EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act S.B.C. 1995, C.38

- by -

Broadway Entertainment Corporation
operating as
Wharfside Eatery
("Wharfside")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Genevieve Eden

FILE NO.: 96/243

DATE OF HEARING: July 9, 1996

DATE OF DECISION: July 18, 1996

DECISION

APPEARANCES

Bruce Jordan	Counsel
Duncan Morrison	President of Broadway Entertainment Corporation
Maria Morrison	General Manager of Wharfside Eatery
Steven Swannell	General Manager of Hunter's Bar and Grill

A. Craig Elder on his own behalf

Ray Stea on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Broadway Entertainment Corporation operating as Wharfside Eatery ("Wharfside") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against Determination # CDET 001581 issued by the Director of Employment Standards on March 19, 1996. The Director's delegate found that A. Craig Elder ("Elder") was entitled to two weeks compensation for length of service pursuant to section 44 of the former *Act* plus interest for a total amount owing of $1,095.60. In this appeal, Wharfside claims that Elder was employed for less than 6 consecutive months as required by the *Act*.

A hearing was held in Victoria on July 9, 1996. All witnesses gave evidence under oath or affirmation.

Consideration of this appeal falls under the transitional provisions of the *Act*. Section 128 of the *Act* states, in part:

> (3) If, before the repeal of the former Act, no decision was made by the director, an authorized representative of the director or an officer on a complaint made under that Act, the complaint is to be treated for all purposes, including section 80 of this Act, as a complaint made under this Act.
>
> (4) Subject to subsections (5) and (6), section 63 applies to an employee whose employment began before section 63 comes into force and is terminated after that section comes into force.
>
> (5) An employer is liable to pay to an employee referred to in subsection (4), as compensation for length of service, an amount equal to the greater of the following:
>
>> (a) the number of weeks' wages the employee would have been entitled to under section 42(3) of the former Act if the employment had been terminated without

> compliance with section 42(1) of that Act:
>
> (b) the amount the employee is entitled to under section 63 of this Act.
>
> (6) The employer's liability to an employee referred to in subsection (4) for compensation for length of service is deemed to be discharged if the employee is given notice according to section 42 (1) of the former Act or according to section 63(3) of this Act, whichever entitles the employee to the longer notice period.

The former *Act* entitles the employee to the longer notice period after 6 consecutive months of employment. The new *Act* cannot be interpreted retrospectively to take away an entitlement that existed at the time of termination. Thus, the relevant statute for purposes of determining the employer's liability is the *Employment Standards Act* (S.B.C. Chapter 10) (the "former *Act*"). The relevant parts of sections 42 and 44 of the former *Act* state:

> Notice required
> 42.(1) An employer shall not terminate an employee without giving the employee, in writing, at least
> (a) 2 weeks' notice where the employee has completed a period of employment of at least 6 consecutive months, and ...
>
> (3) When an employer terminates an employee and fails to comply with subsection (1) the employer shall pay the employee severance pay equal to the period of notice required ...
>
> Temporary layoff becomes termination
> 44. Where an employer temporarily lays off an employee not covered by a collective agreement and the layoff exceeds a temporary layoff, the employee shall be deemed to have been terminated at the commencement of the temporary layoff and the employer shall pay the employee the severance pay under section 42(3).

FACTS

Elder commenced employment with Hunter's Bar and Grill ("Hunter's") as a Server on February 1, 1995. He received a promotion to Supervisor/Manager in July 1995. He started working for Wharfside on August 14, 1995 as a Floor Manager. He was laid off October 20, 1995 and never recalled to work.

A Determination was issued on March 19, 1996 against Broadway Entertainment Corporation ("Broadway") operating Wharfside and Park Hotel (Edmonton) Ltd. ("Park Hotel") operating Hunter's. The Director's delegate, Ray Stea ("Stea"), concluded that the subject companies are associated companies under section 95 of the *Act.* Stea determined that Elder worked for the companies for a period exceeding 6 consecutive months and was entitled to two weeks compensation for length of service given that his layoff exceeded 13 weeks.

The Determination was appealed by Broadway operating Wharfside on April 4, 1996. The Reasons for Appeal state that the employee was employed by the employer for a period of less than 6 consecutive months as required by section 42 of the former *Act*.

The Registrar of companies office records show Duncan Morrison ("Mr. Morrison") as a Principal of both subject companies. Mrs. Maria Morrison ("Mrs. Morrison") is Mr. Morrison's wife and the General Manager of Wharfside.

The parties part company on the critical issues in this appeal. The Director finds that Wharfside and Hunter's are associated companies while they maintain they are separate companies and should be treated as two distinct employers. Hunter's claims that Elder quit their organization to work at Wharfside while Elder maintains that he was transferred to Wharfside. Hunter's contends that Elder left their employ on September 15, 1995 while Elder asserts that there was an overlap in employment and he continued working at both Wharfside and Hunter's to October 20, 1995. The parties testified with respect to each of these issues.
Mr. Morrison gave evidence as President of Broadway operating Wharfside and President of Park Hotel operating Hunter's. He testified that the entities are two different businesses and run independently. They have their own infrastructures and accounting systems as well as different markets and philosophies. The accountants at Hunter's and Wharfside are different individuals who both report to Mr. Morrison. The books are kept separate as are the revenues and expenses.

Mr. Morrison's primary function is marketing, strategizing and monitoring the directions of the companies. He attends management meetings at both operations but less frequently at Wharfside. His attendance at such meetings has been about once per month at Hunter's and about once or twice in the last year at Wharfside. His evidence is that he is not involved in the day-to-day operation of Hunter's or Wharfside and that he generally does not deal with employees and their hiring and firing.

Control is considered to reside with the General Managers of each operation who run the day-to-day operations and functions of the business according to Mr. Morrison. Mr. Steven Swannell ("Swannell") is the General Manager of Hunter's while Mrs. Morrison is the General Manager of Wharfside. Each has their own management teams and each is responsible for hiring and firing in their own operations.

On cross examination, Mr. Morrison acknowledged he "stayed at" Wharfside during the summer of 1995 monitoring construction during a phase of expansion. He also stated that he is the final signatory on paycheques for both Wharfside and Hunter's after signatures from the managers indicating their approval.

On cross exam, Mr. Morrison acknowledged that the statement in the "COMMENTS" section on the Record of Employment form ("ROE") for Park Hotel was accurate This reads, "In Sept/95, Craig started work with another company owned by the same holding company". When asked why the reason for issuing the ROE was entered as code "K" which denotes "other" rather than as code "E" which denotes "quit", Mr. Morrison replied that his accountant

signed the form and that he had no input in this. He maintained that he was not involved with Elder's hiring or his leaving the operations.

Mr. Morrison also acknowledged that Mrs. Morrison had talked to him about Elder's behaviour towards his female colleagues. She thought it might be beneficial for him to speak to Elder as one male to another which he did on one occasion, but this was a personal discussion and not a warning. Mr. Morrison maintained he left any decisions to Mrs. Morrison as he always defers to the managers.

Mrs. Morrison has been the General Manager at Wharfside for 3 years having started there 5 years ago. Her evidence was that Wharfside and Hunter's are two completely different establishments. Wharfside is a sit down diner establishment while Hunter's is a pub grill and tapas bar. The policies regarding service and attention are more stringent at Wharfside. The operations have different management teams, a different management focus, and different accounting systems. There was no inter-relationship between the management teams with the exception of one manager who had been with Mr. Morrison for 5 years who helped out at Wharfside. As General Manager, Mrs. Morrison was responsible for hiring and firing at Wharfside to which Mr. Morrison had no input.

Mrs. Morrison contacted Swannell in the summer of 1995 when Wharfside needed someone right away and asked if Elder would be someone who could help out in a crunch. Elder then worked for Wharfside on a part-time basis, about two days per week, according to Mrs. Morrison. The rest of the time was spent at different employment including Hunter's. Elder was laid off from Wharfside less than 3 months later as the volume fluctuates in this business.

Mrs. Morrison stated she had never seen letters of reference for Elder from Wharfside and Hunter's. The letter from Hunter's dated October 31, 1995 signed by Swannell confirmed Elder was hired there in February 1995 and includes the following statement:

> "As the Wharfside Eatery was anticipating a busy summer season, Craig was moved down there as a supervisor where in my understanding he was laid off as their busy season ended."

There is no indication in the letter when Elder's employment with Hunter's terminated. In later evidence Mrs. Morrison acknowledged she had seen the letter. When asked about Elder's last day worked at Hunter's, Mrs. Morrison said she could only go by the date on the ROE, September 15, 1995.

The letter from Wharfside dated October 23, 1995 confirmed Elder was laid off due to a lack of business; it contained no start or end date of employment.

When Elder was to be laid off from Wharfside, Mrs. Morrison called Swannell and asked if he had any work for Elder. She asked Swannell to attend the layoff meeting "to reassure Craig could get his answers regarding work". When pressed on cross examination, she stated:

> "At times we choose to have other managers give their input so they can learn what it is

> to hire and fire someone, so they can learn. I called Swanny and asked him to assist with the situation."

She felt that Swannell was accessible in that she had had a business relationship with him. She stated:

> "We opened up Hunter's. One day before we opened Hunter's, we hired Mr. Swanell and we opened up Hunter's together. For the first seven months, Mr. Swanell and I ran the place."

When asked about an ad placed in the Times Colonist on November 13, 1995 for an addition to the management team at Hunter's, Mrs. Morrison acknowledged she screened applicants for the position. She testified:

> "If experience is an issue, I often help Duncan with the other organization. With hiring at Hunter's, I was asked for my assistance to ensure we hire the right people."

Swannell's evidence is that he started with Hunter's just before it opened in January 1994. He testified that Mr. Morrison's input into the operation is not "day-to-day" but that "he is a concerned President of the company" and gets involved with matters such as approving promotions.

Swannell testified that he has responsibility for hiring and firing at Hunter's but none at Wharfside. His evidence regarding Elder's departure from Hunter's and start up at Wharfside was vague. He "believed" the position at Wharfside was advertized in the paper and he "believed" Elder applied for it. When asked how he came to know Elder was leaving Hunter's, he stated "he told me" and that "he accepted the position at Wharfside and left Hunter's". On further cross exam, he acknowledged there may have been some crossover of employment but it was not his recollection that Elder continued to work at Hunter's until his final day at Wharfside. On continued cross exam he stated "you may have been working for both companies".

Swannell's testimony regarding his attendance at Elder's layoff meeting was also vague. He "guessed" that the owners of the company thought he might have some input but he could not recall Mrs. Morrison telling him anything specific regarding why she wanted him there and he did not recall questioning her. He denied that it was to discuss future employment at Hunter's.

In response to a query about the interchange of staff between Hunter's and Wharfside, Swannell stated "we have had staff that have worked at each place".

With respect to the ROE form with the code K indicating "other" rather than E denoting "quit", Swannell testified that he "probably" gave the information to Hunter's accountant.

At one point Swannell testified that the statements in his letter of reference for Elder were true; when queried about his characterization of Elder being "moved down" to Wharfside he stated that the letter was written quickly and less than accurate.

Elder's evidence is that he never quit Hunter's rather he was transferred there after being approached by Swannell. He then worked split shifts working two nights at Hunter's and three nights per week at Wharfside until October 20, 1995. He disagreed with the last day worked of September 15, 1995 reported on the ROE for Hunter's noting it was completed October 23, 1995.

Elder's uncontradicted evidence is that when he saw Hunter's ad for a new manager, he contacted Swannell who referred him to Mrs. Morrison.

Elder submitted paystubs from Hunter's up to August 15, 1995 with an additional paystub for the pay period ending September 15, 1995 for 8 hours worked which he thought might be a carryover for something. He also submitted paystubs from Wharfside commencing with the pay period ending August 31, 1995 to that of October 20, 1995. He maintained that when he started at Wharfside, the payroll for him was transferred there from Hunter's and his paystubs from Wharfside reflected his salary for both Wharfside and Hunter's. He was paid twice per month and the paystubs showed 80 hours worked for each pay period from August 31, 1995 to October 15, 1995 plus half the amount for the week ending October 20, 1995.

In reply evidence Mrs. Morrison stated she never authorized payment from Wharfside accounts for work at Hunter's. She stated that Elder was "contacted by managers at Hunter's" and "often helped out with shifts and filling in" and that she believed Hunter's was paying him separately.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Elder is entitled to compensation for length of service under section 42 of the former *Act*. To answer this question it is necessary to determine whether Wharfside and Hunter's are associated entities under section 95 of the *Act*.

ARGUMENTS

Mr. Jordan ("Jordan"), on behalf of the employer, argued that section 95 requires common control and direction. He submitted the Director's investigation did not go far enough; it just went as far as looking at the search of company office records which shows Mr. Morrison as the Principal of both companies. He asserted that Hunter's and Wharfside are two separate organizations under different control and direction and, therefore, Elder's leaving the employ of Hunter's represented the end of his employment for that company and a start at the new company. He contended the evidence revealed that Elder voluntarily left his position at Hunter's and has no claim for anything from them. He submitted that the ROE issued by Wharfside shows insufficient employment to claim protection under the *Act*.

Jordan pointed to a similar section of the *Labour Relations Code* (now s. 38) which mirrors wording in section 95 of the *Act* and asserted that I should be guided by the authorities emanating from the *Code*. He referred to *Grantham Construction Ltd.*, BCLRB No. 420/83, which states at page 6:

> "For the Carpenters to succeed, Smith's role at this project must lead to the conclusion that he is the controlling force in Canterbury's operations. However, as the Board stated in International Cabinets., BCLRB No. L137/82: ... 'Section 37 applications must be assessed on the basis of factual reality and not on the basis of how things might appear.' (at 4)"

Jordan submitted that it might appear that the controlling mind is Mr. Morrison's but on the basis of factual reality I could not arrive at the conclusion that he is the controlling force, and, therefore, I could not find the companies are under common control and direction as required in section 95.

Comet Drywall, BCLRB No. 297/83 is relied upon by Jordan for the proposition that it must be shown that the facts support the conclusion that the companies are under the same operational control and pervasive influence, and that financial control is insufficient to support a finding of common control and direction. He maintained that the financial relationship is not determinative of the issue.

According to Jordan, the evidence shows that Mr. Morrison had in place different management teams and that he has relinquished operational control over these two entities. The management teams are in charge of hiring and firing and the employees. The companies have different infrastructures, their own accounting systems, philosophies, and cater to different markets. The organizations have separate ROEs and separate paycheques. The General Managers have day-to-day responsibilities of each operation. There is no guiding light which runs the day-to-day operation of the two companies according to Jordan. No functional control is exercised by one person, rather control is left to the General Managers at the two companies.

He maintained that Elder's testimony of working at both organizations until he left Wharfside was not supported by the evidence and this could have been clarified if he retained his diaries. He maintained the cheques show Elder being paid a consistent amount by Wharfside and not for work at Hunter's. He pointed to the paystub for the period ending September 15, 1995 from Hunter's to illustrate Elder was being paid separately for his work there.

Jordan concluded that I must find functional operational control in order to find common control and direction which is absent in this case.

Elder argued that the evidence shows that Mr. Morrison is the final signature on payroll cheques for both companies and that he attends meetings at both companies. He asserted the evidence revealed there is communication between the two entities. He stated the evidence did not prove that he had quit his employment, and that he did not leave of his own free will, but was asked to work half time at each operation. He noted that the the ROEs for Hunter's and Wharfside dated October 23, 1995 and October 20, 1995 respectively, were only 3 days apart, and the reference letters were dated October 31st and October 23rd, which supported his contention that he worked at both Hunter's and Wharfside until his termination date. He noted that both General Managers were present at his termination; if there was no affiliation of the

companies, both would not be there.

Stea argued that the *Act* is remedial legislation and its purpose is to protect employees from losing their positions without proper notice. He referred to section 8 of the *Interpretation Act* for the proposition that the *Act* should be interpreted in a broad and liberal manner.

In response to Jordan's argument that I must find functional operational control, Stea submitted that's not what the *Act* says. The *Act* does not require daily control, it requires common control and direction according to Stea. He submitted that Mr. Morrison is the controlling force for both operations. He maintained that Mr. Morrison had not relinquished control as argued by Jordan, he had delegated it, and that Mr. Morrison monitors both entities and is not an absentee employer.

Stea noted it's a given that Mr. Morrison is President of both companies and the evidence reveals there is a relationship between both companies. An example of this was Elder's exit meeting. He contended that it's known in the personnel community that terminating an employee is a highly personal, highly confidential procedure. The evidence was unclear why the General Manager of Hunter's attended the exit meeting at Wharfside.

Stea maintained the evidence revealed an interchange of employees in the past. Elder's evidence that he was approached by Swanell regarding work at Wharfside was not refuted according to Stea. While Jordan submitted that Elder left Hunter's voluntarily, Stea noted that the ROE code did not indicate "quit" rather it indicated "other". Had Elder quit, this would have been straightforward and coded accordingly.

Regarding Jordan's submission that Elder had not retained his diary to show he worked for Hunter's until his termination date, Stea noted that the *Act* does not require employees to keep records, rather it requires employers to keep records and none had been submitted.

Stea concluded that the purpose of section 95 is to pierce the corporate veil and ensure that the employee is not left out in the cold. He concluded that the employment was ongoing, that there was sufficient association between the companies, and the Determination should be confirmed.

ANALYSIS

The onus for proving that the Determination should be cancelled rests with the appellant employer. Section 95 provides a broad remedial power to associate entities. It states:

> 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.

Certain tests have been applied by labour board and employment standards tribunals to determine whether two or more entities may be treated as one employer for purposes of the applicable legislation. Taking into account the various decisions from these tribunals with respect to this issue, I am of the view that the following factors must be addressed to make an association between legal entities:

1. The nature of the business must be determined.

2. There must be more than one business entity involved. They may be corporations, firms, individuals, syndicates or associations, or any combination thereof.

3. The entities must be under common control or direction.

4. There must be an employment standards purpose for associating the entities as one person.

In interpreting s. 95 and addressing these elements, I adopt the approach taken by Mr. Justice Legg in the BC Court of Appeal decision *Helping Hands Agency Ltd. v. British Columbia Director of Employment Standards* 96 C.L.L.C. 210-009 (B.C.C.A.). The issue before the Court of Appeal was whether the Supreme Court had failed to properly apply s. 96 of the former *Act* (now s. 97). The Court of Appeal noted at page 6 that the *Act* is remedial legislation, and, that consistent with section 8 of the *Interpretation Act* "the ESA should be given such fair, large and liberal construction as best insures the attainment of its objects". The Court also noted that the general purpose of the *Act* is to afford protection to the payment of an employee's wages which may not be available to an employee at common law.

A similar approach was taken by Mr. Justice Montgomery of the Ontario Divisional Court, in interpreting s. 12(1) of the *Employment Standards Act*, R.S.O. 1980, c. 137, which is similar to s. 95 of the BC *Act*. The court noted at p. 743 that "The nature of remedial legislation has significantly modified the strict application of water-tight legal compartments. The law of Soloman and Soloman has been eroded by purposive social legislation."

In adopting this approach I recognize that corporate diversity may offer perfectly legitimate business advantages, entirely apart from employment standards issues, in such matters as taxation and finances. The concluding words of s. 95 (a) "for the purposes of this Act" confirm that the section was not intended to interfere with those advantages.

It is clear in this case that there is more than one entity carrying on business. Both Wharfside and Hunter's are in the restaurant business. The issues in this case are whether the two entities

are under common control or direction, and whether there is an employment standards purpose for associating the entities as one person.

Common control or direction is clearly established where the same person is in reality the guiding force or managing authority for both businesses (*Specialized Equipment Products Ltd. and Specialized Engineered Products Ltd.* BCLRB No. B221/95). On the basis of the evidence before me, I conclude that Mr. Morrison is the guiding force for both businesses. There is no dispute that Mr. Morrison is the Principal and President of both Broadway operating Wharfside and Park Hotel operating Hunter's. The evidence is that his primary function is marketing, strategizing and monitoring the directions of the companies and that he attends management meetings for both operations. While his attendance at Wharfside meetings is less frequent than at Hunter's, equal involvement is not required among the business entities. The term "common control and direction" is not defined that narrowly. Mr. Morrison is the final signatory on paycheques for both Wharfside and Hunter's. His involvement with Wharfside was evident in the summer of 1995 when he spent time monitoring construction when Wharfside expanded.

I do not find that control resides with the General Managers of each operation as submitted by the employer. Control refers to the financial and legal arrangements which govern how the entities operate. There was no evidence that the General Managers were involved with such arrangements.

Direction refers to the way in which the people operating the business direct how things should be done. I find that Mr. Morrison had reponisbility for the overall strategic direction of both Wharfside and Hunter's. The day-to-day direction of employees is also a relevant aspect to be considered. However, I do not interpret s. 95 as to require that such day-to-day direction is assumed by the Principal of a legal entity. I find that Mr. Morrison delegated day-to-day direction of employees to the General Managers. Clearly this is not unusual for the President of an organization. However, even here, Mr. Morrison's involvement was still evident. The evidence reveals that he was involved with approving promotions at Hunter's and that he talked to Elder after the General Manager of Wharfside spoke to him about Elder's behaviour.

I find that there was an inter-relationship between Hunter's and Wharfside with respect to the day-to-day direction of employees such that they did not act like two distinct employers. Clearly, such inter-relationship is evident in aspects of the staffing of the two entities by the General Managers. Mrs. Morrison had contacted Swannell when Wharfside needed help which resulted in Elder working at Wharfside. Swannell attended Elder's layoff meeting at Mrs. Morrison's request. I accept Stea's argument that such a meeting is highly personal and confidential. If the Morrisons' contention that Hunter's is a separate employer was accepted, attendance at such a meeting by the General Manager of Hunter's would be highly questionable. Mrs. Morrison's evidence with respect to Swannell's attendance at the exit meeting suggests that this was a learning opportunity for Swannell; this is not indicative of a situation of two distinct employers that operate independently.

Mrs. Morrison's evidence is that she was involved in hiring Swanell. Moreover, she "ran the

place" (Hunter's) with Swannell for the first seven months. Even further, Mrs. Morrison often helped with hiring at Hunter's. Again, this does not support the notion of two distinct employers that operate independently. Nor does Swannell's reference letter that refers to Elder's layoff from Wharfside suppport this notion; it is not usual for a reference letter to refer to termination at another company.

Some interchange of staff between the two operations is also revealed in the evidence. Mrs. Morrison testified that a manager from Hunter's helped out at Wharfside and Swannell's evidence is that staff have worked at each place. Importantly with respect to this case, I find that such interchange of staff occurred with respect to Elder, the issue I will turn to now.

I conclude that Elder did not quit his employment with Hunter's as alleged by the employer. Swannell's evidence that the position with Wharfside was advertized and Elder applied for it is inconsistent with Mrs. Morrison's evidence that she contacted Swannell and asked if Elder could help out. It is also inconsistent with Swannell's own reference letter that refers to Elder being "moved down" to Wharfside. There is no indication on this letter of a termination at Hunter's, rather, the letter refers to a layoff from Wharfside. Moreover, the ROE for Hunter's indicates the code for "other" rather than "quit" and that Elder started work with another company owned by the same holding company. Further, I found Swannell to be vague and evasive in his testimony. Elder, on the other hand, was forthright in his testimony and his statements were consistent throughout the hearing as well as with his written submissions to the Tribunal and what was stated on the Determination.

I also accept, based on the evidence before me, that Elder continued to work at Hunter's and Wharfside until the date of his termination, October 20, 1995. The ROEs for Hunter's and Wharfside are just three days apart. There was no evidence to explain why completion of the ROE for Hunter's was delayed until October 23, 1995 while the employer alleged Elder left there on September 15, 1995. Elder was consistent in his testimony that he continued to work two nights a week at Hunter's and three at Wharfside. This is consistent with Mrs. Morrison's evidence that Elder worked at Wharfside part-time and that he "often helped out" at Hunter's. Although Mrs. Morrison believed that Hunter's was paying Elder separately, this is not reflected in the paystubs Elder received after August 15, 1995 nor is it reflected on the ROE for Hunter's. Moreover, the paystubs from Wharfside consistently show 80 hours worked twice each month; this is not consistent with only part-time employment at Wharfside. Rather, it is more supportive of Elder's assertion that his paystubs from Wharfside also reflect his work at Hunter's.

The foregoing illustrates not only that the treatment of Elder is an example of the interchange of staff between the two entities, but also that the payroll, at least with respect to Elder, was not totally separate in that I have accepted that Elder was being paid on the Wharfside payroll for work at Hunter's.

I conclude that the evidence does not support the notion that the two subject entities run independently and should be treated as two distinct employers for the purposes of the *Act*. I find that there is an adequate factual underpinning to satisfy the test of common control and

direction under s. 95 of the *Act*.

I also find that there is an employment standards purpose for associating the entities as one person. I find that the purposes of the *Act,* which include protection of an employee's wages and the fair treatment of employees, constitute an employment standards purpose under s. 95. Wharfside and Hunter's, by their own actions, treated Elder as being employed by one employer. Even if Elder had not worked with Hunter's while at Wharfside, it would be inconsistent with the purposes of the *Act* to treat Elder as though he had severed his employment relationship with Hunter's where, in effect, he served both entities without regard for any precise notion of to whom he was bound in contract.

As a result, I conclude that Hunter's and Wharfside are to be treated as associated entities for the purposes of the *Act*. Elder worked for the entities for a period in excess of six consecutive months and is entitled to two weeks compensation for length of service.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination # CDET 001581 be confirmed.

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Genevieve Eden
Adjudicator
Employment Standards Tribunal