

Appeals

- by -

Abeda Wood and Marine Products Ltd.  
("Abeda")

- of Determinations issued by -

The Director of Employment Standards  
(the "Director")

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

**ADJUDICATOR:** David B. Stevenson

**FILE No.:** 2002/068 and 2002/069

**DATE OF DECISION:** May 24, 2002

## DECISION

### OVERVIEW

This decision addresses two appeals pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by Abeda Wood and Marine Products Ltd. (“Abeda”) of two Determinations issued by a delegate of the Director of Employment Standards (the “Director”), the first on January 30, 2002 and the second on February 1, 2002. The former Determination (the “annual vacation Determination”) concluded that Abeda had contravened Part 7, Section 58(3) of the *Act* in respect of the employment of six employees of Abeda and ordered Abeda to cease contravening and to comply with the *Act* and to pay an amount of \$9,753.47, while the latter Determination (the “length of service Determination”) concluded that Abeda had contravened Part 8, Sections 63 and 69(6) of the *Act* in respect of the termination of employment of approximately 40 employees, including the six employees affected by the former Determination, and ordered Abeda to cease contravening and to comply with the *Act* and to pay an amount of \$131,768.48.

These appeals were brought along with one other related appeal.

The annual vacation Determination appeal raises two issues: first, that the Director has issued duplicate Determinations for annual vacation pay owed; and second, that in any event the calculations are wrong and the employees have been paid all annual vacation entitlement.

The length of service determination appeal also raises two issues: whether Abeda has any liability to pay length of service compensation; and second, whether the length of service compensation calculations done by the Director are correct. Abeda has provided the following reasons in support of this appeal:

1. The employees covered by the Determination were only temporarily laid off by Abeda. It was the Trustee in Bankruptcy who terminated their employment.
2. The Trustee in Bankruptcy sold all or a substantial part of Abeda’s inventory to another company and were later sold and shipped to Abeda’s customers.
3. The Trustee in Bankruptcy and the Trade Union representing a unit of employees at Abeda may have some arrangement or agreement in respect of the allegation in paragraph 2 to use a mill whose employees were also represented by the Trade Union and employees formerly employed by Abeda may have been re-called to work at that mill.
4. None of the directors or officers of Abeda were involved in this arrangement or agreement.
5. A director and officer of Abeda, Roderick J. Horte (“Horte”), resigned as a director and officer on August 14, 2001.
6. In November, 2001, Horte made a proposal to the creditors of Abeda to restart operation but it was not accepted.

Alternatively, Abeda says the length of service calculations should not have been based on a 40 hour work week, but something less, or on actual average hours worked over the previous 2 or 3 years. Finally, Abeda says the rate of pay used in the length of service calculations appear to have used ‘temporary’ increases and argues they should have been based on normal rates of pay exclusive of shift premiums and/or lead hand rates.

The Director has raised the standing of a former director and officer of Abeda to bring the appeal.

The Tribunal has decided an oral hearing is not necessary in order to decide this appeal.

## ISSUE

The issue in this appeal is whether Abeda has shown the Determination was wrong in a manner that justifies the intervention of the Tribunal under Section 115 of the *Act* to vary or cancel the Determination, or to refer it back to the Director. There is a preliminary issue concerning whether a former director and officer of Abeda has the standing to bring these appeals.

## FACTS

The annual vacation Determination set out the following background:

Abeda Wood and Marine Products Ltd. operated a value added wood product manufacturing plant, which is under the jurisdiction of the *Act*. Almond worked from December 2, 1999 to June 22, 2001 as a Quality/Production Supervisor at an annual rate of \$47,000. Oldfield worked from April 1994 to June 22, 2001 as a millwright paid at the bi-weekly salary of \$1,657.60.

The complaints were filed in the time period allowed under the *Act*.

The complainants were laid off effective June 22, 2001 and were not recalled to work. On September 11, 2001, the employer was assigned into bankruptcy and Arthur Andersen Inc. was appointed as the Trustee.

During the course of the investigation the payroll records for all staff were reviewed, which revealed that four other salaried employees . . . were also owed annual vacation pay upon their termination of employment.

The Determination made findings of fact concerning the annual vacation entitlement of the six employees.

The length of service Determination set out the following background information:

Abeda Wood and Marine Products Ltd. operated a value added wood product manufacturing plant, which is under the jurisdiction of the *Act*.

The complaints were filed in the time period allowed under the *Act*.

On September 11, 2001, the employer was assigned into bankruptcy and Arthur Andersen Inc. was appointed as the Trustee.

On August 20, 2001 Larry Bellman, Delegate of the Director issued a Determination against the employer for outstanding wages owed upon the closure of the business as a result of the complaint filed by the Union. On January 30, 2002 Amanda Clark Welder, Delegate of the Director of Employment Standards, issued a Determination against the employer for outstanding vacation pay owed to Almond and Oldfield and other non-union employees.

The following findings of fact were made:

There is no dispute that the employees of Abeda Wood and Marine Products were terminated upon the closure of the business and assignment into bankruptcy. The parties agree that compensation for length of service has not been paid nor was written notice provided to discharge this liability.

There is nothing in the material on file indicating the Trustee has authorized the former director and officer of Abeda to file appeals of the Determinations.

## ARGUMENT AND ANALYSIS

I will first address the preliminary issue of the standing of a former director and officer of Abeda to bring these appeals. In *Glen Fyfe (as agent for Canadian Neon Ltd.)*, BC EST # D080/00, the Tribunal examined the standing of a bankrupt company, or a director/officer of such company, to appeal a corporate Determination. The decision includes the following analysis:

Section 71(2) of the federal *Bankruptcy and Insolvency Act* states that “on an assignment [into bankruptcy], a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this *Act* and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the . . . assignment . . .”. The trustee, in turn, is given wide authority to deal with the bankrupt’s property. For example, the trustee may, with the permission of the inspectors, “bring, institute or defend any action or other legal proceedings relating to the property of the bankrupt” [see section 30(1)(d)]. Thus, on bankruptcy, the bankrupt’s property (subject to certain exceptions that have no application in this case) vests in the trustee who is given, for the most part, exclusive authority to deal with that property.

Accordingly, Canadian Neon does not have the legal authority to appeal the Determination as that right lies solely with Canadian Neon's licensed trustee--in this case, KPMG Inc. Whether this appeal was filed by Fyfe in his personal capacity, or as an agent of Canadian Neon, the same result holds: the appeal is simply not properly before the Tribunal and thus this appeal must be dismissed. The matter of the complainant employees’ wage entitlements will have to be addressed in the course of the bankruptcy proceeding itself. In that latter regard, I understand each of the employees has now filed a “proof of claim” with the trustee.

Based on the above decision, which correctly states the law in this area, I agree with the position of the Director on this issue. A former director and officer of Abeda has no standing to bring this appeal and it must be dismissed on that basis.

## ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated January 30, 2002 be confirmed in the amount of \$9,753.47 and the Determination dated February 1, 2002 be confirmed in the amount of \$131,768.48, together with any interest that has accrued on the two amounts pursuant to Section 88 of the *Act*.

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**David B. Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**