Employment Standards TRIBUNAL

An appeal

- by -

660 Management Services Ltd., Ideal Welders Ltd. and Caldew Services Ltd.
Associated Employers under Section 95 of the Employment Standards Act
(the "Associated Corporations")

- 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: David B. Stevenson

FILE No.: 2005A/124

DATE OF DECISION: September 26, 2005

DECISION

SUBMISSIONS

Michael W. Hunter, Q.C.	on behalf of the Associated Corporations
Jim Ross	on behalf of the Director
Keema Baysinger	on her own behalf

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by 660 Management Services Ltd., Ideal Welders Ltd. and Caldew Services Ltd. Associated Corporations under Section 95 of the *Employment Standards Act* (the "Associated Corporations") of a Determination that was issued on March 23, 2005 by a delegate of the Director of Employment Standards (the "Director").

2. The Determination found the Associated Corporations had contravened Part 7, Section 54 of the *Act* and Section 46 of the *Employment Standards Regulation* (the *"Regulation"*) in respect of the employment of Keema Baysinger ("Baysinger"), ordered the Associated Corporations to cease contravening and to comply with the *Act* and *Regulation* and ordered the Associated Corporations to pay Baysinger an amount of $1,020.82, an amount which represented the difference between the wages due to Baysinger and an amount which was deposited with the Director by the Associated Corporations during the complaint process.

3. The Director also imposed an administrative penalty on the Associated Corporations under Section 29(1) of the *Regulation* in the amount of $500.00.

4. The appeal on the merits of the Determination touches on several matters: whether the Director erred in law by associating 660 Management Services Ltd., Ideal Welders Ltd. and Caldew Services Ltd. under Section 95 of the *Act*; whether the Director erred in law by failing to end the investigation when the full amount claimed by Baysinger in her complaint was deposited with the Director by her employer; and whether the Director erred in law by finding a contravention of Section 54 of the *Act.* The Associated Corporations also say the Director erred in imposing an administrative penalty.

5. The Associated Corporations say the appropriate remedy is to cancel the Determination and return to the employer the monies that were deposited with the Director.

6. The Tribunal has reviewed the appeal and the materials submitted with it and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

7. The issue in this appeal is whether the Director committed any error in law in making the Determination.

THE FACTS

8. The following Background and Facts are set out in the Determination:

> Baysinger was employed as a payroll/benefits administrator from January 3, 2002 to June 1, 2004 (29 months) at a rate of pay of $35,000 per year ($134.62/day or $16.83/hr). Baysinger was employed under terms of employment with Ideal. 660 Management issued her paycheques. 660 Management issued her Record of Employment (ROE). The complaint was filed in the time period allowed under the Act.
>
> - Baysinger was pregnant with an estimated date of delivery of August 25, 2003.
> - On June 9, 2003 Emilia Saunders ("Saunders"), Controller for Ideal advised Baysinger of a reduction in payroll duties and Baysinger's hours were being reduced from full time, 40 hours per week to 3 days per week. This would be 24 hours per week at 8 hours per day. Saunders advised that Baysinger's remuneration would change to an hourly basis, effective June 30, 2003.
> - Baysinger developed a medical complication as a result of the pregnancy and her doctor advised she not work as of June 20, 2003. Baysinger's son was born August 8, 2003. Baysinger was on pregnancy leave for 17 weeks and parental leave for the next 35 weeks. June 21, 2004 was understood to have been Baysinger's return to work date once her leave was exhausted.
> - On May 20, 2004, Saunders advised Baysinger by letter that Ideal:
>   - had a reduction in sales levels,
>   - had continually endured extensive layoffs of shop employees,
>   - had, as a result, payroll requirements decrease from three days a week to two days a week,
>   - hoped Baysinger would continue and looked forward to her return,
>   - asked if Baysinger was not returning to work "with us" to advise at earliest so the employer could make other arrangements.
> - On June 21, 2004 Baysinger e-mailed Saunders at Ideal advising her that she could not afford to work 2 days a week and thanked Ideal for her time there.
> - On October 8, 2004 Baysinger completed a Self Help Kit Request for Payment Form requesting Compensation for Length of Service (CLOS) a total payment of $1426.93 within 15 days from 660 Management.
> - On October 14, 2004 Saunders responded in writing to Baysinger for Ideal/660 Management on Ideal letterhead refusing Baysinger's request advising that she was not eligible for "severance pay".
> - On October 21, 2004 Baysinger submitted a Complaint and Information form to the Employment Standards Branch. She estimated she was owed Compensation for Length of Service of $1426.93 and provided some details of her complaint.
> - On October 29, 2004 I phoned Saunders and then Baysinger. Saunders stated having evidence to establish Baysinger quit and that would end the matter. Baysinger advised that the reason provided by Saunders that there were less shop employees and hence less payroll work was not true, as the number of shop employees was constant. She maintained that her

> work hours were decreased because of her pregnancy leave and she was forced to quit because her hours were cut so drastically.
>
> - A Notice of Fact Finding Conference was sent to both parties and a Demand for Records was sent to Ideal.
> - On November 9, 2004 both Saunders and Baysinger attended a fact finding conference.
> - On December 22, 2004 Ideal provided a voluntary payment of $1426.93. The wage statement included statutory deductions resulting in a cheque in the net amount of $1099.19. The cheque was marked "this cheque is full & final settlement to Keema Baysinger regarding claim #ER 128-680", the accompanying wage statement described the amount as "Severance Pay". Legal Counsel for Ideal stated the cheque was settlement in the amount requested in the Self Help Kit. I advised Counsel that the offer in the Self Help Kit had been rejected by Ideal, had since been withdrawn by Baysinger and Baysinger had filed a complaint. I advised Legal Counsel that the amount was paid into the ESB Trust and would be applied to amounts, if any, found owing. Legal Counsel advised that Ideal maintains no monies are owing to Baysinger.

9. The Determination sets out the evidence and the position of each of the parties. Based on the evidence, the Director made findings of fact, including finding that:

- Ideal had changed Baysinger's hours of work in June of 2003 without her written consent;
- Ideal had not met the burden of proving that the reduction in Baysinger's hours of work would have occurred if she was not pregnant; and
- That Ideal knew on May 20, 2004 that Baysinger would soon be returning from leave and advised Baysinger her hours would be further reduced from three days to two days without her written consent;
- Ideal had not met the burden of proving that the further reduction in Baysinger's hours of work would have occurred if she had not taken the leave.

10. In reaching the above conclusions, the Director considered and relied on information provided by Baysinger and the employer. The Determination also notes several areas where the employer had made assertions of fact, but had provided no evidence to support those assertions. In light of an argument raised in the appeal by counsel for the Associated Corporations, I make particular note of the statement in the Determination that Ideal had provided no evidence to support "business reasons" as a justification for the reduction in Baysinger's days of work.

11. The Determination contains a consideration of whether the three corporations identified in the complaint proceedings should be associated under Section 95 of the *Act.* The Determination contains some background relating to the question of association:

> 660 Management operates a management services business, which falls under the jurisdiction of the Act. 660 Management provides services, including accounting and bookkeeping, to Ideal Welders Ltd. ("Ideal") and Caldew Services Ltd. 660 Management and Caldew Services Ltd. and Ideal operate at the same location. 660 Management, Ideal and Caldew Services Ltd. operate as Ideal Welders under the direction of Robert James (Jim) Longo, President and Secretary of Ideal. Mollie M. Longo is the President and Secretary of Caldew Services Ltd. Christine Longo is the President and Secretary of 660 Management.

12. The Determination considers whether the conditions for associating the corporations are present and provides the rationale for the decision to associate them. The Determination also indicates the parties were advised in a letter dated April 29, 2005 of the investigation into an association and provided with an opportunity to respond. The Determination indicates that counsel for the Associated Corporations responded to that letter on May 11, 2005, opposing a possible association, but that counsel "provided no information to support his dispute of the section 95 finding."

ARGUMENT AND ANALYSIS

13. The Associated Corporations have the burden of persuading the Tribunal there is an error in the Determination that justifies the Tribunal's intervention to correct that error. The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

> *112.(1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
>
> *(a) the director erred in law:*
>
> *(b) the director failed to observe the principles of natural justice in making the determination;*
>
> *(c) evidence has become available that was not available at the time the determination was made.*

14. As an opening comment to the analysis of this appeal, I point out that that the *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law (see *Britco Structures Ltd.*, BC EST #D260/03). The appeal does not directly challenge findings of fact, but the Director has correctly pointed out there are aspects of the appeal filed by counsel for the Associated Corporations that contradict findings of fact made in the Determination. Accordingly, while I have reviewed the facts set out in the appeal submission, the findings of fact that will guide this decision are those found in the Determination and set out above.

15. The Associated Corporations argue the Director has made several errors in law.

16. The Associated Corporations submit the Director engaged in a "frolic of his own", and committed an error in law, by associating the corporations "for no reason whatsoever". Counsel for the Associated Corporations says there is no evidence of a bankruptcy or of a corporate shuffle to avoid the claim and that in fact the full amount of the claim had been deposited with the Director more than six months before the Determination was issued.

17. The Director says the corporate structure of the business that employed Baysinger necessitated associating the corporations.

18. The Tribunal has indicated that a decision to associate entities under Section 95, while discretionary, requires four conditions be met:

(i) there must be more than one corporation, individual, firm, syndicate or association;

(ii) each of the entities must be carrying on business;

(iii) there must be common control or direction; and

(iv) there must be some statutory purpose for treating the entities as one employer for the purposes of the *Act.*

19. While the appeal does not indicate the specific area of concern with the association, it seems to be about the fourth condition. Counsel for the Associated Corporations says there was "no reason", while the Determination says the purpose for the association was to ensure enforcement of minimum standards found in Section 54.

20. I do not agree with counsel for the Associated Corporations that there is "no reason" for the decision to associate or that the Director erred in law in making the association. I accept, as counsel argues, that a business might operate through several corporations for reasons unrelated to the administration of minimum standards legislation. However, where the interconnection of those several corporations obfuscates questions of responsibility for the correct application of minimum standards and potential liability for any contraventions of those standards, it is not an error, for reasons relating to both the proper administration of the *Act* and the fairness and efficiency in resolving disputes under the *Act*, to associate those corporations. The facts of this case, which show, among other things, the Associated Corporations sharing Baysinger's employment, provide a sufficient reason for associating the corporations and this aspect of the appeal is dismissed.

21. Counsel for the Associated Corporations argues the Director erred in law by not stopping the investigation when the amount claimed by Baysinger in her complaint was deposited with the Director. Counsel says:

> . . . the procedures under the Act are a complaint driven system and . . . the Branch does not have the jurisdiction, in cases of this nature, to issue a Determination that is completely different from the grounds raised in the Complaint and the amounts claimed in the Complaint.

22. No authority is stated for this proposition.

23. In response, the Director submits the complaint that was investigated and determined was not a different complaint than was filed by Baysinger. The Director says that the issues relating to Section 54 of the *Act* were clearly identified in the Complaint. In the area of the Complaint Form provided for the details of the complaint, Baysinger raised the issues of the decrease in days and hours worked from 5 days a week to 3 days a week, the further decrease in days and hours worked from 3 days a week to 2 days a week and that those decreases in days and hours worked related to her pregnancy. The Director submits that in any event he is mandated to ensure employees receive their full entitlement to wages under the *Act.* The Director points to subsection 76(2) of the *Act* to support that assertion. That provision reads:

> *76. (2) The director may conduct an investigation to ensure compliance with this Act and the regulations, whether or not the director has received a complaint.*

24. I do not accept the argument by counsel for the Associated Corporations that the Director was without jurisdiction to investigate the complaint made by Baysinger as a potential contravention of Section 54. There is no issue that the complaint was filed within the period allowed by the *Act.* The Determination makes that finding and there is no appeal from it.

25. Section 74 of the *Act* contains the statutory requirements relating to the filing of complaints with the Director. Section 74(1) of the *Act* states:

> *74 (1) An employee, former employee or other person may complain to the director that a person has contravened*
>
> *(a) a requirement of Parts 2 to 8 of this Act; or*
>
> *(b) a requirement of the regulations specified under section 127 (2) (1).*

26. Subsection 74(2) says the complaint must be in writing and must be delivered to an office of the Branch. There is no issue that Baysinger complied with those statutory requirements. There is nothing in Section 74, or in any other provision of the *Act*, that either requires a complainant to specifically identify the particular contraventions which have taken place or to indicate what is owed. Providing this information at an early stage undoubtedly assists the Director in administering the complaint process, but to suggest it delineates the scope of the Director's jurisdiction is unsupported by any provision and, as the Director has argued, is inconsistent with the general authority of the Director to ensure compliance with the *Act.*

27. Subsection 76(1) of the *Act* requires that the Director, subject to subsection 76(3), accept and review a complaint made under Section 74. Reading subsection 76(1) together with subsection 76(2) and Section 2, which sets out the purposes of the *Act*, the Director is entitled, and quite probably required, to take a liberal view of the scope of the complaint. That conclusion is, of course, consistent with the statutory purpose of ensuring employees receive at least basic standards of compensation and conditions of employment and with the principles expressed in *Helping Hands v. Director of Employment Standards*, (1995) 131 D.L.R. (4th) 336 (B.C.C.A.), *Machtinger v. HOJ Industries Ltd.*, (1992) 91 D.L.R. (4th) 491 (S.C.C.) and *Health Labour Relations Association of B.C. v. Prins*, (1982) 40 B.C.L.R. 313, 82 C.L.L.C. 14,215, 140 D.L.R. (3rd) 744.

28. Although concerns about the procedural fairness of the complaint process can arise if the Director does not allow the party under investigation a reasonable opportunity to respond to the Director's appreciation of the complaint following the required review, there is no such concern in this case. The Associated Corporations were given ample opportunity to respond to the issues raised under Section 54 of the *Act.* The Determination and the material in the Record clearly show that the issues under Section 54, whether the decrease in Baysinger's days and hours of work was related to her pregnancy and was made without her consent, was a matter of investigation and discussion from the outset of the complaint process.

29. The reply submission does not specifically respond to the argument that, as a matter of law, the complaint investigation should have been stopped when the Associated Corporations deposited the amount claimed by Baysinger with the Director. However, the simple response to this part of the appeal lies in subsection 76(3) of the *Act.* As a matter of law, once the investigation of a complaint has been commenced, the Director may only stop or postpone the investigation in those circumstances which are listed in that subsection. None of those circumstances would have applied in this case. The Determination specifically addresses whether the voluntary payment by the Associated Corporations of $1426.93 "resolved" the dispute and concluded that it did not. There is no error in that conclusion.

30. Even if the complaint could be considered "resolved" by the voluntary payment, there is nothing in the *Act* that would compel the Director, as a matter of law, to stop the investigation. Under subsection 76(3), a decision to stop an investigation in such circumstances is a matter of discretion for the Director and not mandatory. It would be an absurd reading of the *Act* to find the Director is compelled, as a matter of law, to stop an investigation in circumstances where a discretion is given about whether to stop investigating.

31. While this appeal has not been argued on the basis of an improper exercise of discretion by the Director, it is worth noting that in reviewing a discretionary decision by the Director, the Tribunal has taken the approach that such decisions should not lightly be disturbed. A challenge to a discretionary decision of the Director requires the appellant to show, at least, the exercise was an abuse of power, the Director made a mistake in construing the limits of his authority, there was a procedural irregularity or the decision was unreasonable, see *Joda M. Takarabe and others*, BC EST #D160/98 and *Jody L. Goudreau et al* (BC EST # D066/98).

32. This aspect of the appeal is dismissed.

33. The argument on the merits of the Determination challenges the finding that the Associated Corporations contravened Section 54 of the *Act* and the calculation of the amount of wages owing to Baysinger for the contravention. I find no merit whatsoever in any of the arguments made by counsel for the Associated Corporations. In some respects, the arguments indirectly challenge findings of fact made by the Director in the Determination. The Director found the Associated Corporations had changed a condition of Baysinger's employment because of her pregnancy and without her written consent and had failed to return her to the position she held before taking leave. Counsel for the Associated Corporations disputes those findings.

34. As indicated earlier, the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law. The appeal submissions make no attempt to characterize the alleged errors in findings of fact as errors of law.

35. The finding of a contravention of Section 54 is firmly grounded in an application of the findings of fact to that section of the *Act*, the relevant parts of which read:

> *54. (2) An employer must not, because of an employee's pregnancy or a leave allowed by this Part,*
>
> *(a) terminate employment, or*
>
> *(b) change a condition of employment without the employee's written consent.*
>
> *(3) As soon as the leave ends, the employer must place the employee*
>
> *(a) in the position the employee held before taking leave under this Part, or*
>
> *(b) in a comparable position.*

36. Next, counsel for the Associated Corporations argues the calculation of the wages owing to Baysinger should not have been based on five days a week and should have included a consideration of whether Baysinger had failed to mitigate her loss by not returning to work for two days a week.

37. The Director calculated the wage loss on five days a week based on his finding that the June 9, 2003 letter was a contravention of Section 54. I agree with that conclusion. Clearly, the letter imposes a change in a condition of Baysinger's employment without her written consent. The further decrease, from 3 days to 2 days was also found to be a contravention of Section 54 as, once again, the Associated Corporations imposed a change in a condition of Baysinger's employment because of her pregnancy or leave and without her written consent. Implicit in the findings made by the Director is a conclusion that Baysinger's days and hours of work should have remained throughout at 5 days a week.

38. It follows that the wage loss was properly calculated on what her conditions of employment should have been throughout her pregnancy and leave if there had been compliance with the *Act.*

39. The argument on mitigation is flawed. Wage loss flowing from a contravention of the *Act* is a statutory consequence of the failure to comply with a requirement of the *Act*; it is not a form of damages for breach of contract but rather a form of remedy for having one's statutory rights ignored or violated. In any event, I agree with the response of the Director on this point that Baysinger was not required to accept a position with the employer that was not the same as or comparable to her pre-leave position. In other words, no question of mitigation arises because an individual will not accept employment on terms that amount to a contravention of the *Act.*

40. That disposes of the remainder of the arguments on the merits of the Determination and, in result, the appeal on the merits of the Determination is dismissed.

41. As a result of this decision, which upholds the correctness of the Determination, the pre-conditions to the imposition of an administrative penalty - the issuance of a determination, the finding of a contravention of the *Act* or regulations and the imposition of a requirement under Section 79 - are established. When these pre-conditions are met, the imposition of an administrative penalty is mandatory. This consequence has been expressed in several decisions of the Tribunal, see for example *Summit Security Group Ltd.*, BC EST #D133/04 (Reconsideration of BC EST #D059/04), *Virtu@lly Canadian Inc. operating as Virtually Canadian Inc.*, BC EST #D087/04, and *Marana Management Services Inc. operating as Brother's Restaurant*, BC EST #D160/04, where the Tribunal said:

> Once the delegate finds a contravention, there is no discretion as to whether an administrative penalty can be imposed. Furthermore, the amount of the penalty is fixed by Regulation.

42. This appeal from the administrative penalty is dismissed.

ORDER

43. I order, pursuant to Section 115 of the Act, that the Determination dated March 23, 2005 be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal