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 -

Traderef Software Corporation
("Traderef")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 96/721

DATE OF HEARING: April 17, 1997

DATE OF DECISION: June 17, 1997

DECISION

OVERVIEW

This appeal is by Traderef Software Corp. ("Traderef") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") against Determination No. CDET 4779 of the Director of Employment Standards (the "Director") dated November 25, 1996. In the Determination, Shari A. MacDonald-Miller ("MacDonald-Miller") is found to be entitled to vacation pay which is 8 percent of total wages, and owed vacation pay which was payable in the 24 months which preceded her termination.

APPEARANCES

Donald Jordan	Counsel for Traderef
Shari MacDonald-Miller	On Her Own Behalf
Catherine Hunt	Counsel for the Director
Murray Superle	Director's delegate

PRELIMINARY ISSUE

Traderef objects to the participation of the Director in Tribunal hearings. Initially its objection was to any sort of participation. In subsequent written submissions on the point, Traderef presents its objection as follows:

- Section 121 of the *Act* is said to restrict the Director to the giving of evidence and the production of records relevant to information obtained for the purposes of the *Act*. It is argued that to allow the Director to participate beyond that is to go beyond the standing contemplated by the Legislature. According to Traderef, "The Tribunal does not have and therefore cannot legally exercise any jurisdiction to permit the Director to participate in the Traderef appeal."

- Traderef argues that to allow the Director to participate to the extent contemplated by *BWI Business World Incorporated*, (1996) BCEST No. D050/96, is unseemly as the Director's neutrality will be, or will appear to be, compromised. It is argued that "the traditional basis for holding that a Tribunal should not appear to defend the correctness of its decision ought to prevail". In that regard, Traderef relies on *Northwestern Utilities Limited v. City of Edmonton*, (1979) 1 S.C.R. 684 and submits that the Tribunal may not rely on the decision *C.A.I.M.A.W. v. Paccar* (1989) 2 S.C.R. 983. Traderef submits in the latter regard that the appeal is not judicial review and the Tribunal need not defer to the Director's expertise, it sharing the knowledge of the Director.

- In its reply submission, Traderef re-frames its second argument in terms of fairness. To allow the Director's participation is said "to commit a breach of natural justice, e.g. bias, reasonable perception of bias". In that connection, Traderef relies on *Re Bambrick* (1992) N.J. No. 323 (Q.L.) (Newf. S. C.).

- The final argument of Traderef is that even if the Director's participation is as contemplated by *Paccar*, that does not extend so far as is set out in *BWI* (supra).

MacDonald-Miller makes no submission on the point of the Director's participation or other matters raised by the appeal. She explains that she is incapable of responding to the legal arguments of the employer and that she can no longer afford legal counsel, having spent over five thousand dollars in an unsuccessful attempt to settle matters with Traderef.

The Director's submission is in support of *BWI*. The Director argues that fair, efficient procedures and the functions of the Director require that the Director be present to explain the Determination and its policy framework, and to demonstrate that it was reached after full and fair consideration of the evidence and submissions of the parties. The Director submits that *Paccar* and other judicial decisions are not applicable to Tribunal appeals but notes "even if it can be said that an appeal to the (Tribunal) is akin to an application for judicial review, Mr. Justice La Forest's opinion in *Paccar* suggests that the body from whom the appeal is taken … is entitled "*to make submissions not only explaining the record before the court*" … but also to argue that it "*had given reasoned* (and) *rational*" consideration to the matters at issue between the parties".

OTHER ISSUES TO BE DECIDED

In respect to the Determination, Traderef argues that it is the former *Employment Standards Act*, S.B.C. 1980 Chapter 10, (the "old *Act*") which governs and that neither it nor the current *Act* empowers the Director "to impose more than the statutory minimum even if the employment contract between the parties provides for a greater benefit". According to Traderef, the Director only has the power to enforce minimum vacation standards, which in MacDonald-Miller's case is said to be 4 percent of total wages.

The Director explains that its policy is to enforce the terms of the employment contract where that is more than the minimum provided by the *Act*. The Director relies on *433428 B.C. Limited operating as Buster & Associates Hauling v. Director of Employment Standards* (1996) BCSC (unreported).

At issue is the matter of whether the Director may collect vacation moneys payable in the 24 months prior to termination, as section 80 of the current *Act* allows, or only that payable in the preceding 6 months, as the old *Act* would provide. Traderef argues that it is the latter, MacDonald-Miller having been terminated before the new *Act* came into force. Traderef argues that the Director's Determination gives "the new *Act* retrospective effect in circumstances not expressly contemplated by the legislation".

The Director argues that section 80 of the current *Act* applies. The Director relies on *Burnaby Select Taxi Limited* (1996) [BCEST No. D091/96], *InterCity Appraisals Limited* (1996) [BCEST No. D245/96] and *Rescan Environmental Services Limited* (1997) [BCEST No. D007/97].

Not at issue are the conclusions of Director's delegate in respect to the facts. As it appeared to me that Traderef did not accept the delegate's conclusion that MacDonald-Miller's contract of employment provided for 8 percent vacation pay, and his conclusions in respect to vacation taken by the employee, I raised that at the hearing. Traderef has told me that it accepts that the facts are as the delegate found them.

FACTS

MacDonald-Miller was engaged in the development of a computer software product which would provide easy access to U.S. and Canadian tariffs and duties. She was manager of the project.

The period of her employment was April 10, 1992 to July 8, 1995. She was laid off.

On investigating matters, the Director's delegate concluded that under the employee's employment agreement she was to receive an annual vacation of 4 weeks or 8 percent of total wages.

The current *Act* came into force and effect on November 1, 1995. MacDonald-Miller filed her complaint on November 29, 1995.

ANALYSIS

Traderef takes no issue with the Director's findings of fact, her calculations or the fairness of her process or Determination. In appealing the Determination, Traderef raises two issues which go to the statutory power of the Director and the scope of the *Act*. The preliminary issue is addressed with that in mind.

The Participation of the Director on Appeals to the Tribunal

Traderef argues that the Director's participation is limited by s. 121 of the *Act*. Section 121 is stated as follows:

> 121. *Except for a prosecution under this Act or an appeal to the Employment Standards Tribunal, the director or a delegate of the director must not be required by a court, board, tribunal or person to give evidence or produce records relating to information obtained for the purposes of this Act.*

As I read s. 121, I find language which contemplates the participation of the Director in Tribunal hearings but does not confine it. Section 121 is a non-compellability clause which protects the privacy of employers and employees about whom the Director may obtain personal or private

information during the course of investigations. Nothing in s. 121, or any other section of the *Act*, restricts the Director to giving evidence and producing records.

Traderef argues that a more restricted role is required for the Director than is contemplated in the *BWI* decision. In that regard it relies on *Northwestern Utilities* and *Re Bambrick* and argues against a reliance on *Paccar*. In the alternative, Traderef argues that *BWI* goes beyond the bounds established by *Paccar*. I find that I am not persuaded by either line of argument.

BWI is a considered decision. It confers on the Director a measured role in appeals to the Tribunal which in my view is quite within the bounds of what the Tribunal may do as master of its own procedure. The Tribunal may confer a status to participate on appeals to any person so long as that is fair, principled and it appears that the person can play a meaningful role in assisting the Tribunal to achieve the purposes of the *Act*, that of s. 2 (d), the provision of "*fair and efficient procedures for resolving disputes over the application and interpretation of the Act*" being of particular importance. *BWI* is made for reasons of fairness and efficiency and reflects, and is consistent with, "the overall investigative and adjudicative framework established by the *Act*".

I am not conducting a judicial review, but even if I were to apply the principles of the Courts as I understand them from reading the submitted decisions, I would have to allow the Director to make submissions on the issues raised by Traderef. The decisions of the Courts, *Northwestern Utilities* included, call for a balancing of two concerns. The first is the prospect that the tribunal's status as an independent and objective decision-maker will be impaired. The second is the need to be fully informed. Even in *Northwestern Utilities* the utility board was permitted full participation on jurisdictional issues despite the aggressive conduct of its counsel, the fact that there were already two adversarial parties before the Court represented by counsel, and the fact that the matter might be (and in fact was) remitted back to the tribunal as a possible outcome of the appeal. *Northwestern Utilities* alone provides the Director with standing to argue each the issues raised by Traderef on appeal as they both go to jurisdiction. The Supreme Court of Canada has clearly decided that a decision-maker can make submissions to it on such issues without appearing unseemly and fairness being compromised.

The need for a balancing of interests is again evident in *Paccar*. In that decision, however, the Court acknowledges that "powerful policy reasons" may justify extending a tribunal's participation beyond the guidelines set out in *Northwestern Utilities*. In that case the Court expressed "complete agreement" with the following passage from *British Columbia Employees' Union v. Industrial Relations Council* ("*BCGEU*") (1988), BCCA, May 24, 1988, unreported.

> The traditional basis for holding that a tribunal should not appear to defend the correctness of its decision has been the feeling that it is unseemly and inappropriate for it to put itself in that position. But when the issue becomes, as it does in relation to the patently unreasonable test, whether the decision was reasonable, there is a powerful policy reason in favour of permitting the tribunal to make submissions. That is, the tribunal is in the best position to draw the attention of the court to those considerations, rooted in the specialized jurisdiction or expertise of the tribunal, which may render reasonable what would otherwise appear

> unreasonable to someone not versed in the intricacies of the specialized area. In some cases, the parties to the dispute may not adequately place those considerations before the court, either because the parties do not perceive them or do not regard it as being in their interest to stress them.

Paccar is a decision on judicial review, and the Court was addressing the matter of what was patently unreasonable, as Traderef points out. But to argue as it does, that the Tribunal is therefore unable to proceed as outlined in *Paccar* is to miss I think what is the fundamental point of that paragraph. That is, where powerful policy reasons exist, a tribunal's role at a hearing can be extended as a matter of policy without causing unfairness or damaging its neutrality, subject to the constraint that the tribunal not vigorously argue the 'correctness' of its decision on non-jurisdictional issues. *Paccar* demonstrates that the Supreme Court of Canada has itself refrained from a rigid and simplistic approach to hearing from tribunals. I can see no reason why the Employment Standards Tribunal would want to do otherwise.

The *Bambrick* decision deals with the status of one tribunal before another. But, in my view, it is not instructive. The facts of *Bambrick* are very different from the case at hand. In *Bambrick*, there were no jurisdictional arguments to be made as matters of jurisdiction were removed from the appeal tribunal's jurisdiction. And unlike the fully independent Employment Standards Tribunal, the appeal tribunal in that case was bound by the policy and legal direction of the inferior tribunal. Beyond that it is concluded in *Bambrick* that *Northwestern Utilities* is equally applicable to all appellant administrative tribunals. That conclusion is, I think, open to serious question, it failing to take into account the unique functions and institutional constraints of administrative tribunals and the fact that they are created as an alternative to judicial decision-making. But most troubling is the appearance that *Bambrick* has taken into account neither *Paccar* nor *BCGEU*.

In summary, I conclude that the Director is entitled to make submissions on the issues raised by the appeal. Even if I were to restrict the Director's participation to the narrow role contemplated by *Northwestern Utilities*, the Director is permitted to make submissions as the issues raised by the appeal go to the jurisdiction of her office. But beyond that, as the *Paccar* decision makes clear, powerful policy reasons favour the measured role set for the Director in *BWI*. That can assist the Tribunal to achieve the purposes of the *Act* without compromising fairness or the Director's neutrality.

The Employee's Vacation Pay Entitlement

The employee was terminated before the current *Act* came into force and effect and before the fifth anniversary of her employment. Strictly speaking, we are therefore concerned with the vacation pay sections the old *Act* although in substance the current *Act* and the old *Act* are the same. Section 37 of the old *Act* is as follows:

> *(1) An employer shall pay annual vacation pay to each employee calculated on the employee's total wages for the year in respect of which the employee becomes entitled to an annual vacation at a rate at least equal to 2% for*

each week of annual vacation to which the employee is entitled under section 36.

(2) An employer shall pay to an employee the annual vacation pay to which he is entitled in one payment

(a) *at least 7 days before the beginning of his annual vacation, or*
(b) *where the employment of the employee ceases before takes his annual vacation, at the time established by the Act for the payment of wages.*"

Section 36 provides that in the case of employees with less than five years' service, "*An employer shall give to each of his employees, after the completion of each year of employment, an annual vacation of at least …2 weeks …*".

Section 5 of the old *Act* is as follows:

(1) On termination by an employer of an employee's employment, the employer shall forthwith pay to the employee ***all wages owing to him****.*

(2) …

(3) Where an employee is paid on a salaried basis and his employment is terminated, the employer shall pay the employee not less than ***the corresponding hourly equivalent of his salary for every hour of work for which he has not been paid****.* (my emphasis)

The term "wages" is defined in the old *Act* as including "*salaries, commissions or money, paid or payable by an employer to an employee for his services or labour*" [s. 1, "wages" (a)].

Traderef argues that the Director may collect only the minimum vacation standard which is 4 percent of total wages. But when I consider the *Act* as a whole, as I am required to do, I conclude that it is the term of the employment contract which the Director must enforce where that is greater than the minimum standard of s. 37 (1). On terminating an employee, the employer is required to pay "*all wages*" owing, a point emphasised by s. 5 (3). Vacation pay is clearly wages. It is "*money payable by an employer to an employee for his* (or her) *services or labour*". Furthermore, there is the language of s. 37 (2), that the employer pay "*the annual vacation pay to which* (an employee) *is entitled*". The vacation pay to which the employee is entitled includes that to which she is entitled by virtue of an employment contract. The Director is no more limited to the collection of the minimum standard of s. 37 (1), than she is limited to the collection of just the legislated minimum wage.

The Director's delegate has found that MacDonald-Miller is entitled to vacation pay which is 8 percent of total wages and it is that to which she is entitled to under the *Act*. I agree. It is the term

of the employment contract which the Director must enforce where that is greater than the minimum standard of s. 37 (1).

The Application of Section 80

The matter of whether the current *Act* has retrospective effect is considered at length in the decision of the Tribunal, *Rescan Environmental Services Limited* (1997) [BCEST No. D007/97]. I agree with that decision and rely on its reasoning.

In *Rescan*, it is found that the current *Act* "clearly purports to and does affect the right of the employer under the old *Act* to rely upon the 6 month limitation on the claim for unpaid wages", the key being the language of s. 128 (3). That section of the *Act* is as follows:

> *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.*

Section 128 (3) is clear, a claim made under the old *Act* which is not decided before November 1, 1995 is to be treated as a claim made under the new *Act* and section 80 has force and effect. Section 80 allows the Director to recover wages payable in the 24 month period prior to a termination. What Traderef argues is that MacDonald-Miller is entitled to less than that because she made her complaint after November 1, 1995 and because the current *Act* is not retrospective. A passage from *Rescan* is on point, at page 8.

> … It is very difficult to see why a complainant who actually files her claim under the new *Act* can be in any lesser position than a complainant whose complaint is deemed under s. 128 (3) to have filed under the new *Act*. The very purpose of s. 128 (3) is to put both classes of claimant in precisely the same situation. It is true, as Rescan argues, that Freeth cannot bring herself within the transitional language of s. 128 (3). However, she need not do so. It is only the claimant whose complaint is already before the Employment Standards Branch under the old *Act* who needs the assistance of the transitional provisions. A claimant filing under s. 80 of the new *Act* is, on the face of the provision, entitled to claim 24 months unpaid wages. There is no need for transitional language, although the language of s. 128 (3) makes the legislative intention as a whole entirely clear. The objective of the Legislature was to make the liberal provisions of s. 80 available to complainants who were owed wages and whose claim had not been the subject of a decision under the old *Act.* Legislation is to be read as a whole and "*given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects*" (*Interpretation Act*, s. 8).

As Traderef points out, it has been found that "in the absence of express words to the contrary, or a necessary and distinct implication arising from the construction of the statute as a whole, an

amendment is presumed not to have retroactive effect" [*MacKenzie v. British Columbia (Commissioner of Teachers' Pensions)*, (1992), 69 BCLR (2d) 227]. And in *Re Matejka* (1984), 53 BCLR 227, at page 230, that:

> The following presumption is applicable to retrospective statutes, namely, a statute is prima facie prospective unless the intent to give it a retrospective operation arises clearly in the terms of the *Act* or by necessary and distinct implication from a construction of the statute.

I am satisfied however that the intent to give the *Act* retrospective operation is clear from its language and a necessary and distinct implication of its construction. Accordingly, it is my conclusion that the authority of the Director is such that she may go back 24 months prior to the termination and collect for MacDonald-Miller vacation pay which was payable but not paid in that 24 month period.

ORDER

I order, pursuant to Section 115 of the *Act*, that Determination No. CDET 4779 be confirmed.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

LDC:lc