

An appeal

- by -

Modern Logic Inc. -and- Auto - Carpark Controls Ltd. -and- Traf-O-Data  
Investment Corp -and- Modern Access Systems Inc. Associated Corporations  
under section 95 of the Employment Standards Act (Appeal by Traf-O-Data  
Investment Corp)  
("Traf-O-Data Group")

- 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

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 2001/893

**DATE OF DECISION:** April 25, 2002

## DECISION

### INTRODUCTION

This is an appeal filed jointly by Grant Furlane and Dale Scott pursuant to section 112 of the *Employment Standards Act* (the "*Act*"). Messrs. Furlane and Scott purport to appeal a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on December 11th, 2001 (the "Determination"). The Director's Delegate determined, in accordance with section 95 of the *Act*, that Modem Access Systems Inc., Modem Logic Inc., Auto-Carpark Controls Ltd. and Traf-O-Data Investment Corp. were "associated corporations" and, accordingly, jointly and severally liable for \$38,384.21 on account of unpaid wages and interest owed to seven former employees of Modem Logic Inc.

Neither Mr. Furlane nor Mr. Scott is personally liable for any of the unpaid wages due under the Determination. It may be that separate section 96 Determinations (section 96 establishes a limited personal unpaid wage liability for corporate officers and directors) have been, or will be, issued against one or both of Messrs. Furlane and Scott. However, there are no section 96 Determinations presently before me. On the face of it, this appeal is not properly before the Tribunal.

A one-page letter, dated December 19th, 2001 and signed by Mr. Furlane as "president" of the "TrafOData Group of Companies", is appended to the notice of appeal. The December 19th letter is written on the letterhead of an entity identified, at the top of the page, as the "TRAFODATA Group of Companies" (whose mailing address is situated in Guelph, Ontario); at the bottom of the page, three "divisions" are identified, namely, "Auto-Carpark Controls", "Modern Logic" and "Burcomatic Products". So far as I can gather, this letter purports to be the reasons for appeal filed on behalf of the "TrafOData Group of Companies" and, more specifically, on behalf of Modem Logic Inc. ("Modem Logic"), Auto-Carpark Controls Ltd. ("Auto-Carpark") and Traf-O-Data Investment Corp. ("Traf-O-Data"). Accordingly, I propose to treat the notice of appeal as an appeal filed by Messrs. Furlane and Scott on behalf of Modem Logic—the employer of record--Auto-Carpark and Traf-O-Data. I shall refer to these three firms collectively as the "Traf-O-Data Group".

At the outset, I should also note that a separate appeal of the Determination was filed by the fourth firm named in the section 95 declaration issued by way of the Determination, namely, Modem Access Systems Inc. I am releasing, concurrent with these reasons, my reasons for decision in the Modern Access Appeal (see BC EST # D151/02). To summarize, I allowed Modem Access' appeal and ordered that the Determination be varied by deleting Modem Access from the section 95 declaration and by cancelling its entire monetary liability under the Determination. In this appeal, the Traf-O-Data Group does not challenge the section 95 declaration as it relates to the three firms that constitute the Traf -0-Data Group.

By way of a letter dated March 14th, 2001 the parties were advised by the Tribunal's Vice-Chair that this appeal would be adjudicated based on the parties' written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575).

### BACKGROUND FACTS

On or about February 28th, 200 I, Modem Logic closed down its operation a few days after a bailiff posted of a notice of seizure of assets at Modern Logic's Richmond premises. According to the

information set out the Determination, the seven complainant employees "allege they were given notice on or about February 14, 2000 [sic, 2001?] that Modem was relocating to Ontario and British Columbia's operation was to [be] closed [at the] end of February 2000" [sic, 2001?]. Although the employees were apparently told that their wages would be paid "eventually", "some...received partial cheques and compensation for length of service but wages are still outstanding" (Determination at page 2).

## ISSUES ON APPEAL

As previously noted, Mr. Furlane's December 19<sup>th</sup> letter does not purport to attack the section 95 declaration. Section 95 reads as follows:

### **Associated corporations**

95. If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction, (a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one person for the purposes of this Act, and

(b) if so, they are jointly and separately liable for payment of the amount stated in a determination or in an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.

Accordingly, the section 95 declaration is confirmed but only with respect to Modem Logic Inc., Auto-Carpark Controls Ltd. and Traf-O-Data Investment Corp.

In his December 19<sup>th</sup> letter Mr. Furlane asserts the following:

- "The Trafodata Group of Companies has since ceased operations and has no money and no assets due to foreclosure by secured creditors.";
- "It was my understanding that all monies owed to the employees of Modern Logic Inc. had been paid by Modern Logic Inc. at February 28, 2001."; and
- "Recently we obtained payroll and personnel records from the B.C. office and now that we have the information submitted by the employees of Modem Logic Inc., we are appealing the determination based on the records currently in our possession."

I am not aware of any proceedings under the federal Bankruptcy and Insolvency Act; thus, there would not appear to be any statutory impediment (such as the stay provisions in the BIA) preventing the Director from endeavouring to collect the unpaid wages in question. Thus, the only issue properly before me relates to the quantum of the individual employees' unpaid wage claims, the matter to which I now turn.

## THE EMPLOYEES' UNPAID WAGE CLAIMS

The particulars of the respondent employees' unpaid wage claims are set out below:

<u>Employee</u>	<u>Unpaid wage claim*</u>
Kee Cheung**	\$10,856.75
Michelle Daniels	\$ 1,913.68

Karla Griffith	\$12,638.20
Joe Kahlert	\$ 5,443.34
Elvira Limbo	\$ 2,286.23
David McInnes	\$ 3,012.91
Kevin Karlsson	\$ 2,233.10
TOTAL	\$38,384.21

\* including section 88 interest to December 11th, 2001

\*\* incorrectly identified as Kee Chung in the Determination

The above unpaid wage claims include monies owed on account of compensation for length of service, vacation pay, reimbursable expenses and regular wages although the individual components vary by employee. For example, some employees were awarded compensation for length of service whereas other employees were not.

I propose to address each employee's claim separately.

### ***Kee Cheung***

Modern Logic challenges the award made in favour of Kee Cheung on account of compensation for length of service on the basis that "he received his full salary up to and including March 15, 2001". Given Kee Cheung's tenure (well over 8 years--thus he was entitled to the statutory maximum), he was entitled to 8 weeks' written notice or 8 weeks' pay in lieu of written notice (see section 63). The delegate did credit Modern Logic with 2 weeks' notice and thus, and quite properly, awarded Kee Cheung an additional 6 weeks' pay.

There does appear to be an error with respect to Kee Cheung's vacation pay award; in his original complaint form filed with the Employment Standards Branch, Kee Cheung claimed "\$315" annual vacation pay from August 31, 1999 to February 28th, 2001. The Delegate awarded Kee Cheung the sum of \$4,315 on account of vacation pay for the same period. It may well be that the delegate simply misread the complaint form and mistook the "+" sign for a "4". Modern Logic says that the payroll records show a liability for unpaid vacation pay in the amount of \$544. Unfortunately, I do not have before me any submission from Kee Cheung. However, given the sum claimed by Kee Cheung in the original complaint form, Modern Logic's records and the likelihood that the Delegate simply misread Cheung's complaint form, I am satisfied that Kee Cheung's award ought to be varied to reflect unpaid vacation pay as per Modern Logic's calculations, namely, \$544.

The delegate awarded Kee Cheung two separate amounts.. \$243.82 and \$449.10 on account what were termed "expenses". There are no particulars whatsoever in the Determination with respect to these two items nor has the delegate provided any further information in his one-paragraph submission to the Tribunal (nor, of course, did Mr. Cheung since he never filed any submission with the Tribunal).

Kee Cheung's original complaint does not mention any unreimbursed expenses. Modern Logic says that it has no record of any expenses being claimed by Cheung and, in any event, that Cheung "had no right to incur expenses without prior written approval". Finally, in section 1 of the *Act*, "allowances and expenses" are specifically excluded from the definition of "wages". Pursuant to section 21(2) of the *Act*, employers are not permitted to require employees to pay the employer's business costs but I do not have

any material before me from which I could conclude that these unparticularized "expenses" amount to recoverable business costs.

It may be that these two items represent the premiums for insurance benefits that were deducted from Kee Cheung's pay but were not remitted to the insurer [see section 22(1)(d) of the *Act*]. As will be seen, the Delegate awarded other employees "expenses" that were, in fact, insurance premiums that were deducted from the employee's pay but not, in turn, remitted to the insurer. As I am unable to determine, based on the material before me, whether these "expenses" are, in fact, unremitted insurance premiums, I am referring that matter back to the Director for further investigation and clarification.

Modem Logic also challenges the award on account of interest, however, that award is mandated by section 88 of the *Act*. Modem Logic says that it did not receive any timely notice of Mr. Cheung's claim and, therefore, ought to be held liable for interest. The essentially identical argument has been advanced with respect to the interest awarded to each employee and must be rejected in each case.

In Common Ground Publishing Corp. (BC EST # D433/00) the employer presented an almost identical argument with respect to section 88 interest as that advanced in this case. The relevant excerpts from the Common Ground decision are reproduced below:

#### **Section 88 Interest**

[Counsel for] Common Ground asserts that it should not be liable to pay interest spanning a period when it was not even aware that a complaint had been filed. In addition, [counsel] says that his client ought not to be penalized by paying interest that accrued over an extended period simply because the investigation did not proceed in a reasonably expeditious fashion.

However, even if this investigation was not carried out with reasonable dispatch – and I do not wish to be taken as accepting that assertion – I do not conceive that I (unlike, say, a judge under the *Court Order Interest Act*) have any discretionary authority with respect to the payment of section 88 interest (see *Insulpro Industries Inc.*, BC EST # D405/98 and *Piney Creek Logging Ltd.*, BC EST # D546/98).

Notwithstanding the foregoing, however, the section 88 interest award will have to be adjusted to reflect the adjustments that I have ordered with respect to Kee Cheung's unpaid wage entitlement.

#### ***Michelle Daniels***

Ms. Daniels was awarded the sum of \$960 on account of compensation for length of service. The Determination does not indicate the total number of weeks' wages that this award represents although given her hourly rate (\$12), it represents 2 weeks' wages based on a 40-hour work week. In light of her tenure, Ms. Daniels was entitled to 4 weeks' compensation for length of service or an equivalent amount of written notice in lieu of such compensation. In both her original complaint and written submission to the Tribunal she says that she received only 2 weeks' written notice and thus claimed a further \$960.

Modem Logic claims that she was given 3 weeks' written notice and says that it has attached the requisite documentation. However, the documents apparently relied on by Modern Logic do *not* show that Ms. Daniels received 3 weeks' written notice of termination. Accordingly, this aspect of her award is confirmed.

The Delegate also awarded Ms. Daniels \$864 (as per her original complaint) on account of vacation pay (9 days), an award Modem Logic challenges because their records show that "no vacation pay is owing".

Ms. Daniels rejects Modem Logic's assertion that no vacation pay is owing and, further, I note that in a record of employment issued by Modem Logic on April 19th, 2001, it stated that Ms. Daniels was to receive a further \$604.80 on account of unpaid vacation pay. Having reviewed both parties' submissions and documents, I am satisfied on a balance of probabilities that Ms. Daniels is entitled to the vacation pay claimed and awarded.

Modem Logic also challenges the section 88 interest award (\$89.68). This ground of appeal is refused for the reasons noted above with respect to Kee Cheung.

In the end result, the Determination is confirmed with respect to Ms. Daniels.

### ***Karla Griffith***

The delegate awarded Ms. Griffith 7 weeks' wages as compensation for length of service based on her over 7 years' tenure. Modem Logic says that on February 9th, 2001 Ms. Griffith received 3 weeks' written notice of termination and that her salary was continued until April 15th, 2001, however, there is nothing in the material before me to show that Ms. Griffith received any written notice of termination as required by section 63. For her part, Ms. Griffith denies having been given any notice of termination, oral or written. On the balance of probabilities, I am not satisfied that Ms. Griffith was given any written notice of termination and, accordingly, I would confirm the Determination in this respect.

Modern Logic also says that Ms. Griffith was not owed any vacation pay and that it has no record of any unreimbursed expenses for her (indeed, it says that she never even submitted an expense claim). There is nothing in the material before me to show that Modern Logic paid Ms. Griffith 6% vacation pay in accordance with section 58 of the Act--accordingly, the award on account of vacation pay is confirmed.

As for the "expenses" awarded to her by way of the Determination, it is my understanding that this item (\$631.51) represents wage deductions for insurance benefits [section 22(1)(d)] that were not, in turn, remitted to the insurer contrary to section 23 of the *Act*. This latter award is confirmed. However, the delegate also awarded a further 4% "vacation pay" (\$25.26) on the \$631.51; in my view, that additional 4% award is not authorized by the *Act* and thus must be cancelled.

Finally, Modem Logic says that Ms. Griffith has not returned a computer that belongs to the company. I need not address whether that allegation is correct since, if it is correct, Modem Logic must take separate civil proceedings to recover that asset (or damages for its misappropriation).

### ***Joe Kahlert***

Mr. Kahlert, who had about 14 months' tenure, was awarded 2 weeks' wages as compensation for length of service (\$3,875.78). Modern Logic says that Mr. Kahlert was given 3 weeks' written notice of termination, however, there is no evidence before me that such notice was ever given. Mr. Kahlert denies having received any prior notice of termination, either oral or written. Ms. Karla Griffith has submitted to the Tribunal copies of termination letters that were issued to some employees but there is no such letter with respect to Mr. Kahlert. However, the 2 weeks' wages awarded is substantially more than the \$1,112.93 "monthly wage" that Mr. Kahlert was apparently being paid (as per the Calculation Sheet appended to the Determination). Thus, this particular matter is referred back to the Director for clarification.

Modem Logic also says that the \$1,112.93 award on account of "regular wages owed" ought to be set aside since Mr. Kahlert "received full salary up to and including February 28, 2001". Further, Modem Logic also says that Mr. Kahlert was paid all accrued vacation pay. Despite these two assertions, however, there is absolutely nothing in the material before me to show that either assertion is correct. Accordingly, the Determination is confirmed with respect to these latter two items.

### ***Elvira Limbo***

Ms. Limbo was not awarded any compensation for length of service nor any amount for unpaid regular wages. Thus, I need not concern myself with Modem Logic's assertion that no monies are owed to Ms. Limbo under either of those two headings. Ms. Limbo was awarded vacation pay (\$780) and a further \$1,399.10 on account of "expenses". Modem Logic says that Ms. Limbo ought to have been awarded only \$240 on account of vacation pay and that she is not entitled to recover any "expenses" since she never submitted any expense claim and did not have the right to incur expenses without prior company authorization.

It appears from the material before me that the "expenses" referred to in the Calculation Sheet appended to the Determination represent wage deductions for insurance benefits [see section 22(1)(d)] that were not, in turn, remitted to the insurer contrary to section 23 of the *Act* – accordingly, this aspect of Ms. Limbo's award is confirmed.

As for the matter of vacation pay, in her original written complaint filed with the Employment Standards Branch, Ms. Limbo claimed \$435 in unpaid vacation pay. Ms. Limbo did not file any submission with the Tribunal; the Determination does not provide any particulars as to how the vacation pay entitlement was calculated nor does the Delegate's submission to the Tribunal.

On the other hand, Modem Logic has provided a Record of Attendance for Ms. Limbo which indicates that she has accrued 5.8 vacation days. There is a handwritten notation on this forIn reducing that number to 3 days; the record has been modified to show 2 vacation days taken on July 15th and 17th, 2000. However, Modem Logic's other records show that those latter 2 days were not taken as paid vacation time but rather an unpaid leave of absence. Accordingly, since Modem Logic's records and Ms. Limbo's complaint both suggest a claim for vacation pay of 5.8 days (i.e., \$435), and in the absence of any explanation for the higher amount awarded in the Determination, I would vary the Determination by reducing Ms. Limbo's award on account of vacation pay from \$780 to \$435.

### ***David McInnes***

Mr. McInnes was not awarded any compensation for length of service, thus, I need not concern myself with Modem Logic's assertion that no monies are owed to him on that account. Mr. McInnes was awarded \$1,425 on account of unpaid regular wages and a further \$1,446.72 as unpaid vacation pay (11 days). Modem Logic says that Mr. McInnes is not owed any regular wages and that his vacation pay entitlement is \$1,094.40. Mr. McInnes in his original complaint stated that he did not receive his last 2 weeks' pay (\$1,425) and there is nothing in the material before me to indicate that Modem Logic paid Mr. McInnes for his work in the final pay period. Modem Logic's payroll record for Mr. McInnes shows that he is owed 11.7 vacation days, however, that record has been altered, by way of a handwritten deletion, to show an entitlement of 8 vacation days--this later reduction is wholly unsubstantiated.

The Determination is confirmed as it relates to David McInnes.

***Kevin Karlsson***

Mr. Karlsson was awarded \$2,233.10 on account of unpaid regular wages, vacation pay and section 88 interest. Modem Logic challenges all three awards and says that Mr. Karlsson has no entitlement whatsoever.

Modem Logic says that Karlsson "received full salary up to and including January 15, 2001" (Karlsson's last day of work). The unpaid wages in question represent an earned commission that Modem Logic did not pay in full; the balance of the commission was due on March 15th, 2001 but was not paid. As for the vacation pay, Modem Logic has "deducted" certain vacation days when, in fact, the days in question were taken in lieu of overtime worked.

Accordingly, I see no reason to cancel any portion of Mr. Karlsson's award and thus I confirm the Determination as it relates to Mr. Karlsson.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed with respect to the awards made in favour of Michelle Daniels, David McInnes and Kevin Karlsson.

The Determination is varied, in accordance with these reasons for decision, with respect to the awards made in favour of Kee Cheung, Karla Griffith and Elvira Limbo. Kee Cheung's "expenses" claim and Joe Kahlert's claim for compensation for length of service are both referred back to the Director for further investigation.

I confirm the section 95 declaration but only with respect to Modem Logic Inc., Auto-Carpark Controls Ltd. and Traf-O-Data Investment Corp.

The Determination is varied so that the employee identified as Kee Chung is properly described as Kee Cheung.

All of the respondent employees are also entitled to whatever additional interest that has accrued, pursuant to section 88 of the *Act*, as and from the date of issuance of the Determination.

---

**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**