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-

Danna Lundy

("Lundy")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 98/306

DATE OF DECISION: August 11, 1998

DECISION

OVERVIEW

This is an appeal filed by Danna Lundy ("Lundy") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") from a Determination issued by the Director of Employment Standards (the "Director") on April 24th, 1998 under file number 086718 (the "Determination").

The Director determined that Lundy (operating as "Protek Industries"), Whole Earth Recycling Society and Rainforest Re-nu'd Recycling Ltd. (operating as "Re-nu'd Recyclers") were "associated businesses, trades or undertakings" for the purposes of section 95 of the *Act.* Further, the Director also determined that the associated entities were liable for $4,169.99 on account of unpaid regular wages, vacation pay and compensation for length of service owed to Ms. Deborah Moir Walmsley ("Walmsley"), a former employee of the Whole Earth Recycling Society.

FACTS

According to the information set out in the Determination, Walmsley was employed by the Whole Earth Recycling Society from February 15th until July 11th, 1997 as a "district fundraising supervisor". The Director's delegate found that while Walmsley was supposed to be paid $2,000 per month, she in fact only received $1,500 per month. Apparently, the $500 monthly shortfall was to be made up by the federal government under a program known as "Business Works". However, a representative of the Business Works program advised the delegate that the employer was responsible for paying the full monthly salary of $2,000 (as set out in the parties' agreement)--this finding has not been challenged on appeal.

The delegate also found that Walmsley was not paid vacation pay in accordance with section 58 of the *Act*, nor had she been given written notice of termination as required by section 63 of the *Act.* The former finding has not been challenged on appeal; the latter finding is in dispute inasmuch as the appellant says that Walmsley was not entitled to any termination pay.

ISSUES TO BE DECIDED

In a letter dated May 19th, 1998 addressed to the Tribunal and appended to the appellant's appeal form, Lundy set out a number of allegations, namely:

- Walmsley was an independent contractor, not an employee;

- Walmsley was an incompetent employee who voluntarily quit and was not terminated; and

> • Whole Earth Recycling Society also seeks to recover (or be given some sort of credit for) certain legal fees apparently expended on Walmsley's behalf and on the understanding that Walmsley would reimburse Whole Earth Recycling Society.

Lundy does not challenge the Director's determination under section 95 of the *Act* thus I need not address that aspect of the Determination although I wish to note that, in any event, I would have found the section 95 order to have been entirely proper in this case.

It should also be noted that Lundy does not challenge the following facts set out in the Determination:

> "On December 9, 1997, the delegate wrote a letter to the employer advising of the complaint and requesting further information. On December 19, 1997, the delegate spoke to Lundy on the telephone who advised the delegate that he would provide a detailed response to Walmsley's allegations by January 5, 1998. To date [*i.e.*, April 24th], the delegate has not received any submissions from the employer."

Thus, it would appear that Lundy was given a fair and reasonable opportunity to present the employer's position during the course of the investigation of Walmsley's complaint (see section 77) but nevertheless failed do put its position forward, in a timely fashion, or at all. Accordingly, based on the principles set out in previous Tribunal decisions such as *Tri-West Tractor Ltd.* (B.C.E.S.T. Decision No. D268/96) and *Kaiser Stables Ltd.* (B.C.E.S.T. Decision No. 058/97), Lundy has failed to present any admissible evidence which would justify cancelling the Determination. However, and in any event, there does not appear to be any merit to the appeal for the reasons set out below.

ANALYSIS

Lundy maintains that Walmsley was an independent contractor but has not set out *any* evidence upon which one could reasonably conclude that such was the case--*e.g.*, lack of employer direction or control. Indeed, the matters set out in Lundy's May 19th letter suggest that Walmsley *was* an employee--*e.g.*, Lundy's reference to the training received by Walmsley; the reference to the employer obtaining a vehicle for Walmsley to use in the course of her duties; and the reference to the employer providing a computer to be used by Lundy at her home. More fundamentally, the "Business Works Employer Certification Statement" signed by Lundy on April 1st, 1997 in the latter's capacity as president of the Whole Earth Recycling Society specifically states that the employer acknowledges that Walmsley was an "employee as defined in the prevailing BC Employment Standards Act & Regulations".

There is no admissible evidence before me upon which I could reasonably conclude that Walmsley was dismissed for just and sufficient cause; nor is there any admissible evidence that she received written notice of termination as required by section 63 of the *Act*. Similarly, there is no admissible evidence before me to support the allegation that Walmsley quit.

As for the claim for reimbursement of legal fees, this is a matter over which I have no jurisdiction. The employer will have to advance that claim in another forum--possibly the Small Claims Court.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **$4,169.99** together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal