EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act

-by-

World Project Management Inc. et al.

("World Project et al.")

-of a Determination issued by-

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE Nos.: 96/222-96/230; 96/417-96/421

DATE OF HEARING: November 12th, 1996

DATE OF DECISION: November 18th, 1996

DECISION

APPEARANCES

Stephen Mellows	for World Project Management Inc. et al.
Keith Johnston Catherine Hunt Chris Finding	for the Director of Employment Standards
Natalie De Marquez Dan Seto Walter Zelenski	on their own behalf

OVERVIEW

The current proceedings began when several former employees of World Project et al. filed complaints with the Employment Standards Branch in which they alleged that they had been dismissed without proper notice or severance pay. Following an investigation (the nature of which is also at issue in this appeal), the Director of Employment Standards (the "Director") issued several Determinations against World Project Management Inc. and various other corporate entities and individuals ("World Project et al." or the "employers"). These Determinations order the employers to pay a total of approximately $1.3 million to former employees on account of individual and group termination pay pursuant to sections 63 and 64 of the Employment Standards Act (the "Act").

World Project et al. have appealed, in accordance with section 112 of the Act, every Determination that has been issued against them. One of the issues that has been raised by World Project et al. relates to the nature of the appeal proceeding itself, specifically:

i) the scope of the appeal; and

ii) who bears the burden of proof in an appeal under the Act--the appellant, the respondent employer or employee (as the case may be), or the Director?

Following a pre-hearing conference held on October 25th, 1996 at the Tribunal's Vancouver office, I issued several orders regarding the conduct of the appeal hearing, including an order that the "burden of proof" issue would be argued sometime during the week of November 12th, 1996, prior to the hearing of any evidence on the substantive grounds of appeal. The "burden of proof" issue was argued before me on November 12th, 1996 at the Tribunal's Vancouver office.

At this latter hearing, I heard legal argument from Mr. Stephen Mellows, on behalf of the employers, and from Mr. Keith Johnston, on behalf of the Director. Both counsel also provided written summaries of their arguments together with supporting caselaw and other documentary material. I wish to thank counsel for their carefully prepared, and obviously well-researched, briefs. Although three former employees appeared at the hearing, none presented any legal argument on the particular issue at hand.

ISSUES TO BE DECIDED

What is the nature of an appeal conducted pursuant to section 112 of the Act (e.g., is it a *de novo* hearing?), and who bears the burden of proof in such an appeal?

THE EMPLOYERS' POSITION

Mr. Mellows, on behalf of the employers, advanced three particular arguments in support of his submission that the burden of proof in this Appeal rests with the Director and/or the respondent employees:

i) section 11(d) of the *Canadian Charter of Rights and Freedoms* mandates such a result;

ii) the wording of the Act suggests that an appeal hearing is a *de novo* hearing and that, accordingly, the burden of proof lies with the Director; and

iii) that the rules of natural justice, and particularly, the requirement that administrative tribunals adjudicate disputes in a procedurally fair manner, requires that the burden of proof should lie with the Director.

THE DIRECTOR'S POSITION

Mr. Johnston submitted that an appeal hearing under the Act is not a *de novo* hearing and that the burden of proving that the Determination ought to be cancelled or varied lies with the appellant. Mr. Johnston says that these conclusions flow from the specific words used in the Act as well as from the general public purposes that are embodied in the Act.

ANALYSIS

The Legislative Framework
Typically, a complainant will file a complaint, alleging some violation of the Act, with a local office of the Employment Standards Branch (section 74). Upon receipt of a complaint, the Director must investigate the complaint unless the complaint

- is filed outside the statutory time limit;
- relates to a matter outside the ambit of the Act;
- is frivolous, vexatious, trivial or not initiated in good faith;
- cannot be upheld due to insufficient evidence;
- is currently being, or already has been, adjudicated in another forum; or
- has been settled

(see section 76).

During the investigative phase, the Director, or her delegate, is acting in a quasi-judicial capacity (see *BWI Business World Incorporated*, EST Decision No. D050/96) and "must make reasonable efforts to give the person under

investigation an opportunity to respond" (section 77). If the dispute giving rise to the complaint is not settled, then the Director may issue a Determination under section 79 of the Act. A Determination is, essentially, a judgment in favour of the complainant (or the Respondent if the complaint is dismissed) and may be enforced as an ordinary order of the British Columbia Supreme Court (section 91). In addition, the Director is given particular statutory powers of enforcement such as priority lien rights (section 87), garnishment (section 89) and asset seizure (section 92) rights .

The Director has the statutory authority to vary or cancel a Determination and a party who has been found liable under a Determination may wish seek such a reconsideration (section 86). More usually, however, a party who has been found liable to pay certain monies under the Act will, as the employers have done in this case, file an appeal with the Employment Standards Tribunal pursuant to section 112 of the Act which simply states that:

> 112. (1) Any person served with a determination may appeal the determination to the tribunal by delivering to its office a written request that includes the reasons for the appeal.

An appeal must be filed within either 8 or 15 days, depending on the mode of service of the Determination and, after considering an appeal, the Tribunal may either confirm, vary or cancel the Determination or refer the dispute back to the Director for further investigation (section 115).

Nature of the Appeal Hearing

Mr. Mellows, on behalf of the employers, submits that a section 112 appeal hearing (and it should be noted that the Tribunal is not required to hold an oral hearing--see section 107 of the Act) should proceed as a hearing *de novo.* Mr. Johnston, on the other other hand, submits that the appeal process is best described as an appeal by way of rehearing. In this latter regard, Mr. Johnston refers to the treatise *Administrative Law,* 3rd ed., by Evans, Janisch, Mullan and Risk, at p. 482:

> The narrowest is the appeal in the strict sense, in which the appellate body reviews the original decision for error on the material that was before the tribunal from which the appeal has been made. Fresh

> evidence is not admissible, and any changes in the facts or the law which have occurred between the time of the first decision and the hearing of the appeal are not taken into account. At the other extreme, an appeal may take the form of a trial *de novo* in which the appellate body makes findings of fact on the evidence presented to it, decides any question of law and exercises any discretion for itself, without regard to the conclusions reached by the tribunal *a quo*...
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> Perhaps the most common form of appeal is that often described as an appeal by way of rehearing. This falls between the very narrow and very broad types of appeal described above. The function of the appellate body in this intermediate category is to decide whether the original decision was wrong but, in reaching its conclusion, it may consider both the material before the original tribunal--its findings and conclusions--and any fresh evidence submitted by the parties. Relevant changes in the facts or the applicable law are also taken into account.

The current appeal process was put into effect as recommended by Professor Mark Thompson following his review of B.C.'s employment standards legislation (see Mark Thompson, *Rights and Responsibilities in a Changing Workplace: A Review of Employment Standards in British Columbia,* Report transmitted to the Minister of Skills, Training and Labour on February 3, 1994). Professor Thompson specifically criticized the internal appeal process that existed under the "old" Employment Standards Act and recommended that an appeal from a Director's order should be heard by an independent tribunal established for that purpose.

In addition to the internal appeal or review process established under section 84 of the "old" Employment Standards Act (S.B.C. 1980, c. 10 as amended), the "old" Act also provided, in section 14(3), for an external appeal of a Director's "certificate" (the equivalent of a Determination issued under the present Act) to the British Columbia Supreme Court--this appeal was expressly stated to be a *de novo* appeal [section 14(5)].

I am of the view that an "appeal by way of rehearing", rather than an "appeal on the record" or a trial *de novo,* best describes the appeal process provided for in section 112 of the Act. The powers given to the Tribunal in sections 108 and 109

of the Act suggest that a section 112 appeal was intended to be wider than a mere review of the record below. Section 107 of the Act states that "the Tribunal may conduct an appeal or other proceeding in the manner it considers necessary". Thus, the Tribunal is not, by statute, limited to merely examining the record below for error.

On the other hand, I do not believe that the Legislature intended that an appeal to the Tribunal should proceed as a trial *de novo*. It should be noted that a trial *de novo* is considered to be an "exceptional form" of appeal [*Dupras v. Mason*, (1994) 99 B.C.L.R. (2d) 266 (B.C.C.A.)]. If the Legislature had intended a section 112 appeal to be a *de novo* hearing, why is there no such direction in section 112 [as there was in section 14(5) of the "old" Act]? Section 2(d) expresses one of the fundamental purposes of the Act, namely, to provide fair and efficient dispute resolution procedures. If a section 112 appeal must proceed as a trial *de novo*, the dispute resolution procedures set out in Part 10 of the Act seemingly only lengthen the dispute resolution process without any concomitant benefit (except, perhaps, as a settlement tool).

The Burden of Proof

In my view, the Tribunal's previous decisions on this point (e.g., *Arbutus Environmental Services*, EST Decision No. D002/96; *Kearns*, EST Decision No. D200/96) have correctly placed the burden of proof on the appellant to show (on a balance of probabilities given that these are civil proceedings), that the Determination under appeal ought to be varied or cancelled.

I do not see that section 11(d) of the *Charter* is relevant here. Section 11(d) states that any person "charged with an offence has the right to be presumed innocent until proven guilty...by an independent and impartial tribunal". The Determinations before me are in the nature of civil judgments, the employers are not charged with an offence under section 125 of the Act, nor are the Determinations in the form of a penalty under section 98 of the Act.

Mr. Mellows argues that the compensation provided for in section 64 of the Act (group termination pay) constitutes a monetary penalty and that, accordingly, the employers have been charged with an offence within the ambit of section 11(d) of the *Charter*. However, I do not conceive that the group termination provisions constitute a monetary penalty. The group termination provisions, like many other

provisions in the Act--e.g., the minimum wages rate, employee leaves, overtime, statutory holiday and vacation pay--simply form part of an overall legislative scheme to ensure that employees subject to the Act enjoy certain minimum terms and conditions of employment. It may be true, as argued by Mr. Mellows in his Brief, that the group termination pay obligation may not, in a particular case, bear any relationship to the length of time that a particular employee has worked for the employer or the length of time that might be required by that employee to find new work. On the other hand, it could equally be argued that the statutory minimum wage does not bear any relationship to what an actual "competitively determined labour market wage" might be. However, in either case, the statutory provision does not constitute a monetary penalty--the point of the minimum employment standards set out in the Act is not to punish an employer; rather the purpose is to establish minimum terms and conditions of employment. In effect, the Act represents a pronouncement of public policy with respect to employment relationships throughout the province.

In any event, section 11(d) creates a presumption of innocence insofar as a hearing before an adjudicative body of first instance is concerned; this section does not create a similar presumption in regard to an appeal to a subsequent tribunal. In the case at hand, it must be remembered that an independent and impartial tribunal--i.e., the Director--has already found the employers liable under the Act. I recognize that the employers in this case challenge the impartiality of the Director, however, that particular allegation is itself a ground of appeal that will have to be proved by the employers as part of their case on appeal. It does not follow that because the employers have challenged the Director's impartiality *in this case*, the Director is impartial *in all cases.*

Lastly, Mr. Mellows submits that the Director cannot be an independent and impartial decision-maker because the Director must both investigate the complaint and issue a decision with respect to the complaint. In my view, the Director is an independent party because she represents neither the employer nor the employee at either the investigative or the appeal stage (see *BWI, supra.*). During the investigation, the Director must give the party under investigation an opportunity to respond and cannot simply take the information from the complainant at "face value". At no point during the investigative stage is the Director an agent or advocate for the complainant. Indeed, upon receipt of a complaint, the Director is mandated, by statute, to consider whether or not the complaint ought to be

dismissed out of hand by reason of section 76 of the Act. Once the investigation has been concluded, the Director then must determine whether or not there has been a violation of the Act. The fact that the Director ultimately comes to a decision in favour of one or the other party--employer or employee--does not, in my view, compromise the Director's neutrality or independence.

CONCLUSION AND ORDERS

I find that an appeal under section 112 of the Act is in the nature of an appeal by rehearing rather than a narrow "appeal on the record" or a wider trial *de novo*. In an appeal under the Act, the burden of proof lies with the appellant to prove, on a balance of probabilities, that the Determination ought to be varied or cancelled. It follows from this conclusion that the appellant will be the first party called upon at an appeal hearing to present its case.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal