Employment Standards TRIBUNAL

An appeal

- by -

Richard A. Mott, a Director or Officer of United Used Auto & Truck Parts Ltd.
("Mott")

- 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: Paul E. Love

FILE No.: 2001/28

DATE OF DECISION: June 21, 2001

DECISION

OVERVIEW

A Determination in this matter was issued against United Used Auto & Truck Parts ("United" or "company") on October 20, 2000 in favour of a number of employees in the amount of $261,199.39, inclusive of interest by a Delegate of the Director of Employment Standards (the "Delegate"). Following the expiration of the appeal period, the Director issued a Determination on December 1, 2000, against each of three directors of the company. This appeal relates to a Determination issued against Richard A. Mott, a director of the company. On or about August 8, 2000, a receiver was appointed. The employees of United were discharged by the receiver, after appointment. The Delegate, imposed liability on Mr. Mott, pursuant to s. 96 of the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the *"Act"*) in the amount of $76,445.44.

Mr. Mott argued that he was not a director of the company, because he did not function as a director of the company, and that upon the appointment of a receiver he ceased to be a director of the company. Mr. Mott was registered as a director with the Registrar of Companies. There was no issue raised by the appellant relating to his appointment or resignation from the office. While Mr. Mott appears to have been an inactive director, he had the right to function as a director. The fact that he chose or did not carry out active management duties, did not lead me to conclude that he had ceased to be a director of the company.

Mr. Mott argued that the amount of the Determination was incorrect, that the appointment of the receiver discharged the liability of the directors for payroll, and that vacation pay was included improperly in the Determination. I found that the appointment of a receiver did not discharge the directors from liability imposed under s. 96 of the *Act*. In reviewing the Determination, it was apparent that the calculations of the Delegate supported a liability of $76,445.44, and that the Delegate had not included any wages earned after the appointment of the receiver, or any amounts for compensation for length of service. I determined that vacation pay was included in the definition of "wages" and accrued vacation pay became owing after the termination of the employees, while Mr. Mott remained a director of the company. I confirmed the Determination.

Mr. Mott also asked that the effect of the Determination be suspended pending resolution of bankruptcy proceedings of United. I held that while the Tribunal had a power to suspend the effect of a Determination during the appeal process, the Tribunal had no jurisdiction to supervise the enforcement powers given to the Director, after the Tribunal exercised its jurisdiction to confirm a Determination.

FACTS

This is an application by Richard A. Mott concerning a Determination issued by a Delegate of the Director of Employment Standards, on December 1, 2000, against him as a Director of

United Used Auto & Truck Part Ltd. ("United" or "company") for two months unpaid wages. Liability was also imposed on two other directors of United, Ian G. Mott, and Howard I. Mott. These gentlemen, both represented by the same counsel have filed appeals, and these appeals will be dealt with in separate decisions. This application was decided upon the written submissions, filed by the parties.

In a submission dated April 6, 2000, counsel for Mr. Mott requested an oral hearing, and further stated that the corporate records had not been kept up to date for years. I note that the Tribunal notified Mr. Mott on May 14, 2001, that the matter would be decided by way of written submissions without an oral hearing. In my view, this is an appropriate case for written submissions. Counsel for Mr. Mott has supplied statutory declarations setting out evidence in support of the appeal.

By way of background, the Determination against the company ("Corporate Determination") was issued on October 20, 2000 in favour of a number of employees in the amount of $261,199.39, inclusive of interest. The Delegate found that the employer had not paid wages owing at the date of service, compensation for length of service, union dues or pension contributions. The amounts were owing to Colin W. Beck, Terrence Coates, Edward Couture, Donald Harold Eckel, Gordon W.J. Gibson, Gordon W. Gilbert, Howard R. Henderson, Laura L. King, Jeff B. Levinsky, David R. Parker, Jeff B. Podskalny, Morrie Roegele, Charles D. Ruzich, Barry C. Scriver, Alan G. Shirley, Frank Spear, Andreas W. Tielen, Einar A. Vennberg, Robert J. Ward, Steven J. Haberlin, Stuart MacInnes, Anne Murney, Rick Steel, Luis Orantes, Morley Kirkham, Paul Phelan, Steve P. Foreman, Robert Goodman, Douglas Mott (the "employees").

In a separate decision issued on April 23, 2001, I dismissed an appeal made by Julien Dawson of the corporate Determination. There is no evidence before me of Mr. Dawson's connection to the employer, directors or officers of the company. There was no evidence before me that Mr. Dawson was authorized to proceed with the appeal by the Trustee in Bankruptcy. I held that Mr. Dawson did not have any standing to file the appeal on behalf of United.

On December 1, 2000, the Delegate issued a Determination against Richard A. Mott, as a director of United in the amount of $76,445.44 which represented up to two months unpaid wages for each employee. The Delegate performed a BC Online Registrar of Companies Corporate Search and as at October 11, 2000 Mr. Mott was listed as a Director/Officer. The unpaid wages were earned between August 8, 1998 to August 8, 2000. It is unnecessary for me to set out the entitlements of each of the 29 employees of the company. Those entitlements are set out in as a schedule to the Determination. The issue raised in this appeal are common to all employees.

Mr. Mott alleges that he was not a Director of the company. Mr. Mott alleges that the Director erred with regard to the calculation of the amount of the Determination, and alleges that the Director included wrongfully, vacation pay. I note that a substantial portion of the entitlement for each employee was vacation pay accrued to the date of the appointment of the receiver.

I note that the appeal materials contain also the grounds of appeal which were filed by Julien Dawson on December 27, 2000, and are as follows:

1. The Director failed to comply with the principles of natural justice in rendering the Determinations;

2. The Director fettered her discretion in failing to take into account relevant circumstances such as the solvency of the Appellant company;

3. The Director erred in her determination that the Appellant company had not paid the complainant's wages;

4. The Director's calculation of the monies owed by the Apellants was patently unreasonable and mathematically incorrect. As a result the Appellants seek a new hearing before a different Adjudicator.

Appellant's Argument:

Mr. Mott alleges that he was not a director of the company, because he did not fulfill the functions of a director. He further argues that he is not a director because a receiver was appointed.

Counsel for Mr. Mott submitted that on August 8, 2000 Price Waterhouse Coopers Inc. was appointed Receiver over the company (the "receiver") and terminated all employment contracts and took control of the company. It is submitted that the directors should not be held responsible for failures to pay payroll, which were not within their control. The directors were prevented from running the company by the receivers and from meeting the Company's payroll commitments after August 8, 2000. It is submitted that there is an error in the inclusion of vacation pay in the calculation of wages owing. It is requested that if the Determination is upheld, the effect of the Determination be suspended pending the sale of corporate assets. It is alleged that the company owns properties in the range of $48 million.

The appellant asks me to suspend the effect of the Determination until all bankruptcy proceedings related to United are concluded and all corporate assets are sold.

We have provided an appraisal of the lands owned by United Auto. Those lands will be sold to pay the companies debts. It is premature to determine the amount which is recoverable from the sale which may approach a value of $48,000,000.00 for 32 properties totalling 149.27 acres. It would be inequitable to force payment on a 76 year old non-participant in corporate governance, prior to the time the assets of the employer were realized.

It is further submitted, pursuant to s. 113(2), that a deposit of $10.00 is adequate in the circumstances of this appeal.

Director's Submission:

In a written submission dated January 24, 2001, the Delegate said as follows:

> According to the payroll records and the records of employment the employees were not paid their accrued vacation pay or any wages earned after July 29, 2000. The monies determined to be owed in the above mentioned Determination are the wages owing and the accrued vacation pay for each employee. The amount for each employee is no more than 2 months' wages or the wages and accrued vacation pay which ever was the smaller amount. The amount determined to be owed is in accordance with the Section 96 of the *Act*.

ISSUES:

At all material times was Mr. Mott a director of the company?

Does the liability of a director, pursuant to s. 96 of the *Act* cease because of the appointment of a receiver?

Did the Delegate err in the calculation of wages by including vacation pay?

Is the calculation incorrect?

ANALYSIS

In this appeal the burden rests with the appellant, in this case Mr. Mott, to establish an error in the Determination such that I should vary or cancel the Determination. I note that in assessing a Director's Determination, the director must show that either he is not a proper director, or that there is some error in the assessment made against him as a director: *California Shutter Co. of Canada, BCEST #D 133/99 (Petersen).* I note that I am not persuaded that Mr. Mott has shown that any of the grounds of appeal raised by Julien Dawson (included with the appeal materials) show any error in the Determination. For the purposes of this appeal, it is convenient to deal with each issue, raised by Mr. Mott's counsel, under the sub-headings listed below:

A Director of the Company:

I note this is a case where the evidence suggests that one of the three directors dominated the decision making of the company, but there is no allegation that the dominant director operated "oppressively". There may be cases where there is some actual evidence of oppressive conduct by other directors, that might persuade an Adjudicator to relieve a person named as a director from liability under s. 96. Alternatively, there may be cases such as *Director of Employment Standards, BCEST #RD244/01 (Love, Jeffries, Petersen),* where the company appointed a director at a meeting called, without the knowledge or consent of the appointee. This is not a

case of either "oppressive conduct" by a dominant director, a case of "unregistered" resignation, or a case which involves an allegation of lack of consent to the appointment or election to office.

Mr. Mott alleges that he was not a director of the company, because he did not fulfill the functions of a director. The appellant relies on the definition of director in the *Company Act, R.S.B.C. 1996, c. 62:*

> "director" includes every person, by whatever name designated, who performs functions of a director

and says that according to s. 117 of the *Company Act* a director must manage or supervise the management of the affairs of the company. The appellant presents an argument which is based on *Sindia, BCEST #D 131/99 (Jamieson).* While counsel for Mr. Mott has not identified the passage in *Sindia* related upon, the following passage seems to form some basis for the argument:

Taking that approach, with which I agree, if I accept that it is not necessary to be recorded in the official company records as a director to have liability under Section 96, then the flip side surely has to be that being recorded as such may not be sufficient in itself to establish liability. If the registration as a director or officer is merely token and there is no accompanying exercise of typically director or officer tasks duties or functions, liability under s. 96 may not exist.

I note in *Sindia*, there was evidence of a resignation of a director two years earlier. In my view Sindia is not authority for any "flip side" proposition. *In Director of Employment Standards, BCEST #D2000/371 (Petersen, Jeffries, Falzon),* the Tribunal set forth a number of principles in connection with s. 96:

1. The corporate records, primarily those available through the Registrar of Companies or available at a corporation's registered and records office, raise a rebuttable presumption that a person is a director or officer. In other words, the Director of Employment Standards may presumptively rely on those corporate records to establish director or officer status.

2. It is then open to the person, who, according to the corporate records, is a director or officer, to prove on the balance of probabilities that the company records are inaccurate, for example because the person resigned and the documents were not properly processed, a person is not properly appointed.

3. There may well be circumstances where it would be inappropriate to find that a person is a director or officer despite being recorded as such. However, it will be the rare and exceptional case to be decided on all the circumstances of the particular case **and not simply by showing that he or she did not actually perform the functions, duties or tasks of a director or officer**.

4. The determination of director-officer should be narrowly construed, at least with respect to Section 96.

(My emphasis added)

Further, the Tribunal recently said in Director of Employment Standards, BCEST #RD244/01 (Love, Jeffries, Petersen):

> In Davrey Securities Inc, BCEST #D065/01 (Petersen), the Tribunal held that liability imposed pursuant to s. 96 on a director or officer, for the liabilities of a corporate employer, was, in law, an anomaly. The approach of the Tribunal is to scrutinize with care liability imposed on directors, and to narrowly construe s. 96 of the Act.
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> ¶¶ 14 It is not appropriate to take a functional approach, however, in this case. The functional approach is typically used by the Tribunal as an aid to interpretation, when a party carries out the functions of a director or officer, but is not named on the records in the office of the Registrar of Companies. Section 1 of the Company Act, indicates that a person can be a director if that person fulfils the functions of a Director. See for example Tsai, a Director or Officer of Davrey Securities Inc, BCEST #D065/01 (Petersen), Penner, BCEST #D371/96 (Thornicroft). The Act does not distinguish between active and inactive directors: Brown, BCEST #D193/99.
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> ¶¶ 15 In the Company Act a "director" is defined to include every person, by whatever name designated who performs the functions of a director. Sections 110 and 112 indicate the different methods by which a person can become a director. Under Section 110(1) the subscribers to the memorandum are the first directors. Section 110(2) provides that succeeding directors must be elected or appointed in accordance with the articles of the company. Section 112(1) provides that no election of a person as a director is valid unless the person consented to the election or appointment. Consent can be expressed in two ways, either by consenting in writing before the election or appointment, or if elected or appointed at a meeting, by being present and not refusing to act as a director. It follows, in our view, that the Director is correct as a matter of law, that De Sousa, by virtue of s. 110 of the Company Act, became a director when he subscribed the memorandum. There is no requirement in s. 110 of the Act that a first director need consent to act as a director. A company cannot be formed without subscribers, and endorsing a memorandum is a voluntary and consensual act.

In this case, presumptively, Mr. Mott, is a director because he was named as a director of the company in the records of the Registrar of Companies. The evidence provided by the appellant consists of the statutory declarations of Flora Stowell, a retired bookeeper and former employee

of the company, and Mr. Mott. Mrs. Stowell's evidence is that Ian Mott was in control of the company, and that Mr. Mott did not control the company. Mr. Mott would have to ask her for financial information, and he did not know how to use a computer. Mr. Mott's statutory declaration, rather significantly does not comment on how he became a director of the company. There has been no evidence presented that Mr. Mott was appointed improperly or that Mr. Mott had resigned. Mr. Mott's statutory declaration essentially indicated that:

> Ian Mott was in day to day control of the company, and made all financial decisions, dealt with legal matters, solved problems;
>
> He had access to the financial records, but Ian Mott was in control of the records;

Mr. Mott apparently did not sign or deliver payroll cheques. He worked in the business first managing the lot, and then attending to purchase of vehicles at auction. He holds 28 % of the shares, and his brother Ian holds 72 % of the shares. It is unclear the degree of connection Mr. Mott presently has with the company. He is 76 years old, and is a war veteran. His wife died of cancer about five years ago.

If the appellant is to succeed in this matter, the appellant must be able to show circumstances exist to show that it would be inappropriate to find that the appellant was a director despite being recorded as such. The exemption with regard to circumstances is a narrow one. In my view, personal circumstances are not relevant to this inquiry. For example, the fact that Mr. Mott is in his 70's, is a widower, and a war veteran are irrelevant to whether he was a director. In my view the Tribunal has no equitable jurisdiction, and cannot decide the issue of "appropriateness" based on fairness or hardship. Many section 96 cases arise in circumstances of business failure, where the company is unable to pay. Blameworthiness or fault, or lack thereof, are not factors to be considered in determining whether a person is a director.

To some persons it may seem harsh to hold an elderly, widowed, war veteran liable. The legislature has provided, however, that directors are liable in a limited sense for a company's liabilities to an employee. This is obviously a departure from the historical view related to the "corporate veil". In *Archibald, BCEST #D 090/00 (Thornicroft)*:

> While, to some, it may seem harsh that corporate officers and directors are personally liable for employees' unpaid wages, it should be noted that there are various limitations on their liability; it is not "open-ended". First, the liability is "capped" at 2 months' wages per employee; second, officers and directors have the ability to limit their liability by ensuring that employees' wages are kept current; third, in the event of a impending payroll shortfall, directors can further limit their continuing liability through resignation; and fourth, officers and directors are not liable for compensation for length of service if the corporation is in receivership, bankruptcy or is the subject of some other similar insolvency proceeding.

Mr. Mott appears to have been passive with regard to decisions taken by the company. It appears that Mr. Mott had access to financial information, which would not be available to an employee. He did not control the information, but control of information is not necessary for a finding that a person is a director. In my view, a director named in the records of the Companies office, has a fiduciary duty to manage the company. If a director, for whatever reason permits a director, who has majority control, to dominate a company, this does not amount to a special circumstance. In British Columbia there is no obligation on a company to have more than one director. In closely held companies, the reality is that there may be only one director, who is also an officer of the company, and the sole shareholder of a company. There may be many instances, in closely held companies, where one director dominates the decision making of a company, and where other directors have a more passive role. The law provides remedies, available in the Supreme Court of British Columbia, to shareholders, and directors, for oppressive conduct by a director. A person cannot become a director, or remain a director without consent, and it is open to a director to resign. In today's age, legal advice is readily available concerning a director's liabilities.

In Gabrielle, BCEST #D260/98 (Thornicroft), the Tribunal indicated that:

> In a modern corporation, the directors are usually elected by the shareholders and owe a fiduciary responsibility to the corporation itself. This fiduciary duty is, in part, crystallized in the Company Act provisions that require directors to "manage or supervise the management of the affairs and business of the company" [section 117(1)] and to "act honestly and in good faith and in the best interests of the company" while exercising "the care, diligence and skill of a reasonably prudent person" [section 118(1)]. While directors can, and usually do, delegate the day-to-day management authority over the affairs of the corporation to officers and employees, the ultimate residual authority to manage the business rests with the directors. Directors could be said to be charged with the responsibility for the strategic decisions of the business and for ensuring that such decisions are implemented. Usually, the implementation of such strategic decisions will be the responsibility of officers and other corporate employees with the directors maintaining an ongoing monitoring function.

In order for a person to become a director, they must either be an initial subscriber to a memorandum, or they must consent to be a director. A person who does not wish to remain as a director can resign from that function. I note that the Director seeks to impose a substantial liability on Mr. Mott. The onus in this case rests on Mr. Mott to establish an error. In the absence of clear evidence, that Mr. Mott resigned, or was appointed improperly, I am not inclined to find any error in the Determination regarding his status as a director. In my view, there are often passive directors in a company, and there is no distinction between passive and active directors. For Mr. Mott, to have remained a director of the company, he must have from time to time consented to remain a director of the company. There is no evidence to the contrary submitted by the appellant. I therefore reject the argument that Mr. Mott was not a director of United.

Appointment of the Receiver:

In this case it is apparent from the calculations attached to the Determination, that the Delegate did not include any wage claims arising after the date of the appointment of the receiver. This is a question of fact, and Mr. Mott has offered no contradictory proof. I am satisfied by the Director's submission, and from my review of the Determination, including the calculations attached setting out the entitlements of the employees. Mr. Mott argues that there should be no liability after the date of the appointment of the receiver, because nothing could reasonably be done. After appointment Mr. Mott was not able to exercise the functions of a director. I note that while the directors of a company may have been prevented from running its affairs and generating a cash flow to pay its employees, the appointment of a receiver cannot have the effect of extinguishing the director's liability to the employees under the *Act*, including liability for wages and vacation pay. It is clear that the basis for director's liability is different than the basis for the company's liability. The liability is derived from the status of being a director of a company at the time that the wages were earned or should have been paid. The Directors of a company have a substantially lesser obligation than that of a corporate employer. In *Docherty, BCEST #D 248/99 (Thornicroft),* the Tribunal held that s. 96 creates an unpaid wage liability ceiling for a Director. The liability is limited to two months wages, or the lesser of the amount actually owing. Mr. Mott could have avoided liability under s.96 by resigning his position in a timely way, prior to the appointment of the receiver.

Incorrect Calculation:

While Mr. Mott alleges that the calculations were incorrect, there are no particulars given of the alleged errors, other than an error with regard to inclusion of vacation pay, which I deal with in a separate heading below. The calculation sheets attached to the Determination support an amount owing by the directors in the amount of $76,445.44. There is no information before me, from Mr. Mott to show that the amount set out in the Director's Determination is incorrect. An appeal under the *Act*, is not a hearing *de novo*, or a fresh investigation. The appellant must show an error in the Determination, such that the Determination should be varied or canceled. A bare allegation of an incorrect calculation will not suffice, to meet the appellant's burden.

The Delegate made the calculations under s. 96 of the *Act*. Section 96 reads as follows:

> 96(1) A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months' wages for each employee.

Section 96(2) makes it clear that the director is not liable for compensation for length of service (s.63). The entitlements found by the Delegate do not include any claim for compensation for length of service. From my review of the Determination, it appears that the Delegate took the view that the appointment of the receiver, and termination of the employees, terminated the obligation of the company's directors to pay wages accruing after the date of the termination of

the employees. The company's directors have not become responsible for compensation for length of service because of any decision by the Receiver to terminate the employees.

It is clear, on an analysis of the facts in this case, that the liability contained within the Determination, is a liability for two months wages, or less.

Vacation Pay:

It is submitted by the employer that vacation pay, cannot be included in the entitlement and that would lead to some circularity in the definition of wages. Mr. Mott says vacation pay is not money payable in respect of work. It is a prescribed amount based on a percentage of total wages, and is not intended as direct compensation for work. I do not accept this argument.

In s. 1 (a) "wages" are defined as including "salaries, commissions or money, paid or payable by an employer to an employee for work" and 1(c) "money, including, the amount of any liability under section 63, required to be paid by an employer to an employee under this *Act*." Certain types of payments made by employers are excluded expressly from wages. Vacation pay does not fall into any of the excluded categories of gratuities, money paid at discretion for production or efficiency, allowances or expense or penalties. Vacation pay is earned or accrued based on the earnings of the employee, and is payable for work. An employee does not receive vacation pay or an entitlement to vacation unless that person works for an employer

It seems to be the legislative intent the vacation pay earned or accrued is captured by s. 96 of the *Act*. Section 96 provides specific exemptions from personal liability of a director for certain items - termination pay or compensation for length of service in the event of a receivership, insolvency or a proceeding under s. 427 of the Bank Act (Canada). A director is not liable for vacation pay that becomes payable after the director ceases to hold office. A director is not liable for money that remains in an employee's time bank after the director ceases office. If the legislature intended that a director was to be exempted from payment of vacation pay accrued or payable during office, one would require clear wording in the section, given the rather broad definition of wages set out in section 1 of the *Act*.

I note in this case, a substantial portion of the entitlement of each employee was vacation pay accruing up until the date of the appointment of the receiver, and termination of the employees. In my view, however, the accrued vacation pay forms part of the entitlement of the employees upon termination. This is apparent from a review of s. 58(3) and s. 18 of the *Act*.

Section 58(3) of the *Act* provides as follows:

> Any vacation pay an employee is entitled to when the employment terminates must be paid to the employee at the time set by section 18 for paying wages.

Section 18 of the *Act* provides that:

> 18(1) An employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment.

An employer may pay vacation pay at least 7 days before the beginning of the employee's annual vacation, or, with the agreement of the employee (or by collective agreement), on the employee's scheduled pay date. For many employers, including this employer, the amount of the vacation pay is a liability which accrues and changes throughout the year.

When the receiver terminated the employees, the employees became entitled to payment of the vacation pay, within 48 hours of the date of termination. This amount can be considered to be wages falling within the definition of two months wages, and therefore the responsibility of the directors of the company, pursuant to s. 96 of the *Act*.

The submission of Mr. Mott, did not refer to any of the case law which has been developed by the Tribunal. The Tribunal decided in *Creative Screen Arts Ltd, BCEST #D024/98 (Collingwood)* that vacation pay was included within the definition of wages.

The argument raised by the appellant has been considered, in detail, previously by the Tribunal in *John Andrew, Director or Officer of Xinex Networks Inc., in Receivership, BCEST #D068/99 (Stevenson)*:

> ¶¶ 18 The definition of "wages" under the Act is inclusive. Vacation pay falls within the definition, as it is "money, paid or payable by an employer to an employee for work". I agree with the submission of the Director that all the employees of Xinex were terminated by operation of law on June 5, 1998, the date Xinex was placed in receivership. Any vacation pay owed at the time of termination became payable to the employees within 6 days of termination by application of Section 58(3) of the Act, which says:
>
> *58 (3) Any vacation pay an employee is entitled to when the employment terminates must be paid to the employe at the time set by section 18 for paying wages.*
>
> ¶¶ 19 Unpaid vacation pay falls quite comfortably within the concept of what would be "unpaid wages" under subsection 96(1) of the Act. Section 80 of the Act allows recovery of wages that became payable in the period beginning 24 months before the termination of employment.

For all the above reasons, I am not satisfied that Mr. Mott has shown any error in the Determination.

Suspension of the Effect of the Determination:

Mr. Mott asks that I suspend the operation of the Determination until the resolution of bankruptcy proceedings, on the basis that there is ample security in lands owned by the company, and collection would pose a hardship to him based on his personal circumstances.

The suspension jurisdiction of the Tribunal, can be found in s. 113 of the *Act* which reads as follows:

> 113(1) A person who appeals a determination may request the tribunal to suspend the effect of the determination.
>
> (2) The tribunal may suspend the determination for the period and subject to the conditions it thinks appropriate, but only if the person who requests the suspension deposits with the director either
>
> (a) the total amount, if any, required to be paid under the determination, or
>
> (b) a smaller amount that the tribunal considers adequate in the circumstances of the appeal

Section 115, however, sets out the relief that the Tribunal may grant. That jurisdiction is limited to confirming, varying or cancelling the determination, or referring the matter back to the director.

Under s. 91 of the *Act*, the Director is given the power to file a Determination or a Decision of the Tribunal and enforce the Determination or Decision as a judgement of the Supreme Court:

> 91(1) The director may at any time file a determination or an order of the tribunal in a Supreme Court registry.
>
> (2) unless varied, cancelled or suspended under section 86, 113, 115, 116, or 119 a filed determination in enforceable in the same manner as a judgment of the Supreme Court in favour of the director for the recovery of a debt in the amount stated in the determination.
>
> (3) Unless varied or cancelled by the tribunal under section 116, a filed order of the tribunal is enforceable in the same manner as a judgement of the Supreme Court in favour of the director for the recovery of a debt in the amount stated in the order.
>
> (4) If a determination or order filed under this section is varied, cancelled or suspended, the director must promptly withdraw the determination or order from filing in the Supreme Court.

While the Tribunal has a power to suspend a Determination, it is a power which is given to the Tribunal to preserve a status quo, following the filing of an appeal from a Determination, or a reconsideration application, while there is an appeal in process. I have determined that the Delegate did not err in the Determination.

The Tribunal does not have any general supervision authority over the Director with respect to the exercise of her statutory powers of enforcement, other than to issue a suspension order pending appeal: *Cunliffe, BCEST #D432/00 (Thornicroft).* It is clear that the Tribunal has jurisdiction to suspend the effect of a Determination pending a reconsideration application: *New Westminster (City), BCEST #D118/99 (Love, Edelman, Thornicroft*).In *New Pacific Limousine Service Inc., BCEST #D345/96 (Edelman)*, the Tribunal held that there was no jurisdiction, following the confirmation of a determination, to suspend enforcement of the determination by making an order that funds be held in trust, pending a small claims action between the parties, arising out of the employment relationship.

In my view, once the Tribunal makes an order confirming a Determination, the decision with regard to enforcement of a Determination or Decision lies with the Director. The Director has chosen thus far not to engage in any collection action to enforce the Determination until the Decision was rendered in this matter. If the appellant chooses to apply for reconsideration of my decision, he can apply to the Tribunal for a suspension order. It is of course open to the appellant to negotiate a "stay" with the Director.

ORDER

Pursuant to s. 115 of the *Act* I order that the Determination dated December 1, 2000, is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal