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-

488699 B.C. Ltd.
d.b.a. Miss Milly House Cleaning Services

(the "employer")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 99/98

DATE OF DECISION: May 19th, 1999

DECISION

OVERVIEW

This is an appeal brought by 488699 B.C. Ltd. doing business as Miss Milly House Cleaning Services (the "employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on January 25th, 1999 (the "Determination").

The Director's delegate determined that the employer owed its former employee, Michelle D.A. Wilson ("Wilson"), the sum of $292.74 on account of unpaid wages (including minimum daily pay, overtime pay and 1 weeks' wages as compensation for length of service) and interest. The bulk of the award--$243.28--represents 1 week's wages as compensation for length of service (plus concomitant vacation pay). Further, by way of the Determination, the employer was assessed a $0 monetary penalty in accordance with the provisions of section 98 of the *Act* and section 29 of the *Employment Standards Regulation.*

ISSUE TO BE DECIDED

In a letter dated February 18th, 1999, appended to the employer's appeal form, the employer's president stated that:

> "The base [sic] of our appeal will be under the Employment Standards Act--laying off an employee with no written notice due to an unforseen [sic] circumstance of company temporarily discontinuing business due to going to court with the Franchiser [sic], Miss Milly Ltd."

FACTS AND ANALYSIS

The employer does not claim that it had just cause to terminate Ms. Wilson's employment on October 30th, 1998; nor does the employer dispute that given Wilson's tenure, she would have ordinarily been entitled to 1 week's wages as compensation for length of service or an equivalent amount of written notice (see section 63 of the *Act*). However, the employer says that it was not obliged to pay

Wilson any termination pay (or give her written notice in lieu of payment) by reason of section 65(1)(d) of the *Act* which provides that an employee is not entitled to termination pay or notice if that employee was "employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under section 427 of the *Bank Act* (Canada) or a proceeding under an insolvency Act".

There is nothing in the material before me indicating that the employer discontinued its operations due to a receivership, bankruptcy, insolvency or some other similar court proceeding.

Section 65(1)(d) codifies the common law doctrine known as "frustration" whereby a contract (such as a contract of employment) is deemed discharged, or ended, if some external event, beyond the control of either party, renders the continued performance of the agreement impossible. When a contract has been ended by a "frustrating event" there is no need for either party to terminate the agreement by giving notice of termination since the contract has already been discharged by operation of law. It must be remembered, however, that both under the common law and section 65(1)(d) of the *Act*, the contract must be "impossible" to perform by reason of the unforeseeable event or circumstance in question--in this case, the onus of proving such an event or circumstance rests with the employer.

In a written submission to the Tribunal dated April 1st, 1999, the employer's president stated:

> "On October 30, 1998, we laid off all employees from 488699 BC Ltd., dba Miss Milly House Cleaning Services--Surrey, North Delta due to the company being temporarily discontinued while a franchise problem is resolved by the courts in November of 1999. On November 2, 1998 we gave the opportunity to six staff members to come and work for our new company 572433 BC Ltd. Dba Capital House Cleaning, that is all the staff we required at this time."

I note that in an earlier submission to the delegate, the employer referred to court proceedings commencing on November 2nd, 199*8*. Regardless of whether the court proceedings were imminent, or one year off, however, I have absolutely no evidence before to explain how or why these court proceedings rendered Wilson's continued employment impossible as of October 30th, 1998. The employer has not provided any particulars about the litigation other than a generic description of the court proceedings as a "franchise dispute". For example, I do not know if the employer was obliged to discontinue operations by reason of some interlocutory

injunction issued by the courts. Further, according to the uncontested information set out in the Determination, it was the employer who initiated these court proceedings and, accordingly, the employer must have known well in advance of November 1998 whether or not these proceedings would have an impact on its ongoing operations. Finally, absent some extraordinary order, such as a interlocutory injunction requiring the employer to cease operations, it is not clear to me how a "franchise dispute" would necessarily render Ms. Wilson's employment contract "impossible to perform".

In the material before me, the employer has also made some other, totally unsubstantiated, allegations that Wilson (and other former employees) "lie, lie and lie" but I do not consider this allegation to be a proper ground of appeal.

In its April 1st, 1999 submission the employer also, arguably (see above quote), raised section 65(1)(f) as a possible defence to Ms. Wilson's claim for termination pay (although this particular provision was not specifically mentioned). That section states that termination pay is not payable where the employee "has been offered and has refused reasonable alternative employment by the employer". However, that section, in my view, has no application to a situation where, as here, the alleged alternative employment was offered by an entirely separate legal entity (and, in any event, it is not clear whether an offer of employment was, in fact, ever made to Ms. Wilson by Capital House Cleaning) .

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **$292.74** together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

_____

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal