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 -

Joda M. Takarabe, Roland Eikmeier, Guy Stedman, Gus DeJardin,
Chris Holden, Michael J. Randall, Martin J. Watt
("the Appellants")

\- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

PANEL:	Lorna Pawluk Ib Petersen Geoffrey Crampton
FILE NOS.:	97/249; 97/253; 97/266; 97/267; 97/268; 97/269; 97/362
DATE OF HEARING:	January 30 & February 20,1998 with written arguement following
DATE OF DECISION:	May 26, 1998

DECISION

APPEARANCES

David Moonje	on behalf of the Appellants
Victor P. Leginsky	on behalf of Corporate Couriers Ltd.
Adele J. Adamic Graeme Moore	on behalf of the Director of Employment Standards

OVERVIEW

The Appellants make their appeal under Section 112 of the *Employment Standards Act* (the "*Act*") against various Determinations dated March 27, 1997 or April 15, 1997. Each of the Appellants received a Determination which was addressed to him personally although the content of each was virtually identical.

The Determinations dealt with the following three issues:

1. Entitlement of persons who work as "bike couriers" under the *Act*.
2. Ability of the Director of Employment Standards (the "Director"), to enter into a settlement with employers in an industry regardless of whether or not a complaint has been filed.
3. Ability of a person to reject a settlement reached between the Director and employers in an industry.

Each of the Appellants was found to be a bike courier who was an employee of Corporate Couriers Ltd. ("Corporate"). In dealing with the second and third issues, the Director's delegate concluded that the powers given to the Director under Section 76 (Investigation after or without a complaint) and Section 78 (Settlements), when taken together with the purposes of the *Act* (as set out in Section 2), allow the Director to accept a settlement on behalf of a group of employees. The Director negotiated and executed an agreement (the "Industry Agreement") with Corporate on December 3,1996. It provided for compliance with the *Act* within a specific six-month period and amended a "Self-Audit Agreement" which the Director and Corporate had entered into on or about, September 11, 1996. As a result, the Director declined to "...pursue the matter further than what (was) obtained in the (Industry Agreement)". This, the Appellants say, was a significant *volte face* by the Director and led to Determinations which breached various principles of administrative law.

The various Determinations concluded that Corporate had not contravened the *Act* and no further action would be taken on the complaints with the following effect on each of the Appellants:

- J. Takarabe - not eligible to receive any remuneration under the Agreement.
- R. Eikmeier
- M. Watt
- G. Stedman
- G. DeJardin
- C. Holden
- M. Randall

(R. Eikmeier, M. Watt, G. Stedman, G. DeJardin, C. Holden, M. Randall) - funds paid by Corporate to the Director were deposited into the Director's trust account

The Appellants' grounds of appeal are:

1. The Director does not have the statutory authority to compromise the minimum entitlements under the *Employment Standards Act*; and

2. If the Director has such authority, then the exercise of such authority is unreasonable in the circumstances.

Corporate's response to the Appellants is that the Director's delegate investigated each complaint, considered each complaint individually and made various Determinations which, it says, are proper and should not be impugned by the Tribunal.

The Director expressed a number of concerns about the appeals as they relate to the statutory authority of the Tribunal to supervise the Director's decision-making processes but she did not make a motion that the appeals be quashed. In short, the Director submits that the Tribunal does not have the jurisdiction to supervise the Director's decision-making process.

A hearing was held in the Tribunal's offices on January 30, 1998 and February 20, 1998 at which time evidence was given under oath or affirmation. By agreement of the parties, Michael Randall's testimony concerning the investigation of the Appellants' complaints and their communication with the Director's delegates would be "representative of the evidence each of the appellants would give." At the conclusion of the hearing, the Tribunal requested counsel to submit written arguments and final submissions.

ISSUES TO BE DECIDED

Does the Tribunal have the jurisdiction to decide this appeal?

Does the Director have the statutory power to compromise the minimum entitlements of the *Act*?

Was the Director's delegate estopped from exercising her statutory powers by operation of the doctrine of legitimate expectations?

Did the Determinations result from an abuse of power by the Director's delegate?

FACTS

Various important facts, such as the following, are not in dispute:

- The Appellants submitted their complaints during July and August, 1996. Their complaints alleged that Corporate had contravened several sections of the *Act* related to the non-payment of vacation pay and statutory holiday pay as well as deductions from their wages.

- The Appellants were employed as bike couriers by Corporate for various periods of time beginning as early as April, 1992. Their compensation was based entirely on commissions earned.

- The Appellants met with Corporate's president and general manager on July 11, 1996 to discuss the issues which gave rise to their complaints. Some fifteen of Corporate's bike couriers subsequently signed a letter to confirm their dissatisfaction with the issues discussed at the July 11th meeting.

- The Appellants were aware in July, 1996 that the Employment Standards Branch was planning to conduct an audit of all employers of bike couriers in Vancouver.

- On or about August 19, 1996 the Appellants received a letter from Mr. Dave Ages, an Industrial Relations Officer (delegate of the Director), to inform them of the on-going review of the bicycle courier industry. That letter included the following paragraph:

  > You will be included in any audit of Corporate Couriers. Should it be found that you are owed additional wages, the company will be required to pay. Whether or not it is found that you are owed wages, you will be contacted when the investigation has been

> completed. If, at that time, you believe that you remain owed something, you may ask that this Branch conduct an additional individual investigation of your complaint.(sic)

- Corporate, and other employers in the bicycle courier industry, attended a meeting with several of the Director's delegates on September 11, 1996. At the end of that meeting the Director's delegates met privately with representatives of each of the employers to conclude a "Self Audit Agreement" with each of them. Corporate's representative, Murray Eakins, signed a Self Audit Agreement which included the following terms:

> 4. that a failure by the Company to meet the terms of this agreement may result in an audit for all employees and ex-employees of the Company for the period of September 11, 1994 to the time of that audit; and
> 5. that this audit agreement does not preclude the filing of complaints by employees or ex-employees. Such complaints would be investigated and determined by the Employment Standards Branch in accordance with provisions of the *Employment Standards Act.*

- The Appellants were not involved in and did not participate in the "Self Audit Agreement" process because they were not invited to do so by the Director.

- Counsel for a consortium of courier companies, which included Corporate, wrote to the then - Minister of Labour (Hon. Moe Sihota) on October 9, 1996 to express the view that the actions "...flowing out of" the September 11th meeting "...improperly compromised the rights of these courier companies." The letter also requested the Minister that he:

> "...make clear to the Director of the Employment Standards Branch, and her delegates, that the procedural safeguards set out in the *Employment Standards Act* must be followed. Secondly, I ask that you make it clear to the Director and her delegates that if the Branch deems it necessary to effect a policy change in the administration of the *Act* relating to a particular target industry, that the Branch should make such changes only after reasonable consultation with the companies, contractors and industry associations affected. I also ask that the effect of certain imposed "agreements" and/or decisions which flowed out of the September 11, 1996 meeting be suspended until this matter can be properly be dealt with by joint consultation.

- Mr. Dan Cahill (then-Program Advisor, Employment Standards Branch) replied to the October 9th letter to the Minister as follows:

> At the September 11,1996 meeting, the officers informed the companies of the reason for the investigation. They then discussed the main issues affecting the courier industry, including an

explanation of the tests determining who is an employee and who is an independent contractor. The companies were given two options. They could agree to do a self-audit on present employees only on a restricted number of issues and for a shorter period of time. Or, they could opt for a full investigation for the preceding two year period. Following that, there was a lengthy question and answer period. The meeting then broke up, with each company meeting individually with an officer where they were given the opportunity to discuss their situation and, in most cases, a self-audit agreement was signed.

The officers did not behave as stated in your letter.

With respect to your argument that there was a contravention of natural justice, I wish to point out that the officers followed standard Branch practice. The request for records and the actions taken to achieve compliance are well within the mandate of the Branch. Further, the *Employment Standards Act* (the "*Act*") specifically allows for demands for records, and certainly contemplates settlements of this nature

The self-audit agreements will stand.

The companies agreed, through this informal process, that it was not necessary to issue a Determination. The self-audit agreement is a settlement. If the companies did not wish to settle the matter, the Branch would have conducted a full investigation, concluding with the issuance of a Determination which could have been appealed by either party. If a company chooses not to honor the self-audit agreement, it will be set aside. The Branch will then proceed to the more formal process.

Regardless of the formality of the process, the issue of compliance with the *Act* is foremost.

- On the same date, Mr. Cahill wrote to the officers who comprised the "Bicycle Courier Industry Compliance Group":

Re: Bicycle Courier Audit

As you may be aware, there was a huge response to the Branch's bicycle courier industry initiative. There were a number of reports in the media. The BC Trucking Association requested a meeting. And, a number of the courier companies hired a lawyer, Victor Leginsky, to respond on their

> behalf. Mr. Leginsky made submissions on behalf of his clients to the Minister of Labour as well as to Jill Walker. In response, a one week's delay in actions by the Branch was granted in order to give the companies time to make further submissions. The focus of these submissions was to be on the issue of ability pay.
>
> A number of submissions were received from the courier companies. These have not resulted in any substantive change with regard to the audit initiative. The self-audit agreements, as negotiated, should proceed. Should any of the companies provide evidence to the investigating officer of dire financial straits or indicate that they would like assessments as to whether or not the workers are employees, the officer should consider extensions to time limits as appropriate while ensuring general compliance with the agreement. Employers who choose not to abide by the terms of the agreement should be subject to investigation. A determination and appeal rights should be given. It should be noted that a number of companies have already provided their calculations and paid out the wages owing.
>
> The Branch views this initiative and the ensuing response as very positive. Within the limits available resources, it is considered a good example of how the Branch ensures industry wide compliance.

- On November 4, 1996 Mr. Cahill advised the Director's delegates who had attended the September 11th meeting that he had "re-visited and adjusted" the Self -Audit Agreements with the employer of bike couriers as a result of a meeting which took place on November 1, 1996. According to Mr. Cahill's' electronic memorandum:

    > "The new agreement will recognize a type of ESA release, a new 6-month limit for the wage calculation, and will include persons who may have left employment in the 6 months prior to September 16th." (Sic)

- The Determinations which are under appeal contain, as an attachment, a copy of the Agreement dated December 3,1996 (the "Industry Agreement") between Corporate and the Director. The terms of that agreement, *inter alia*, included the following:

    1. This Agreement is in keeping with the purposes of the *Employment Standards Act...*
    2. This Agreement amends the self audit agreements between the Company and the Director of Employment Standards entered into on September 11, 1996 or shortly thereafter.
    3. The time frames for the self audit agreement is amended by this Agreement to apply to the period from March 17, 1996 to September 16, 1996 (the "covered period"). This Agreement applies to all bicycle couriers employed by the Company at any time during that time period.

4. This Agreement does not cover complaints filed with the Employment Standards Branch after September 16, 1996.
5. The time period to be audited for those bicycle couriers whose employment terminated within six months prior to September 16, 1996 will be limited to the covered period or the duration of employment during the covered period, whichever is less.
6. The company will report to the Director the names of the bicycle couriers together with wages paid to each bicycle courier by December 13, 1996.
7. The Director will have final approval of the form of Release from further actions against the Company under the Act for payment of wages due under this Agreement.
8. The Agreement is without prejudice to any position taken or any agreement that may be reached in the ongoing courier industry talks.
9. The responsibility for all wages due to the bicycle couriers rests with the Company should this Agreement be set aside by the Employment Standards Tribunal.
10. If this Agreement is rendered void by the Employment Standards Tribunal, the self-audit agreements entered into on September 11, 1996 or shortly thereafter are not affected.
11. The Director, or her delegates, will not initiate any actions against the Company including audits or investigation for matters which pre-date the signing of this Agreement except as covered in this Agreement so long as the Company performs its duties and obligations.

- Approximately 20 courier companies, including Corporate agreed to the terms of the Industry Agreement.

- The Appellants declined to settle their complaints under the terms of the Industry Agreement and decided, instead, to appeal the Determinations.

- The Director acknowledges (in her written submission of May 12, 1997) that the Appellants "...would have received more wages had the Director and BCTA not negotiated the (Industry Agreement)."

- Corporate did not appeal the Determinations.

Oral testimony by Mr. Dave Ages

Mr. Ages is an Industrial Relations Officer (IRO) and a team leader of the Employment Standards Branch office in Vancouver. He has been an IRO for approximately twelve years. As an IRO he is a delegate of the Director (see definition of "director" in Section 1(1) of the *Act*). He was summoned as a witness by the Appellants.

Mr. Ages testified that he had acquired a knowledge of the courier industry and "bike couriers" during his employment as an IRO. He had received and investigated various

complaints concerning Corporate during Spring, 1996. Soon thereafter, he and another IRO sent a memo to their Regional Manager (Mr. Dan Cahill) to suggest how the Employment Standards Branch might change its process of dealing with complaints from the courier industry with the objective of avoiding a "...revolving door of complaints." The memorandum requested direction from management of the Branch to commence the project.

Other objectives which the officers believed would result from this "sectoral" approach to compliance/enforcement included: reduced workload; increased compliance with the *Act*; and, greater awareness of the *Act*'s requirements.

Mr. Ages' manager approved his proposal. In August, 1996, Mr. Ages and his colleague convened a meeting of several officers to plan its implementation. According to Mr. Ages' testimony, the implementation plan which emerged from that meeting had the following characteristics:

- recognize that specific active complaints existed;
- expect self-audit would not, automatically, bring an end to individual complaints.

On the question of the "time frame" for liability for non-compliance, Mr. Ages testified that he and his fellow IROs discussed the following points:

- liability for wages determined to be owing under a self-audit would extend back to the most recent date on which a complaint had been closed; and
- if there were no complaints against an employer, the maximum liability period would be two years (consistent with the provisions of Section 80 of the *Act*.) The reasons for this, according to Mr. Ages, were: (i) to avoid "second guessing" an IRO who had already investigated and dealt with a complaint; and (ii) to recognize that individual employers in the courier industry had been audited previously.

However, prior to the meeting on September 11, 1996 the specific period of liability under the self audit process had not been decided (See D. Ages' letter of August 19, 1996).

Mr. Ages testified, under cross examination by counsel for the Director, that the self audit process which was adopted for the bike courier sector was "...an evolution from other approaches which the Branch had adopted previously". When asked if he would change certain parameters if he were to do it again, he testified that "...nothing is etched in stone but I thought the process was appropriate."

Under cross examination by counsel for Corporate, Mr. Ages confirmed that his letter of August 19, 1996 told bike couriers that they would be guaranteed an investigation of their complaints but were not guaranteed any particular result.

Oral testimony by Mr. Dan Cahill

Mr. Cahill has been a Labour and Employee Relations Specialist in the Ministry of Labour since November, 1996. Prior to that time he was Regional Manager and Program Advisor in the Employment Standards Branch at which time he reported directly to the Director. He confirmed that he approved the bike courier project which had been proposed by Mr. Ages. However, he testified, he had no input into the drafting of the standard form which became the Self-Audit Agreement and had not seen it prior to the September 11th meeting. In particular, he testified, paragraph #5 of the Self-Audit Agreement had not been brought to his attention although he was aware that one effect of the Self-Audit Agreement would be "...a different level of compliance for recent complaints compared to older complaints."

Mr. Cahill became aware of various concerns related to the Self-Audit Agreement after the September 11th meeting. Those concerns and a letter dated October 9, 1996 to the then Minister of Labour (written by Mr. Leginsky on behalf of a consortium of courier companies in the Lower Mainland) prompted Mr. Cahill to discuss with the Director the terms and conditions of the Self-Audit Agreement. Mr. Cahill responded on behalf of the Minister in a letter dated October 25, 1996 following discussions with the Director.

Mr. Cahill confirmed in his testimony that, in his mind, compliance with the *Act* was the most important objective. He also confirmed that, despite the comments in his letter, the **process** adopted by the IROs at the September 11th meeting was not a model for any such future meetings.

Mr. Cahill attended a meeting at the British Columbia Trucking Association ("BCTA") offices on November 1, 1996 (which the BCTA had scheduled) to discuss various concerns that had been raised by various courier companies. Mr. Leginsky describes that meeting (in a letter dated October 28, 1996) as "discussions...to put into place a new process to resolve the issues." Mr. Cahill's objectives in attending the meeting were twofold:

(i) to "get the industry to buy-into compliance with the *Act*"; and

(ii) to arrive at an "equitable settlement" of outstanding concerns.

According to Mr. Cahill's testimony, an "equitable settlement" would be some resolution other than the Self-Audit Agreement or an investigation of all active complaints by bike couriers. He concluded, following the November 1st meeting, that employers in the bike courier industry did not "buy-in" to the Self-Audit Agreement after the September 11th meeting. For that reason, he testified, the Self-Audit Agreement was not "worthwhile" as it would not bring about compliance with the *Act*.

Mr. Cahill confirmed that neither the Appellants nor any other complainants were party to or involved in the consultations/discussions he had with the BCTA.

Oral Testimony by Ms. Donna Cummings

Ms. Cummings is an Employment Standards Officer (ESO). She has been an ESO for approximately three years and in that capacity acts as a delegate of the Director.

Ms. Cummings testified that her first knowledge of the bike courier industry was acquired at the meeting of September 11, 1996 at which time she was assigned to meet with the representatives of two courier companies (neither of them Corporate). Neither of the employers to which she was assigned was required to conduct a "self-audit" and she did not follow-up with either company after the September 11th meeting.

Ms. Cummings was advised (in late - November , 1996) by Mr. Graeme Moore (Program Advisor) that she had been assigned to work with the courier industry and was asked to attend a meeting on December 3, 1996 with the BCTA. At that meeting, she and Mr. Moore met with representatives of various courier companies to review complaints on hand as of that date and to sign (on behalf of the Director) individual agreements with each company which were in the standard Industry Agreement form. Ms. Cummings testified that the terms of the Industry Agreement applied only to complaints filed between March 17, 1996 and September 16, 1996. She also testified that if a complaint had been filed prior to March 17, 1996 she considered it to be outside of the period covered by the Industry Agreement (see paragraph #3 of the Industry Agreement) and, therefore, the complainant would not be entitled to any wages under the terms of the Industry Agreement.

She also agreed, under cross-examination, that under the terms of the Industry Agreement a complainant who filed a complaint on March 17, 1996 would be entitled only to receive 1 day's wages although his or her entitlement may be greater than that under the *Act*.

In mid-December, 1996 Ms. Cummings was assigned responsibility for all complaints filed under the *Act* by employees in the courier industry, including the Appellants' complaints. As a result of this new responsibility, she testified, she reviewed approximately eighty complaints and issued eight Determinations (including the seven which are the subject of this appeal).

Ms. Cummings also testified that the manner in which she dealt with complaints under the terms of the Industry Agreement "...would not have been different than the process (she) would have adopted if the Self-Audit Agreement had been in effect at the time." However, she acknowledged, under cross examination, that she did not conduct an individual investigation of the Appellants' complaints as described in Mr. Ages' letter of August 19, 1996.

Under cross-examination by Mr. Moonje, Ms. Cummings testified that she could not remember the specific terms and conditions of the Self-Audit Agreement and, in particular, she could not recall the terms of paragraph #5 of that Agreement. However, she confirmed in her testimony that if an individual employee (complainant) would not accept the results produced by an employer's self-audit, she retained the authority to determine (following an

investigation) the amount of wages owing under the *Act* (based on the entire 24 month period permitted under Section 80 of the *Act*).

Ms. Cummings testified that she drafted the Determinations which are the subject of this appeal "...immediately prior to issuing them." After drafting them, she sent a copy to Mr. Moore and he reviewed them with legal counsel. However, she also testified that she "...was given no direction on what to write in the Determinations." Her reasons for deciding to uphold the Industry Agreement were as set out on page 5 of the Determinations:

i) the Director had entered into an Agreement with Corporate;
ii) the Industry Agreement was in the best interest of labour relations;
iii) to ensure speedy resolution of all outstanding complaints;
iv) to encourage compliance with the *Act*; and
v) she did not want to "second guess" the Director.

She also considered Section 76(2)(g) of the *Act* which allows the Director to stop or postpone investigating a complaint if "...the dispute that caused the complaint is resolved."

Under cross-examination by the Director's counsel, Ms. Cummings testified that approximately 250 bike couriers (who did not file complaints and who were current employees" of courier companies on December 3, 1996) received payments as a result of the Industry Agreement. In addition, she testified, approximately 70 bike couriers who filed complaints received payments under the terms of the Industry Agreement. Furthermore, individual employees who filed a complaint were not given a "preferred status" under the terms of the Industry Agreement.

ANALYSIS

The Appellants submit that there are several grounds for their appeal. Their first ground of appeal is that the Director " ... does not have the statutory power to compromise the minimum entitlements of the Appellants" under the *Act.* This ground gave rise to a preliminary objection by the Director that " ... the Tribunal is without jurisdiction to rule on some of the issues raised by (the Appellants)."

We will deal with this preliminary issue before considering the other grounds of appeal.

In making her preliminary objection the Director states clearly that she is not disputing the " ... strength of the Tribunal's privative clause: (Section 110 of the *Act*) nor the Tribunal's authority to act within the jurisdiction given to it by Part 12 and 13 of the *Act*. Rather, the Director submits, she is " ... questioning the Tribunal's authority to move beyond that statutory jurisdiction and into an area occupied solely by courts of superior jurisdiction, that of prerogative relief."

The Director makes the following submissions in support of her preliminary objection to the Appellants' first ground of appeal:

- It requires the Tribunal to make a broad ruling on the validity of the policy and processes adopted by the Director vis-à-vis the bicycle courier industry.
- It requests the Tribunal to exercise a "superintending " power over the Director, a power which is normally exercised by the courts and one which has not been given to the Tribunal by the Legislature through an express provision in the *Act.*
- It requests the Tribunal to grant relief in the nature of prohibition, that is, an order prohibiting the Director from making sectoral settlements which, the Appellants allege, are outside of the Director's powers. On this point the Director relies on Section 2 of the *Judicial Review Procedure Act* (R.S.B.C. (1996) c.241).
- Certain provisions of the *Act* (Part 9 for example) specifically give the Director the discretionary authority to vary certain provisions of the *Act* if she is satisfied that such a variance is " ... consistent with the intent of the *Act*" (Section 73(1)(b)). Such discretionary powers reinforce the Director's authority to undertake broad remedial actions in administering the *Act.* [see, for example, *433428 B.C. Ltd. v. British Columbia (Director of Employment Standards)* 21 CCEL (2d) p.49]

For these reasons, the Director submits, the Appellants' first ground of appeal should fail.

Corporate submits that the Director acted within her statutory authority when she entered into the industry-wide agreements with the employers in the bicycle courier industry. That submission is founded on several points:

- The various functions, duties or powers given to the Director under the *Act* fall into various categories ("administrative"; "executive"; "judicial"; "quasi-judicial"; or "legislative"). [Jones, deVillars *Principles of Administrative Law*, 2nd ed., 1994, pp. 69-71 deSmith's *Judicial Review of Administrative Decisions*, 4th ed., pp. 71-76]
- When she entered into the industry-wide agreements, the Director's actions were "administrative" (rather than "legislative" or "quasi-judicial") and she was acting within her authority to promote the purposes of the *Act* and to encourage compliance with the *Act.* [MacAulay, Sprague *Practice and Procedure Before Administrative Tribunals*, v.1 at p. 6-16 and 6-18, 6-19]
- In discharging her duty to achieve the purposes of the *Act*, particularly Section 2(b), 2(d) and 2(e), the Director has the authority to enter into industry-wide agreements which are intended to achieve the purposes of the *Act.*

- The execution of industry-wide agreements by the Director was an "administrative" act which was a proper exercise of the Director's powers and authority.
- The Director is given broad discretion under the *Act* and the Tribunal should interfere with that discretion only:

    a) if the (Director's) delegate refuses to exercise her jurisdiction, or

    b) if the (Director's) delegate has failed to exercise her discretion in accordance with 'well-established legal principles', meaning that the delegate must exercise her discretion *bona fide*, uninfluenced by irrelevant considerations and not arbitrarily or illegally. [*Boulis v. Minister of Manpower and Immigration* (1972) 26 D.L.R. (3d)216 @ p. 217 (S.C.C.)]

In *Jody L. Goudreau et al* (BC EST # D066/98), the Tribunal recognized that the Director is "an administrative body charged with enforcing minimum standards of employment..." and "...is deemed to have a specialized knowledge of what is appropriate in the context of carrying out that mandate." The Tribunal also set out, at page 4, its views about the circumstances under which it would interfere with the Director's exercise of her discretion in administering the *Act*:

> The Tribunal will not interfere with the exercise of discretion unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:
>
> > ... a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably".
> > *Associated Provincial Picture Houses v. Wednesbury Corp.* [1948] 1 K.B. 223 at 229
>
> Absent any of these considerations, the Director even has the right to be wrong.

> Section 81 of the *Act* requires the Director to include, in a determination, the reasons for it. When assessing an argument that the Director has considered immaterial factors or failed to consider material factors, the Tribunal will confine itself to an examination of the relevant determination.

In *Boulis v. Minister of Manpower and Immigration* [(1972), 26 D.L.R. (3d) 216 (S.C.C.)] the Supreme Court of Canada decided that statutory discretion must be exercised within "well established legal principles". In other words, the Director must exercise her discretion for *bona fide* reasons, must not be arbitrary and must not base her decision on irrelevant considerations.

In *BWI Business World Incorporated* (BC EST #D050/96), the Tribunal described the quasi-judicial role of the Director within the adjudicative processes of the *Act*:

> Under the current *Act*, the adjudicative process is triggered by the filing of a complaint with the Director of Employment Standards under Section 74. The Director also has the authority to conduct an investigation in the absence of a complaint [section 76(3)]. Once a complaint has been filed, the Director has both an investigative and an adjudicative role. When investigating a complaint, the Director is specifically directed to give the "person under investigation" (in virtually every case, the employer) "an opportunity to respond" (section 77). At the investigative stage, the Director must, subject to section 76(2), inquire into the complaint, receive submissions from the parties, and ultimately make a decision that affects the rights and interests of both the employer and the employee. In my view, the Director is acting in a quasi-judicial capacity when conducting investigations and making determinations under the Act [*cf. Re Downing and Graydon* 21 O.R. (2d) 292 (Ont.C.A.)].
>
> (at page 3)

It can be seen from a careful reading of *BWI Business World Incorporated* and *Jody L. Goudreau et al* that the Director acts in a variety of capacities in carrying out her statutory mandate. Depending on which statutory function she is exercising, the Director may be acting in an "administrative", "executive", "quasi-judicial" or "legislative" capacity (see, for example, Jones, de Villars *Principles of Administrative Law,* 2nd ed., 1994,pp. 69-71; de Smith's *Judicial review of Administrative Decisions,* 4th ed., pp. 71-76; and MacAulay, Sprague *Practice and Procedure Before Administrative Tribunals,* v.1 at p. 6-16, 6-19).

The appeal and inquiry powers of the Tribunal are set out in Section 108 of the *Act.* In particular, Section 108(2) gives the Tribunal the power to "...decide all questions of fact or law arising in the course of an appeal or review". Section 112(1) of the *Act* allows a person served with a Determination to appeal it to the Tribunal. Section 115(1) of the *Act* gives the Tribunal the power to "...confirm, vary or cancel the determination under appeal, or refer the matter back to the Director". We agree with the Appellants that Section 115 of

the *Act* confers on the Tribunal a "...wide ambit of appellate authority" (see, for example, *British Columbia (Minister of Health) v. British Columbia (Environmental Appeal Board), (1996)* 26 B.C.L.R.). We believe that we can deal with this preliminary issue by adopting the analysis set out in *Jody L. Goudreau* above. That is, we will confine our analysis to applying the following test:

(i) Have the Appellants shown that there was an abuse of power when the Director entered into the industry wide agreements?
(ii) Did the Director make a mistake in construing the limits of her statutory authority?
(iii) Was there a procedural irregularity?
(iv) Did the Director exercise her power unreasonably?

In summary, we do not agree with the Director that the Tribunal is without jurisdiction to decide this appeal. We can dispose of the preliminary issue before us because, in our view, the Tribunal can decide the Appellants' grounds for appeal while remaining firmly within the jurisdiction given to it in Part 12 and Part 13 of the *Act.* As noted above, Section 108(2) of the *Act* gives the Tribunal the power to decide all questions of fact or law. The Appellants have raised a question of law: namely, whether the Director has the legal authority to enter into settlements which, as alleged by them, "compromise the minimum entitlements of the Appellants under the *Act*". The fact that this argument could be properly addressed by a court on judicial review in the absence of an Employment Standards Tribunal is quite beside the point because there *is* an Employment Standards Tribunal. It is an appeal body. As such, it exercises whatever appellate authority is granted by the *Act.* In this context, the use of terms such as "superintending" and "prerogative" serve only to divert the focus from the single relevant question, which is what the statute says. In the case of this Tribunal, specific jurisdiction has been given to decide *all* questions of fact and law arising in the appeal. The Appellants have raised a question of law: whether the Director's determinations are lawful insofar as they are founded on the Industry Agreement. Whether or to what extent that ground of appeal is meritorious is another matter entirely. But the Tribunal clearly has jurisdiction to deal with it, and to dispose of it within the ambit of its remedial power as defined in section 115 of the *Act.*

We will turn now to deal with each of the Appellants' grounds of appeal:

(a) The Director does not have the statutory power to compromise the minimum entitlements of the Appellants for the following reasons:

- Section 4 of the *Act* establishes that its requirements, or those of the *Regulation* , are minimum requirements and "...an agreement to waive any of those requirements is of no effect, subject to Sections 43, 49, 61 and 69 (of the *Act*)".

- The *Act* is remedial in nature and has as one of its central purposes the creation of certain protections for employees which may not be available to them at common law.

- The *Act*, specifically Section 78(1)(a), does not give the Director's delegate the authority to make a determination which, in the specific circumstances of this case, affirms the Industry Agreement which was entered into by the Director and Corporate. That is, there is no statutory authority by which the Director may impose a settlement without notification or consultation.

- The Industry Agreement is an "agreement" within the meaning of Section 4 rather than a "settlement" within the meaning of Section 78(1)(a) of the *Act.*

- The Director's delegate erred when she determined that the Industry Agreement was "authorized by" the *Act*.

(b) The Appellants had a legitimate expectation that no decision to settle or compromise their complaints would be made without their participation. Further, the Director was estopped from denying the Appellants their individual rights; and

(c) The statutory powers exercised by the Director, and affirmed by the Director's delegate, were discretionary powers that had to be exercised within the bounds of law. In the present circumstances, there was an abuse of discretion, improperly affirmed by the Director's delegate. More specifically,

- The discretionary power to settle was exercised for improper purposes; and
- The Determination was based upon irrelevant considerations and without considering relevant matters.

For convenience, we reproduce Section 78 and Section 79 of the *Act.*

Settlements

78. (1) The director may do one or more of the following:

(a) assist in settling a complaint or a matter investigated under section 76;

(b) arrange that a person pay directly to an employee or other person any amount to be paid as a result of a settlement;

(c) receive on behalf of an employee or other person any amount to be paid as a result of a settlement.

(2) The director must pay money received under subsection (1)(c) to the person on whose behalf the money was received.

(3) If a person fails to comply with the terms of a settlement, the settlement is void and the director may

(a) determine the amount the person would have been required to pay under section 79 had the settlement not been made, and

(b) require the person to pay that amount.

Determination

79. (1) On completing an investigation, the director may make a determination under this section.

(2) If satisfied that the requirements of this Act and the regulations have not been contravened, the director must dismiss a complaint.

(3) If satisfied that a person has contravened a requirement of this Act or the regulations, the director may do one or more of the following:

(a) require the person to comply with the requirement;

(b) require the person to remedy or cease doing an act;

(c) impose a penalty on the person under section 98.

(4) In addition, if satisfied that an employer has contravened a requirement of section 8 or Part 6, the director may require the employer to do one or more of the following:

(a) hire a person and pay the person any wages lost because of the contravention;

(b) reinstate a person in employment and pay the person any wages lost because of the contravention;

(c) pay a person compensation instead of reinstating the person in employment;

(d) pay an employee or other person reasonable and actual out of pocket expenses incurred by him or her because of the contravention.

(5) If satisfied that an employer has contravened section 39, the director may require the employer to limit hours of work of employees to

(a) 8 in a day or 40 in a week, or

> (b) if the employer has adopted a flexible work schedule under section 37 or 38, an average over the shift cycle of 8 in a day or 40 in a week.
>
> (6) If satisfied that an employer has contravened a requirement under subsection (5), the director may require the employer to vary the overtime wages payable to employees for the period of the contravention and any later period.

It is also convenient to reproduce the relevant paragraphs from the Determinations which are the subject of this appeal. Although the Director's delegate issued a Determination to each of the Appellants, the following text was common to each:

> The Director has the ability to settle a matter investigated under Section 76. This ability is set out in Section 78(1).
>
> The Director may accept a settlement on behalf of a group of employees, when such a settlement conforms with the expectations set out in Section 2.
>
> The Director met with your employer and negotiated a settlement. A copy of that agreement is attached. It provides for compliance with the *Act* for bike couriers for their duration of employment with that employer within a specific six(6)-month period of time.
>
> The Director is of the view that there is a legitimate purpose to restrict the amount of wages required to be paid to a six(6)-month period, it being the ability to quickly secure the voluntary compliance with the *Act* of a number, if the majority, of companies which employ bike couriers. The settlement allowed the Director to deal with industry-wide practices, which were in contravention of the *Act*, on an industry-wide basis.
>
> Some bike couriers, those who did not file a complaint, gained by this settlement; and some, those who did file a complaint and were employed in excess of six (6) months, did not gain as much as they might have gained in the absence of this settlement. To deal with industry-wide practices on the basis of complaints would not have been as likely to have resolved the industry-wide practices. To deal with the industry produced the greatest good for the greatest number.
>
> Accordingly, therefore, the Director declines to pursue the matter further than what has been obtained in the settlement agreement.
>
> (reproduced as written)

The central thrust of Corporate's response to this ground of appeal is that:

> "...the director (when undertaking an administrative act) has a duty to act in consideration of the broader public interest: MacAulay, Sprague, p.8-1. Although the definition of what comprises "public interest" varies from situation to situation (*ibid*, pp.8-5 to 8-7) it is submitted that the public interest in this case includes obtaining efficient compliance with the *Act* from the broadest number of employers; where possible, saving money and other resources such as staff and agency time; promoting the purposes of the *Act* generally."

Corporate also submits that the making of and entering into the Industry Agreement was a proper "administrative act" by the Director.

The Director's submission on this ground is that the *Act* gives her "...specific authority to compromise" certain minimum statutory provisions, for example by giving the Director the power, under Section 73, to vary certain provisions of the *Act* as set out in Section 72. She does not dispute the general proposition that the courts have repeatedly endorsed the "...broad remedial role" of the Director: *Machtinger v. Hoj Industries Ltd.* (1992) 91 D.L.R. (4d) S.C.C. 491; *Helping Hands Agency Ltd. v. British Columbia (Director of Employment Standards)* (1995) 15 B.C.L.R. (3d) 27; *433428 B.C. Ltd. v. British Columbia (Director of Employment Standards)* 21 C.C.E.L. (2d) p. 49; *Westar Mining Ltd; Bell et al . v. British Columbia (Director of Employment Standards)* (1996) 25 B.C.L.R. (3rd) 297 (C.A.).

We believe it to be important and significant that section 78(1)(a) confers a discretion on the Director: she **"...may assist in settling a complaint..."**. Thus, when the Director decides to assist she is exercising a statutory discretion; the *Act* does not require the Director to assist in settling a complaint. Having made that point, we also acknowledge that assisting employers and employees to resolve disputes is consistent with the Director's statutory role, is an activity in which the Director should be encouraged to engage in and is supportive of the purposes of the *Act* in general and, specifically, section 2(d) of the *Act* ("...to provide fair and efficient procedures for resolving disputes..."). The Director not only has the authority to assist in settling complaints, she should be encouraged to do so whenever she considers it appropriate.

Section 79(3) of the *Act* also gives the Director discretion in how to bring about compliance with the *Act* or *Regulation*. Under that provision, the Director "...**may** do one or more of the following:

> a) require the person to comply with the requirement;
> b) require the person to remedy or cease doing an act;
> c) impose a penalty on the person under Section 98."
>
> (emphasis added)

Thus, while the Director is given specific powers to require compliance and impose penalties, she is not limited to doing only those acts. She may, in addition, assist in the settlement of complaints.

Our view is supported by the approach taken by the Supreme Court of Canada in its interpretation of employment standards legislation in several cases which it has considered in recent years, the most recent of which is *Rizzo & Rizzo Shoes Ltd.* [(1998)154 D.L.R. (4th) 193]. That case involved employees who lost their employment when the company filed for bankruptcy. An officer from Ontario's Ministry of Labour concluded that severance pay was owing to the former employees. The Trustee disallowed their claim. The Ministry was successful in its appeal to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision. The Ministry sought leave to appeal the Court of Appeal judgment but subsequently discontinued its application. Soon thereafter, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance and to add themselves as parties to the proceedings. The Supreme Court granted an order allowing them leave to appeal. In delivering its unanimous judgment, the Supreme Court of Canada overturned the Ontario Court of Appeal because it "...did not pay sufficient attention to the scheme of the *Employment Standards Act*, its object or the intention of the legislature;..." (at p.204). Writing for the Court, Mr. Justice Iacabucci went on to state:

> In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 at p. 1002, 91 D.L.R. (4th) 491, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.*, [1997] S.C.J. No. 94 (QL) [reported 152 D.L.R. (4th) 1]. It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the ESA as being the protection of "...the interests of employees by requiring employers to comply with certain minimum standards, including minimum periods of notice of termination". **Accordingly, the majority concluded, at p. 1003, that, "...an interpretation of the *Act* which encourages employers to comply with the minimum requirements of the *Act*, and so extends its protection to as many employees as possible, is to be favoured over one that does not**" (emphasis added).

The Court went on to state, at page 209:

> **Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits - conferring legislation. As such, according to several decisions of this Court, it**

> **ought to be interpreted in a broad and generous manner.** Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Attorney-General of Canada*, [1983] 1 S.C.R. 2 at p. 10, 142 D.L.R. (3d) 1; *Hills v. Canada (Attorney Gereral),* [1988] 1 S.C.R. 513 at p. 537, 48 D.L.R. (4th) 193). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40*a* of the *ESA*, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the *Act* (emphasis added).

It is also significant to note that in deciding to allow the appeal by the former employees of Rizzo & Rizzo, the Court noted that the "...Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this court on their behalf." As a result, the Court ordered the Ministry to pay the costs of the appeal on a "party - and -party basis".

We note that one of the purposes of the *Act*, as set out in Section 2(a), is to " ... ensure that employees in British Columbia receive at least the basic standards of compensation and conditions of employment." This purpose does not stand in isolation from other purposes, such as: promoting the fair treatment of employee and employer as well as providing fair and efficient dispute resolution procedures. To achieve those purposes, the Legislature has enacted the various minimum employment standards in Part 2 through 8 of the *Act.* In particular, Section 4 of the *Act* prohibits any agreement which seeks to waive any of the minimum requirement of the *Act* or *Regulation* (subject to Section 43, 49, 61 and 69 - sections which recognize the existence of collective agreements that may contain terms and conditions which differ from the requirements of the Act). But, the *Act* also requires that the terms and conditions of such collective agreements must, when considered together, meet or exceed the requirements of the *Act*.

When the provisions of Section 4 are read together with the discretionary powers given to the Director under Section 78(1)(a), it is our view that Section 4 should not be interpreted to limit the proper exercise of the Director's discretionary power to assist in settling a complaint. Nothing in our analysis should be construed as placing limits on the circumstances under which the Director may assist in settling complaints. Further, our analysis should not be taken to support the proposition that the Director must, in all cases, press for enforcement of 100% of statutory entitlements. The Director may assist in bringing about a settlement which provides for entitlements that are less that those proscribed by the *Act.* However, in our view, the discretionary authority given to the Director to **assist** in settling complaints does not amount to an authority to **impose** a settlement without consultation or over the objection of the parties to the dispute. Moreover, if the Director's asistance does not bring about a settlement and she issues a determination, she cannot issue a determination which provides for less than the statutory minimum standards.

We are not persuaded that the circumstances of this appeal are analogous to the circumstances in which the Director may assist in bringing about a settlement of complaints from the former employees of a bankrupt employer. There may well be occasions where it is not possible for the Director to enforce employees' statutory entitlements because their former employer is bankrupt. However, that lack of funds is an enforcement problem rather than an issue which determines the employees' statutory entitlements.

Our examination of the evidence does not lead us to find that the Director's actions amounted to an abuse of power. In particular, we note that there is no evidence to support a finding that the Director exercised her discretionary power for improper purposes.

We find that the Appellants have satisfied us that they are entitled to have the merits of their individual complaints investigated fully by the Director. We make that finding for several reasons. Mr. Ages' letter of August 19, 1996 gave the following undertaking:

> "Whether or not it is found that you are owed wages, you will be contacted when the investigation has been completed. If, at that time, you believe that you remain owed something, you may ask this Branch conduct an additional individual investigation of your complaint." (sic)

This was confirmed by his oral testimony that he told the " ... bike couriers that they would be guaranteed an investigation of their complaints but were not guaranteed any particular result."

Ms. Cummings (the Director's delegate who issued the Determination) confirmed in her oral testimony that her reasons for deciding not to "...pursue the matter further than what has been obtained in the settlement agreements" were:

i) the Director had entered into an Agreement with Corporate;
ii) the Industry Agreement was in the best interest of labour relations;
iii) to ensure speedy resolution of all outstanding complaints;
iv) to encourage compliance with the *Act*; and
v) she did not want to "second guess" the Director.

Mr. Cahill's testimony confirmed that neither the Appellants nor any other complainants participated in the discussions between BCTA which led to the Industry Agreement being executed by Corporate on December 3, 1996.

We note, that paragraph #5 of the Self-Audit Agreement contains an express provision which recognizes that the agreement does not preclude the filing of complaints and that such complaints " ... would be investigated and determined ... **in accordance with the provisions of the *Act***." (emphasis added). Similarly, paragraph #9 of the Industry Agreement states:

> The responsibility for all wages due to the bicycle couriers rests with the Company should this Agreement be set aside by the Employment Standards Tribunal

Finally, on this topic, we note that the Director's written submission of May 12, 1997 recognizes expressly that Appellants " ... would have received more wages had the Director and the BCTA not negotiated the (Industry Agreement)."

The Appellants argue that they " ... had a legitimate expectation that the self audit process would not compromise their individual complaints." The Director argues that the Appellants are seeking a substantive right and that the doctrine of legitimate expectations does not apply here as their procedural rights are limited to those in the *Act*.

In our view, the doctrine of legitimate expectations is an aspect of the principle of fairness which applies where a public official or a decision-maker leads an affected party to believe that the decision in question will not be taken without some form of consultation or

hearing. The principle was enunciated by the Supreme Court of Canada in *Old St. Boniface Residents Association Inc. v. Winnipeg* [(1990) 3 S.C.R. 1170] at p. 1204:

> The principle developed in these cases is simply an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a public official **an opportunity to make representations in circumstances in which there would otherwise be no such opportunity**. The Court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation".(emphasis added)

We agree that the doctrine of legitimate expectations applies in the circumstances of this case and that the *Act* does not exhaustively outline the Appellants' procedural rights. While the doctrine could not be used to supplant statutory requirements, it can create procedural remedies where the legislation is silent and the expectation has arisen [*Sturdy Truck Body (1972) Ltd. v. Canada (1995) 2 C.T.T. 338].* Extending the doctrine to confer a right to a particular outcome in the pre-determination process takes the doctrine beyond the boundaries recognized by the courts. The Courts have stated clearly that the doctrine of legitimate expectations applies only to procedural and not substantive rights:

> There is no support in Canadian or English cases for the position that the doctrine of legitimate expectations can create substantive rights. It is a part of the rules of procedural fairness which can govern administrative bodies. Where it is applicable, it can create a right to make representation or to be consulted. It does not fetter the decision following the representations or consultations.
> (*Reference Re: Canada Assistance Plan* (1991) 58 B.C.L.R. (2d) 1 at p.24)

In our view, the Appellants' legitimate expectation was to have been consulted prior to the issuance of the individual Determinations and this was not done.

When we examine the Determinations we find that they are offend "well established legal principles" because the Director did not give the Appellants any opportunity to participate in discussions to settle their complaints. Rather, the Director presented the Appellants with a *fait accompli* which had the effect of imposing a settlement on them, over their objections, as distinct from assisting them and Corporate to settle their complaints. In addition, we find that the Determinations do not set out how the Director's delegate has drawn her own attention to "...matters which (she) is bound to consider".

ORDER

We order, under Section 115(1) of the *Act*, that the Determinations under appeal be referred back to the Director.

Lorna Pawluk
Adjudicator
Employment Standards Tribunal

Ib S. Petersen
Adjudicator
Employment Standards Tribunal

Geoffrey Crampton
Chair
Employment Standards Tribunal