

An appeal

- by -

Entertainment Equity Corp.  
("Entertainment Equity")

- 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

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 2001/106

**DATE OF DECISION:** May 31, 2001

## DECISION

### OVERVIEW

This is an appeal filed by Entertainment Equity Corp. (“Entertainment Equity”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Entertainment Equity appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on January 10th, 2001 under file number ER098-121 (the “Determination”).

In a letter attached to the appeal form dated and filed February 2nd, 2001, Entertainment Equity’s solicitors state that they are acting as counsel for Entertainment Equity Corp. and four other named individuals. However, the Determination orders only Entertainment Equity to pay the unpaid wages in question and, thus, the other individuals do not, at this time, have any appeal rights in their respective personal capacities. I understand that some or all of these individuals may be Entertainment Equity directors or officers but unless and until separate section 96 determinations are issued against them, they do not have any right to appear before the Tribunal as individual appellants.

The Director’s delegate determined that Entertainment Equity owed five former employees a total of \$27,883.31 on account of unpaid wages and section 88 interest. The particulars of the employees’ unpaid wage awards--set out in Attachment “A” to the Determination--are summarized below:

Employee	Wages	Vacation Pay	Interest	Total
Sharon Bloedorn	\$3,221.40	\$203.21	\$280.61	\$3,705.22
Yzobela Hyett	\$4,185.09	\$466.92	\$381.18	\$5,033.19
Ron Ireland	\$3,668.29	\$597.93	\$356.14	\$4,622.36
Jason Margolis	\$9,485.47	\$773.74	\$833.59	\$11,092.80
Seanna Sills	\$2,925.00	\$247.00	\$257.74	<u>\$3,429.74</u>
TOTAL				<u>27,883.31</u>

N.B. *italicized* figures correct errors in Attachment A

Further, by way of the Determination the Director also assessed a \$0 penalty pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation*.

In a letter dated April 19th, 2001 the parties were advised by the Tribunal that this appeal would be adjudicated based on the parties’ written submissions and that an oral hearing would not be held (see section 107 of the *Act*). Although Entertainment Equity’s solicitors, in their March 30th, 2001 submission, maintained that an oral hearing was “patently necessary and reasonable

in the circumstances” I am of the view that there is simply no legitimate justification for an oral hearing in this case.

### **ISSUES ON APPEAL**

In a memorandum prepared by Entertainment Equity’s legal counsel dated February 2nd, 2001 and appended to Entertainment Equity’s appeal form, a number of assertions are advanced in support of the appeal. Some of these assertions do not constitute proper grounds of appeal. For example, Entertainment Equity says that the Determination should be varied pursuant to section 86, however, that authority rests with the Director not this Tribunal--the Tribunal’s authority to vary is contained in section 115 of the *Act*. The memorandum also refers to the Director’s powers under section 85 of the *Act* but I conceive this reference to relate more to the argument that the Director failed to afford Entertainment Equity a reasonable opportunity to respond as required by section 77.

Entertainment Equity’s legitimate grounds of appeal may be summarized as follows:

- the five complainants were not employees but rather independent contractors;
- the complainants did not work all of the hours for which they were awarded compensation by way of the Determination; and
- Entertainment Equity was not given a reasonable opportunity to respond to the complaints contrary to section 77 of the *Act*.

I shall address each ground in turn.

### **FACTS AND ANALYSIS**

#### ***Employees or independent contractors?***

The only substantive submission filed by Entertainment Equity, namely, a 2 1/4 page letter from Entertainment Equity’s solicitors to the Tribunal dated March 30th, 2001, does not address, in any fashion, the status of the five individuals in question. This issue is briefly discussed in the Determination--apparently, Entertainment Equity also failed to provide any substantive submissions on this point to the delegate--and I do not find any obvious error in the delegate’s analysis.

Certainly, the evidence before me shows that Entertainment Equity treated the five individuals as employees to the extent that they were carried on Entertainment Equity’s books as employees, they were specifically engaged as “employees”, T-4 statements of earnings were issued to them, their wages were subject to the usual statutory deductions, in their work they utilized tools and equipment provided through the auspices of Entertainment Equity and, finally, Entertainment Equity directed and controlled their daily work activities.

There is no merit whatsoever to this ground of appeal.

***Did the employees work all of the hours credited to them?***

At the outset, it should be noted that the delegate applied section 34 (4-hour minimum daily pay) for some of the working days in question. It should also be noted that, as with the previous ground, this particular ground of appeal was not addressed in Entertainment Equity's legal counsel's March 30th submission. Entertainment Equity has manifestly failed, in my view, to raise even a *prima facie* case on this ground of appeal.

In calculating the employees' unpaid wage entitlements the delegate relied, firstly, on Entertainment Equity's agent's (Axiom Entertainment Canada, Inc.) time records and, secondly, applied section 34 when the records were incomplete or missing. Further, the delegate also relied on the evidence of Entertainment Equity's "production accountant" who provided evidence with respect to the employees' time records and their respective hours of work.

I cannot find that the delegate erred in calculating the employees' respective wage entitlements.

***Section 77***

Section 77 of the *Act* provides as follows:

**Opportunity to respond**

77. If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

Two employees filed unpaid wage complaints. During the course of the delegate's investigation into those two complaints, the delegate became aware of three other potential unpaid wage claims and, relying on section 76(3) of the *Act*, the delegate also investigated these three other potential claims.

The delegate's efforts to obtain Entertainment Equity's response to the various unpaid wage claims are delineated in the delegate's submission to the Tribunal dated February 27th, 2001. The delegate's assertions in this regard stand wholly uncontradicted. To summarize, an Entertainment Equity director (who was also, I understand, Entertainment Equity's solicitor) was initially contacted by telephone in February 2000 and subsequently by fax in February and again in March 2000. This Entertainment Equity director refused to provide information based on the (what I consider to be) ill-conceived notion that providing any Entertainment Equity payroll or related information would amount to a breach of solicitor-client privilege. As requested by this director, the delegate contacted another Entertainment Equity principal, in writing, and requested certain information--this request was totally ignored. A third principal was contacted, in writing, however he provided very little relevant information.

In my opinion, the foregoing efforts by the delegate to obtain relevant information from Entertainment Equity fully satisfied the requirements of section 77 of the *Act*. I might add, since

this point was raised in Entertainment Equity's appeal documents, that I do not accept that the delegate, having made a unrequited request in writing to a particular Entertainment Equity principal was then *obliged* to issue a section 85 summons to that individual in order to compel disclosure of relevant information. So far as I am concerned, if an employer voluntarily refuses to provide information, the delegate is quite within her authority to proceed to make a determination based on the information available to her--section 77 does not require the delegate to *obtain* a employer response, it only requires that an employer be given an *opportunity* to respond.

***Who is the employer?***

Although not raised in its initial appeal documents, Entertainment Equity's March 30th, 2001 submission stakes out the position that the "true" employer was not Entertainment Equity at all but rather another company, The Dream Team Inc. ("Dream Team"). This issue was not raised during the delegate's investigation and thus is not properly before the Tribunal--see *Tri-West Tractor Ltd.* (B.C.E.S.T. No. D268/96) and *Kaiser Stables Ltd.* (B.C.E.S.T. No. D058/97).

However, even if this issue is properly before the Tribunal, I consider the argument to be wholly without merit in any event. The employees received Entertainment Equity paycheques drawn on an Entertainment Equity bank account, they were directed in their work by other Entertainment Equity employees in Vancouver and Entertainment Equity issued T-4 statements of earnings to the employees in which Entertainment Equity was identified as the employer. It may well be that Dream Team could be considered to be an "associated corporation" pursuant to section 95 of the *Act* and thus jointly and severally liable with Entertainment Equity for the employees' unpaid wages but that matter is not before me.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$27,883.31** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

In light of the foregoing, it follows that the \$0 monetary penalty levied by way of the Determination is similarly confirmed.

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**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**