers Limited) and both an appeal decision and a subsequent reconsideration decision have now been issued by this Tribunal with respect to those two determinations. White was given the opportunity to fully participate in both the appeal and the reconsideration application and, in fact, did so. *White never filed timely appeals with respect to the May 27th determinations* and only purported to file any sort of appeal on January 25th, 2000.

The May 27th, 1999 determination against Smoother Movers Limited, having now been cancelled, cannot be appealed--that determination has ceased to exist as a matter of law (once it was cancelled by Adjudicator Stevenson) and, as noted above, one cannot appeal a nullity. To the extent that the present appeal is, in

some rather opaque fashion, an attempt to have the Tribunal reconsider Adjudicator Stevenson's decision to cancel the May 27th "Smoother Movers Limited" determination, I am of the view that such an application must be dismissed because White has manifestly failed to meet the "*prima facie* case" threshold as set out in *Milan Holdings*, *supra*.

If White's appeal relates to the May 27th, 1999 determination issued against Bensley (as a sole proprietor), the appeal is not timely (by something in excess of 7 months). Such an appeal ought to have been filed by no later than June 21st, 1999 and there is absolutely nothing in the material before me which would justify an extension of the appeal period. If White's intent is to seek a reconsideration of the May 27th, 1999 "Bensley" determination, I am of the view that such an application must be dismissed for want of a *prima facie* case.

In my opinion, the matters in dispute between these parties have been given a more than full airing and the time has come (indeed, the time has passed) to bring these protracted proceedings to a final conclusion.

ORDER

White's application, made pursuant to subsection 109(1)(b) of the *Act*, for an extension of the appeal period relating to one or more of the determinations set out below is refused. Accordingly, and pursuant to subsections 114(1)(a) and (b) of the *Act*, to the extent that White's appeal relates to one, two or all of the following Determinations, namely:

- July 16th, 1998 (Smoother Movers Limited);
- May 27th, 1999 (Douglas Bensley); and
- May 27th, 1999 (Smoother Movers Limited)

the appeal is dismissed.

To the extent that White's appeal is, in fact, intended to be an application for reconsideration of one or both of Adjudicator Petersen's March 10th, 1999 decision (B.C.E.S.T. Decision No. D094/99) and Adjudicator Stevenson's August 11th, 1999 decision (B.C.E.S.T. Decision No. D325/99), I decline to exercise my discretion to reconsider either of those two decisions.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal