Employment Standards TRIBUNAL

An appeal

- by -

Stephen G. Funk

- and by -

Nick DiMambro and 518820 B.C. Ltd. operating as DiMambro & Associates

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2004A/101 & 2004A/154

DATE OF DECISION: November 15, 2004

DECISION

SUBMISSIONS

Stephen Funk	on his own behalf
Nick DiMambro	on his own behalf and on behalf of 518820 B.C. Ltd.
Theresa Robertson	for the Director of Employment Standards

INTRODUCTION

I have before me two separate appeals filed by Stephen Funk ("Funk") (see Tribunal File No. 2004A/101) and a second appeal filed jointly on behalf of Nick DiMambro ("DiMambro) and 518820 B.C. Ltd. (the "Numbered Company") (see Tribunal File No. 2004A/154).

The parties separately appeal a single Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on May 18th, 2004 (the "Determination"). The Determination was issued following an investigation conducted by the Director's delegate. Pursuant to the Determination, Mr. DiMambro and the Numbered Company were jointly ordered to pay their former employee, Mr. Funk, the sum of $2,792.73 on account of unpaid wages and section 88 interest.

Although Mr. Funk's appeal was filed within the statutory appeal period, the DiMambro/Numbered Company appeal was filed slightly less than two weeks after the governing appeal period expired. By way of written reasons for decision issued on August 31st, 2004, I extended the appeal period relating to the DiMambro/Numbered Company appeal (see B.C.E.S.T. Decision No. D150/04).

Subsequently, the Tribunal's Vice-Chair wrote to the parties requesting that they file submissions with respect to the DiMambro/Numbered Company appeal. The parties have now filed their submissions with respect to both appeals and with those submissions in hand I am now in a position to finally adjudicate both appeals.

By way of a letter dated October 15th, 2004, the Tribunal's Vice-Chair advised the parties that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held (under Section 103 of the *Act*, Section 36 of the *Administrative Tribunals Act* ("*ATA*") applies to the Tribunal. Under Section 36 of the *ATA*, the Tribunal is not obliged to hold an oral hearing). I note that although Mr. Funk did not request an oral hearing, Mr. DiMambro sought an oral hearing "to reduce the volume to relevant issues only". However, I am not satisfied that an oral hearing will serve that purpose; the relevant issues can easily be addressed by way of the extensive written submissions that are now before me. Indeed, having reviewed the parties' written submissions, I am of the view that an oral hearing would only delay the timely adjudication of this appeal [a result inconsistent with section 2(d) of the *Act*] and would likely result in my having to make several orders limiting the parties to only those matters that are properly before the Tribunal.

THE DETERMINATION

As noted above, the Determination was issued following an investigation conducted by a delegate of the Director. In his original complaint filed with the Employment Standards Branch, Mr. Funk alleged that he was employed by the Numbered Company. Mr. Funk further alleged that he was dismissed without receiving compensation for length of service and that he was also entitled to certain unpaid regular wages.

According to the information set out in the delegate's "Reasons for Determination", DiMambro and the Numbered Company operated an accounting practice under the firm name "DiMambro & Associates". Mr. Funk was employed by the accounting practice as an accounting student. The delegate noted that prior to the Determination being issued, the Numbered Company was struck from the B.C. Corporate Register for failing to file annual reports. Apparently, Mr. DiMambro obtained a court order reinstating the Numbered Company to the Register but the reinstatement had not been fully effected as of the date of the Determination. In her Reasons, the delegate noted that since the reinstatement was not yet "complete", she was ordering both DiMambro and the Numbered Company to pay Mr. Funk his unpaid wages. The formal payment order was issued against "Nick DiMambro and 518820 B.C. Ltd. operating as DiMambro & Associates".

The delegate rejected Mr. DiMambro's position that Mr. Funk was a mere "observer" and consequently determined that the parties were in an employment relationship. The delegate further determined that since there was no clear agreement regarding Mr. Funk's wage rate, he was only entitled to be paid at the minimum wage ($8 per hour) for all hours worked. The delegate's findings with respect to Mr. Funk's unpaid wage entitlement, found at page 9 of her Reasons, are set out below:

> Mr. Funk alleges that he worked at least 8 hours a day and at least 5 days per week during his employment, but he did not keep any records of those hours. Mr. DiMambro provided a log showing hours when Mr. Funk was present in the office which he says shows Mr. Funk was present only 84 hours (Attachment B). I have reviewed the log and it shows that Mr. Funk was present for 3 hours on nearly every weekday between December 12 and March 13, 2002, for a total of 165 hours during this time. It indicates that "84 hours are not present". Since, at the time of his employment, the *Act* set the minimum daily pay requirement at 4 hours pay to an employee who commenced work, I find that Mr. Funk is entitled to 4 hours pay for each day on which he attended at the office, bringing the total payable hours to 220 for this period.
>
> Since it is clear from the information provided by both parties that the relationship continued until April 12, 2002, I find that Mr. Funk is owed an additional 4 hours pay for each weekday from March 14 to April 12, 2002, including the statutory holiday on March 29, 2002, for a total of 88 additional hours (close to the 84 not present).

In light of the above findings, the delegate ordered Mr. DiMambro and the Numbered Company to pay Mr. Funk the sum of $2,792.73 on account of unpaid wages, 4% vacation pay and section 88 interest. The delegate dismissed Mr. Funk's claim for compensation for length of service on the ground that Mr. Funk voluntarily quit his employment [see section 63(3)(c) of the *Act*]:

> With regard to Mr. Funk's claim that he was dismissed by Mr. DiMambro, I am not convinced that this was the case. After reviewing the correspondence between the parties, I am of the belief that Mr. Funk withdrew his services as the dispute over wages grew and that aspect of his claim is dismissed. (see delegate's Reasons at page 9)

One could characterize a "quit" predicated on a failure to pay wages as a constructive dismissal [see section 66], however, the delegate did not turn her mind to that issue and Mr. Funk does not challenge the delegate's Determination as it relates to section 63 (compensation for length of service).

I shall now address each appeal in turn.

THE FUNK APPEAL: TRIBUNAL FILE NO. 2004A/101

Reasons for Appeal

In his appeal form, Mr. Funk alleges that the Director's delegate failed to observe the principles of natural justice in making the Determination [see section 112(1)(b) of the *Act*]. However, in his one-page letter appended to his appeal form he particularized his reasons for appeal as follows:

> The essence of my appeal is to request that the Employment Standards Tribunal find that I am entitled to a greater number of hours of employment in the calculation of wages owed than what has been determined by the Director of Employment Standards.
>
> The Determination has been based upon a four-hour day assumption. Since my actual hours greatly exceeded this, and the Director has some information in support of this noted in her "Reasons for Determination", as well as a copy of my record of client files worked on, I wish to have my wage entitlement amount increased by the Employment Standards Tribunal.
>
> I am not challenging any other aspect of the original determination.

I consider Mr. Funk's reasons for appeal to more particularly allege an error of law on the part of the delegate [see section 112(1)(a)], namely, that the delegate erred in calculating his unpaid wage entitlement. I intend to proceed on this latter basis (see *Triple S Transmissions Inc.*, B.C.E.S.T. Decision No. D141/03). Certainly, there is nothing in the material before me that would suggest Mr. Funk was denied natural justice such as being denied the opportunity to make submissions, to be advised about the respondent's position, or by having his complaint adjudicated by a person who was, or appeared to be, predisposed against him.

As noted above, Mr. Funk's position is that the delegate erred in failing to credit him for all of the hours that he allegedly worked. In essence, Mr. Funk asserts that the delegate made an erroneous finding of fact. A finding of fact may be characterized as an error of law but only if the factfinder (in this case, the delegate) made a "palpable and overriding error" or the finding of fact is "clearly wrong" (see *Housen v. Nikolaisen,* [2002] 2 S.C.R. 235).

Mr. Funk's Total Working Hours: The Evidence and the Delegate's Findings

In reviewing the conflicting evidence with respect to Mr. Funk's total working hours, the delegate noted that although Mr. Funk provided a list of clients and staff with whom he had interactions, "he did not keep a record of the hours he alleges to have worked" (delegate's Reasons at page 3). Mr. DiMambro, on the other hand, "submitted a log of the dates and hours Mr. Funk was present in the office" (delegate's Reasons at page 3). However, this latter document was apparently inconsistent with Mr. DiMambro's statement to the delegate "that Mr. Funk's attendance at the office was sporadic and often for only 20 minutes a day, or so" (delegate's Reasons at page 8).

As detailed in the delegate's Reasons (at pages 4 to 6), the delegate interviewed eight separate witnesses during the course of her investigation. Of these eight witnesses, one (in Mr. DiMambro's employ when he was interviewed) testified that Mr. Funk's attendance at work was "unpredictable". Another, but in this case former, employee advised the delegate that "Mr. Funk worked in the office everyday, all day, during the time she worked". Another employee told the delegate that Mr. Funk "came in around 10 am and then worked full days". None of the other witnesses apparently provided any information regarding Mr. Funk's hours of work.

In her Reasons, the delegate quite rightly observed that the comparative credibility of the parties was a central issue in resolving the conflicting evidence before her. However, after referring to the well-known B.C. Court of Appeal decision, *Farnya v. Chorney* (which directs the factfinder to assess the most likely scenario in light of known or probable facts), the delegate, in my view, failed to embark on the very factfinding inquiry that she had previously instructed herself to undertake, at least with respect to the conflicting evidence regarding Mr. Funk's actual working hours.

Although the delegate, in my view, appropriately weighed and considered the conflicting evidence in order to determine whether Mr. Funk was an employee rather than a mere "observer", the same cannot be said with respect to her determination of the "hours worked" issue.

I previously set out the delegate's reasons with respect to Mr. Funk's working hours, however, for convenience I reproduce them again:

> Mr. Funk alleges that he worked at least 8 hours a day and at least 5 days per week during his employment, but he did not keep any records of those hours. Mr. DiMambro provided a log showing hours when Mr. Funk was present in the office which he says shows Mr. Funk was present only 84 hours (Attachment B). I have reviewed the log and it shows that Mr. Funk was present for 3 hours on nearly every weekday between December 12 and March 13, 2002, for a total of 165 hours during this time. It indicates that "84 hours are not present". Since, at the time of his employment, the *Act* set the minimum daily pay requirement at 4 hours pay to an employee who commenced work, I find that Mr. Funk is entitled to 4 hours pay for each day on which he attended at the office, bringing the total payable hours to 220 for this period.
>
> Since it is clear from the information provided by both parties that the relationship continued until April 12, 2002, I find that Mr. Funk is owed an additional 4 hours pay for each weekday from March 14 to April 12, 2002, including the statutory holiday on March 29, 2002, for a total of 88 additional hours (close to the 84 not present).

In my view, the only logical conclusion one can draw from the above-quoted excerpt is that the delegate rejected Mr. Funk's evidence as to his working hours in favour of Mr. DiMambro's log. It should be also be noted, in turn, that the delegate's reliance on the log necessarily implies her rejection of Mr. DiMambro's oral statements regarding Mr. Funk's working hours (*i.e.*, that Mr. Funk often worked "only 20 minutes a day").

Having reviewed the delegate's reasons, I am at a loss to determine why she rejected Mr. Funk's evidence in favour of the log; the delegate simply stated that she was calculating Mr. Funk's unpaid wage claim based on the hours recorded in the log (adjusted to account for the 4-hour daily minimum). It may be that the delegate rejected Mr. Funk's position simply because "he did not keep any records of those hours". However, there is nothing in the *Act* that required Mr. Funk to keep a record of his hours and, in the absence of such a record, the delegate was nonetheless obliged to receive, consider and weigh his oral

evidence regarding his working hours (see *e.g., Superior Beauty Supplies and Equipment,* B.C.E.S.T. Decision No. D581/97; *Rodrique,* B.C.E.S.T. Decision No. D600/97; *Fierbach,* B.C.E.S.T. Decision No. D617/01).

Further, as I noted above, two former employees also provided evidence corroborating Mr. Funk's assertions regarding his working hours, however, there is nothing in the delegate's reasons explaining *why* she apparently rejected that corroborating evidence.

There is nothing in the delegate's Reasons that would call into question Mr. Funk's credibility. On the other hand, there are some points to be made with respect to Mr. DiMambro's lack of credibility. First, the delegate's Reasons necessarily imply that she rejected Mr. DiMambro's oral evidence regarding Mr. Funk's typical workday (*i.e.,* that Mr. Funk often worked only 20 minutes per day). Second, Mr. DiMambro apparently stated that four separate witnesses denied having provided the specific information that the delegate recorded in her Reasons, however, none of the witnesses ever contacted the delegate to recant their evidence. The delegate states that she recorded the evidence of these four witnesses accurately in her Reasons and is unable to account for the alleged recantations (apparently in statements made by them to Mr. DiMambro). Third, Mr. DiMambro himself acknowledged that the log was inaccurate in the sense that it was an incomplete record of Mr. Funk's working hours since it omitted 84 hours (see delegate's Reasons at page 9; however, Mr. DiMambro now says that the delegate misinterpreted his position on this latter point).

Proposed Order

I do not think it appropriate, however, that I make credibility findings without having heard the parties and the witnesses. Accordingly, I propose the vary the Determination by deleting the delegate's findings with respect to Mr. Funk's working hours and refer that latter matter back to the delegate for further investigation and a reasoned decision.

I now turn to the appeal filed by Mr. DiMambro and the Numbered Company.

THE DiMAMBRO/NUMBERED COMPANY APPEAL: TRIBUNAL FILE NO. 2004A/154

Reasons for Appeal

Mr. DiMambro and the Numbered Company appeal the Determination on the grounds that the Director's delegate erred in law [section 112(1)(a)] and failed to observe the principles of natural justice in making the Determination [section 112(1)(a)].

The two appellants' position is more fully detailed in Mr. DiMambro's submission dated September 24th, 2004. Although the appellants' September 24th submission is somewhat disjointed, and their position is not detailed with absolute precision, it would appear that Mr. DiMambro and/or the Numbered Company allege that the delegate erred in law in several respects, namely:

- Since other bodies (the Canada Revenue Agency and the Society of Management Accountants) apparently concluded that Mr. Funk was not employed by one or both of the appellants, the delegate should have reached a similar conclusion. This latter argument gives rise to the legal doctrine known as "issue estoppel";

- Mr. DiMambro says that the Numbered Company operated the accounting practice and, accordingly, he cannot be held liable as an "employer";

- The delegate erred in finding that Mr. DiMambro was an employer simply because the Numbered Company, which had been struck from the B.C. Corporate Register for failing to file annual reports, had not yet been formally restored to the Register when the Determination was issued;

- In any event, Mr. Funk was never employed by either of the appellants because his status was that of a mere "observer" whose sole interest and purpose was to glean skills to assist him in his own professional practice;

- The delegate misinterpreted the actual working hours recorded in the log and otherwise erred in crediting Mr. Funk with 308 working hours;

- The delegate incorrectly determined that Mr. DiMambro was a director or officer of the Numbered Company during the relevant period; and

- The delegate improperly relied on a "without prejudice" settlement offer made by DiMambro and/or the Numbered Company in adjudicating Mr. Funk's complaint.

As noted above, the appellants also allege that the delegate failed to observe the principles of natural justice in making the Determination [section 112(1)(b)]. This latter ground is particularized on the appellants' appeal form as follows: "Bias and incorrect facts were relied upon." The only further particulars that might possibly raise a "natural justice" concern are contained in the appellants' September 24th submission wherein Mr. DiMambro states that the delegate should have "rel[ied] on the investigative powers provided in Section 84 of the [*Act*] to resolve the disputes and to establish facts".

Analysis: Natural Justice

There is absolutely nothing in the material before me to suggest that the delegate was biased (for example, evidence of predisposition; conflict of interest, etc.) against the appellants. The fact that the delegate issued an order requiring the appellants to pay Mr. Funk a certain sum of money certainly does not suggest bias on the delegate's part. Further, in that latter regard, I note that Mr. Funk believes the Determination favours the appellants' position rather than his own.

As for section 84 of the *Act*, the delegate did exercise her statutory authority to investigate Mr. Funk's complaint and, so long as the delegate sought out relevant information, did not suppress relevant information, and provided the parties with a fair opportunity to respond to whatever evidence and allegations she uncovered during her investigation (section 77), no natural justice question arises. The delegate conducted a thorough investigation and fully complied with her obligation to notify the parties of any adverse evidence or argument.

I consider this ground of appeal to be wholly unsupported by any credible evidence.

Analysis: Mr. Funk's total working hours

Inasmuch as I have referred the matter of Mr. Funk's total working hours back to the Director, Mr. DiMambro will be given an opportunity to reply to Mr. Funk's submissions with respect to this issue.

Accordingly, it would not be appropriate for me to say anything further with respect to this particular point until such time as the delegate has prepared a further report (after hearing from the parties) and the parties have been given an opportunity to comment on whatever report the delegate prepares.

Analysis: Mr. Funk's status

The delegate determined that Mr. Funk was an employee. In reaching this conclusion, the delegate reviewed the applicable legal principles and the evidence that was before her. In my view, the delegate correctly determined, based on the evidence before her, that Mr. Funk was an employee. At the very least, Mr. Funk was being trained by Mr. DiMambro for the latter's business (see section 1 definition of "employee") and, beyond that, the evidence also indicated that Mr. Funk was providing services to Mr. DiMambro's clients while working out of Mr. DiMambro's offices.

The decision apparently made by Canada Customs and Revenue Agency regarding Mr. Funk's status as an "employee" (there is an indication in the record that this decision was appealed, however, I do not have the final decision before me) would necessarily address a separate legal test under a separate statutory regime. Accordingly, the doctrine of issue estoppel does not apply and, in any event, this particular point was fully (and, in my view, correctly) addressed by the delegate in her Reasons at page 7.

The Society of Management Accountants is not a quasi-judicial adjudicative body and, accordingly, any view that body might have expressed (and, in that regard, there is no formal "decision" from that body before me) is entirely without any legal force insofar as these proceedings under the *Act* are concerned.

Analysis: The delegate's reference to a "Without Prejudice" settlement offer

The delegate, at page 3 of her Reasons and under the heading "Complainant's Position", recorded that after the parties' relationship ended, the Numbered Company offered Mr. Funk $2,200, on a "without prejudice" basis, in full payment of his submitted invoices. This offer was apparently refused by Mr. Funk.

At page 8 of her Reasons, under the heading "Findings and Analysis", the delegate relied on the "without prejudice" offer (and appended the relevant correspondence between the parties as Attachments) as evidence of Mr. DiMambro's implicit acknowledgement that Mr. Funk's claim was one for unpaid *wages* for past work. So characterized, the delegate relied on this settlement offer to further support her determination that Mr. Funk was an employee.

In my view, Mr. DiMambro's objection regarding the delegate's reference to this latter exchange is entirely well-founded. The delegate should not have referred to this evidence in her Reasons nor was it appropriate for the delegate to append the actual correspondence between the parties as Attachments to her Reasons.

"Without prejudice" communications are generally considered to be privileged communications. Such communications are inadmissible before an adjudicative body except for the limited purpose of proving a settlement agreement (there are also some other even more limited purposes, none of which is relevant here). A "without prejudice" letter was the central document in *Maracle v. Travellers Indemnity Co. of Canada,* [1991] 2 S.C.R. 50, where the Supreme Court of Canada observed:

> ...when an offer to pay a stated amount is made by one party to the other, an admission of liability is usually implicit. In this type of situation, the admission of liability is simply an

> acknowledgement that, for the purpose of settlement discussions, the admitting party is taking no issue that he or she was negligent, liable for breach of contract, etc...
>
> ...the letter of February 23, 1983 was made "without prejudice" to the liability of the insurer. The use of this expression is commonly understood to mean that if there is no settlement, the party making the offer is free to assert all its rights, unaffected by anything stated or done in the negotiations.

In my opinion, the delegate erred in referring to this evidence in her summary of the parties' positions and in relying on this evidence to support one of her findings. Having said that, however, it is clear that separate and apart from the "without prejudice" letter, there was ample evidence to support the delegate's finding that Mr. Funk was an employee and, accordingly, this error did not result in the delegate making a legally untenable finding of mixed fact and law (namely, that Mr. Funk was an employee).

Analysis: Mr. DiMambro's status as a director/officer of the Numbered Company

At page 2 of her Reasons, the delegate stated that Mr. DiMambro was a director/officer of the Numbered Company. Mr. DiMambro asserts that he resigned his directorship on October 9th, 1998 (although I have before me a corporate record to that effect, there is nothing in his material regarding a resignation from his *office*). However, a person may be, as a matter of law, characterized as a director or officer, even though that person is not formally recorded as such in the corporation's records, if they carry out the *functions* of a director or officer (see *Penner and Hauff,* B.C.E.S.T. Decision No. D371/96).

In this case, however, Mr. DiMambro's alleged director/officer status is simply not relevant since the Director's delegate proceeded against him on the ground that he was an *employer*; the delegate did not rely on the personal director/officer liability provision contained in section 96(1) of the *Act.*

The final issue that I shall address is whether the delegate correctly determined that Mr. DiMambro was an "employer" for purposes of the *Act.*

Did the delegate correctly determine that Mr. DiMambro was an "employer"?

The delegate did not make an affirmative finding that Mr. DiMambro was the actual employer of Mr. Funk after considering and applying the statutory definition and relevant common law tests. Rather, the delegate appears to have determined that Mr. DiMambro was an employer simply because the Numbered Company had ceased to exist as of the date of the Determination since it had been struck from the Corporate Register and had not yet been formally reinstated. The relevant portions of the delegate's Reasons (at page 2) are set out below:

> With regard to the history of 518820 BC Ltd., it was a limited company, but was removed from the BC Corporate Registry on October 5, 2001 for failure to file annual reports. Nick DiMambro, a director/officer of 518820 BC Ltd., started DiMambro & Associates about this same time, using 518820 BC Ltd. as the parent company. It was during this dispute with Stephen Funk that Mr. DiMambro discovered that 518820 had been removed from the corporate registry. Mr. DiMambro has obtained a Court Order allowing for the re-instatement of 518820 BC Ltd., once the Order is filed with the Corporate Registry. Mr. DiMambro has taken steps to do this, but as of the date of the determination, *the re-instatement is not complete, thus Mr. DiMambro and 518820 BC Ltd. are both named as the employer in this determination.* (my *italics*)

While I am satisfied that the delegate correctly determined that Mr. Funk was an employee, it is not clear that he was employed by both Mr. DiMambro and the Numbered Company. I note that the delegate might have investigated whether these latter two persons could be "associated" under section 95 in which case both Mr. DiMambro and the Numbered Company would have been "jointly and separately [severally] liable" for Mr. Funk's unpaid wages. However, as matters now stand, Mr. DiMambro has not been named as a employer by reason of a section 95 declaration.

The delegate, in her Reasons, stated that Mr. DiMambro was a director/officer of the Numbered Company in October 2001, however, as noted above, Mr. DiMambro apparently resigned his directorship on October 9th, 1998. It is not clear whether Mr. DiMambro might have continued to be a director, in law, because he still exercised the functions of a director, nor do I have any information before me regarding his status as an officer during the relevant time frame. However, as noted above, the delegate did not proceed against Mr. DiMambro under section 96(1) and thus his status as a director/officer of the Numbered Company is not particularly material, at least insofar as matters presently stand.

Although not determinative of the issue, I note that Mr. Funk filed a complaint solely against the Numbered Company, naming that firm as his employer; Mr. DiMambro was identified by Mr. Funk as the latter's "supervisor". Thus, it would appear that the Numbered Company was the apparent employer in Mr. Funk's view and, as I interpret the above-quoted portion of the delegate's reasons, the delegate only named Mr. DiMambro as a co-employer because the Numbered Company had been struck from the Corporate Register and had not yet been formally reinstated.

Section 344(1) of the *Business Corporations Act* (which was enacted in place of the now-repealed *Company Act*) states, *inter alia,* that when a company is dissolved under section 422 for failing to file annual reports "the company ceases to exist for any purpose". However, section 344 is specifically subject to sections 346 and 347. Section 346 states that legal proceedings instituted prior to dissolution "may be continued as if the company had not been dissolved" [section 346(1)(a)] and that "a legal proceeding may be brought against the company within 2 years after its dissolution as if the company had not been dissolved" [section 346(1)(b)]. Assuming, but not deciding, that a complaint under the *Act* is a "legal proceeding", Mr. Funk's complaint (filed April 17th, 2002) was filed within 2 years of the October 5th, 2001 dissolution date.

Pursuant to section 364(1) of the *Business Corporations Act*, "a company is restored...when the registrar alters the corporate register to reflect that restoration". Further, section 364(4) states: "A company that is restored is deemed to have continued in existence as if it had not been dissolved, and proceedings may be taken as might have been taken if the company had not been dissolved".

It may be that the Numbered Company has now been formally restored and the Registrar's records have been amended to reflect that restoration. I am unable to determine whether formal restoration has occurred from the material that is before me. However, and quite apart from compliance with the statutory formalities respecting reinstatement, it would seem that Mr. Funk's claim could have been pursued against the Numbered Company by reason of section 346(1) of the *Business Corporations Act.*

Although the *Business Corporations Act* was assented to on October 31st, 2002 it was not proclaimed into law until the spring of 2004. It may be that the now-repealed *Company Act* applies in this case. There were comparable (though not identical) provisions in the former legislation. This latter matter is an issue that will require further investigation.

I am not satisfied that the delegate has set out in her Reasons a legally sufficient justification for determining that Mr. DiMambro was an "employer". It may be that Mr. DiMambro was a co-employer of Mr. Funk based on the traditional legal tests to determine employer status; it may be that Mr. DiMambro can be determined to have been an employer by way of a section 95 declaration; it may be that Mr. DiMambro is personally liable for Mr. Funk's unpaid wages under section 96(1) as an officer/director of the Numbered Company--see also section 347 of the *Business Corporations Act* regarding director/officer liabilities where a company has been dissolved. None of these latter issues is addressed in the Determination.

In light of the fact that Mr. DiMambro has raised a *bona fide* question regarding his status--and in the absence of a proper evidentiary foundation that would allow me to adjudicate this issue--I think the most prudent course would be to refer the question of Mr. DiMambro's status back to the Director for further investigation. In this way, each party will be given a full opportunity to make submissions on this latter matter.

ORDER

Pursuant to section 115(1)(b) of the *Act,* I order that the matters relating to:

i) Mr. Funk's unpaid wage entitlement (and, more specifically, his actual working hours); and
ii) the question of Mr. DiMambro's status as an "employer"

be referred back to the Director for further investigation.

Pursuant to section 115(1)(a) of the *Act,* I order that the Determination be confirmed in all other respects.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal