BC EST #D354/99

EMPLOYMENT STANDARDS TRIBUNAL

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

Employment Standards Act R.S.B.C. 19965, C. 113

- by -

D. Hall & Associates Ltd.
("the Appellant")
and

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John McConchie

FILE NO.: 1999/215

DATE OF DECISION: August 18, 1999

DECISION

FACTS

On March 22, 1999, a delegate of the Director of Employment Standards issued a determination against the appellant in the amount of $13,985.22, comprised of $13,369.32 and $615.90 interest. The Director's delegate found that the appellant had contravened Sections 40(1) and 40(2) of the *Employment Standards Act.* This finding referred to funds to which the delegate held the complainant entitled on account of overtime pay and pay for termination without cause and without compensation for length of service.

The issues before the Director's delegate included: (1) whether the complainant's position fell within Section 37.5 of the Employment Standards Regulations (which deals specifically with oil and gas field workers and contains its own code for rates of pay and overtime), (2) whether the complainant was entitled to compensation for claimed travel time, and (3) whether the complainant was discharged for just cause and, hence, disentitled to compensation under the *Act* for termination without notice.

The Director's delegate rejected the Employer's argument that Section 37.5 of the Employment Standards Regulations applied to the case at hand. The delegate gave the Regulations what he called a "narrow read" and found that the complainant's work, for the most part, was "not even incidental to that of exploring for oil and gas or the operating of equipment to extract it." Having made this finding, the delegate proceeded to evaluate and reject the Employer's other arguments addressing the specifics of the case before him. He found that the complainant was entitled to compensation for travel time, which he found formed part of his work day. He went on to find that the Employer had not established that it had just cause to terminate the complainant, and so awarded $1,242.00 as compensation for length of service.

At the conclusion of the delegate's written Determination appeared the following notice, which is common to all determinations issued by the Branch:

> Appeal Information
>
> Any person served with this Determination may appeal it to the Employment Standards Tribunal. The appeal must be delivered to the Tribunal by April 14, 1999. Complete information on the appeal procedures is attached. Appeal forms are available at Employment Standards Branch offices.

On April 13, 1999, the appellant faxed an appeal to the Employment Standards Tribunal. It is stamped as having been received at the Tribunal at 10:36 am on April 13. The transmittal was a total of 10 pages including the cover page.

The "message" portion of the fax cover sheet said: "Please find enclosed necessary documents in regards to an appeal of a determination issued by the Director of Employment

Standards. Orignal [sic] documents will be forwarded via mail." The second faxed page was the Employment Standards Tribunal Appeal Form. On this form, the appellant had completed the required sections and signed the document. Section C of the Form contains the following instructions:

> **C. Reasons for this appeal**
> To comply with the Tribunal's rules and the Employment Standards Act, you must do all of the following on a **separate sheet**:
> 1. State why the Determination is wrong (e.g. an error in law or an error in the findings of fact);
> 2. Give clear reasons why you are making this appeal;
> 3. State clearly what facts are in dispute; and
> 4. State clearly what remedy you are seeking from the Tribunal.

The third page of the faxed group of documents contained the appellant's type-written description of the reasons for the appeal. In its substantive part, it reads:

> **Reasons for This Appeal:**
> Determination of incorrect compensation for overtime on service and travel time.
> Determination of termination without cause and without compensation for length of service.
> Determination of employment position not falling under Section 37.5 Employment Standards Regulations, Oil patch exemption.
>
> **Documents Required:**
> Copy of Determination enclosed
> Copy of letter from the Northern Society of Oilfield Contractors & Service Firms regarding BC Employment Standards Act - Section 37.5

The attached letter from the Northern Society of Oilfield Contractors (the "Northern Society") was directed to the Director's delegate and dated March 23, 1999, which was one day after the Determination was issued. The letter was in the form of a submission from the Northern Society to the delegate advising of its role in the consultations leading to the passage of the Regulations affecting oil and gas workers and its interpretation of those Regulations. Specifically, the Northern Society took the position on behalf of its member, the appellant, that section 37.5 and Appendix 3 of the Employment Standards Regulation should not be read as being limited to the exploration, drilling and servicing of *new* wells. Instead, said the Northern Society in its letter, the spirit and intent of the regulation was to extend its scope to *existing* wells and drilling operations. Referring to the language of the Regulations, the submission gave several factual examples in support of the Northern Society's position. In addition to this, the letter referred to the history of exemptions and variances which had applied to the Oil Patch. The letter concluded with the Northern Society expressing its interest in receiving a response and inviting the delegate to contact it with any questions.

On April 14, 1999, the Registry Clerk of the Tribunal wrote to the appellant acknowledging receipt of the Appeal dated April 13, 1999. The letter does not indicate if it was sent by ordinary mail or faxed. The Registry Clerk advised the appellant of the following:

> As mentioned in my telephone message of April 13, 1999, you have not provided all the information required to process your Appeal. Accordingly, we are unable to proceed with your Appeal until the following is received:
>
> **C. Reasons for this appeal**
>
> To comply with the Tribunal's rules and the Employment Standards Act, you must do all of the following on a **separate sheet**:
>
> 1. State why the Determination is wrong (e.g. an error in law or an error in the findings of fact);
> 2. Give clear reasons why you are making this appeal;
> 3. State clearly what facts are in dispute; and
> 4. State clearly what remedy you are seeking from the Tribunal.
>
> You may forward the necessary information via fax (604) 775-3372. The appeal deadline is April 14, 1999. The above requested information must be received in our office by 4:00 pm April 14, 1999. Information received after this deadline will not be accepted as the appeal will be considered out of time.

On the same date, April 14, 1999, the appellant's counsel wrote to the Tribunal by facsimile advising that she had been retained only that same day by the appellants to assist them with the matter. Counsel's letter acknowledged that the Tribunal had asked for further information regarding the appeal. It went on to set out the following grounds for appeal:

> The grounds for appeal are as follows:
>
> The Director's Delegate erred in finding that the Employee's position was not covered by s. 37.5 of the *Regulation* to the *Employment Standards Act*, and thus finding that the Employee was owed overtime pay.
>
> The Director's Delegate erred in finding that the Employee's position was not covered by the variance from the overtime provisions of the *Employment Standards Act* for workers working in the Oil Patch, which variance was in existence prior to October 27, 1997, and thus finding that the Employee was owed overtime pay.
>
> The Director's Delegate erred in finding, in the circumstances of this case, that the Employee was entitled to compensation for travel time and that such travel time formed part of the work day.

> The Director's Delegate erred in finding, in the circumstances of this case, that the Employer did not have just cause for termination of the Employee.
>
> The Remedy the Employer is seeking is that the decision of the Director Delegate be cancelled.
>
> I will be filing a full appeal submission with the Tribunal in the future, outlining in more detail the reasons, as well as the factual and legal basis, for the appeal.

On the same day, the Registrar of the Tribunal wrote to the parties, including the appellant and its counsel, advising that the Tribunal had received an appeal by the appellant dated April 13, 1999 and seeking written responses by May 5, 1999. The letter went on to advise that the matter "will be decided by an Adjudicator" who may "decide this appeal solely on written submissions or an oral hearing may be held. An oral hearing may not necessarily be held." This letter was obviously a form letter sent out automatically upon the receipt of an appeal. It did not discuss whether there was any insufficiency in the materials filed on appeal by the appellant.

On April 26, 1999, the appellant's counsel wrote to the Registrar to advise that counsel had now had the opportunity to discuss the matter more fully with their client and that "As noted in our letter to the Tribunal dated April 14, 1999, we will be filing a full appeal submission with the Tribunal in the near future, outlining in more detail the reasons, as well as the factual and legal basis, for the appeal."

On May 5, 1999, the Program Advisor of the Employment Standards Branch wrote on behalf of the Director. He contended that neither the appellant's letter of April 13 nor counsel's letter of April 14 met "the expectations of the Employment Standards Tribunal." He argued that appellant's counsel had recognized this when she advised that she would be filing a full appeal submission with the Tribunal in the future. He submitted that the filing of a "nominal appeal" with a full appeal to follow is contrary to the requirements of s. 112 of the *Employment Standards Act* and defeats one purpose of the *Act*, namely, to "provide fair and efficient procedures for resolving disputes over the application and interpretation of this *Act*." By this method, he argued, the appellant has the benefit of an extension period without having to apply for it. On behalf of the Director, he asked that the Tribunal dismiss the appeal on this ground.

The Program Advisor's submission went on to present the Branch's arguments on the facts and on the interpretation to be applied to s. 37.5 of the Regulations, taking the position on behalf of the Director that s. 37.5 "applies only to oil or gas well drilling or servicing, and only to activities related to gas well drilling or servicing." The letter concluded with submissions in support of the findings of fact and legal conclusions of the Director's delegate. It sought the opportunity to reply to the appellant's "full appeal submission" in the event the Tribunal proceeded with the Appeal.

A letter from the complainant dated May 11, 1999 was received by the Tribunal on May 13 but did not concern itself with the preliminary issues discussed in this decision, and so will

not be further discussed here. I have not taken this submission into account in reaching the conclusions expressed in this decision.

On May 12, 1999, the Employer filed what it termed a "more detailed submission regarding the factual and legal grounds for this appeal." The submission restated the grounds for appeal which had been set out in counsel's letter of April 14. It raised a new ground of appeal of which counsel said she had only now become aware, namely, that the Determination made errors in the calculation of wages owing in respect of overtime because the Director's delegate had not deducted the full amount of wages actually paid to the complainant from the amount owing. The balance of the submission dealt with the substantive submissions of counsel on the various grounds. I have not taken this submission into account in this case as the sufficiency of the appeal documentation must be assessed as of April 14, 1999 in the absence of an application for an extension of time to file the appeal.

On May 20, 1999, Employer counsel wrote to respond to the submission filed on behalf of the Director on May 5, 1999. Counsel submitted that the Director has no standing to make an argument about the expectations of the Tribunal regarding time limitations under s. 112. The role and status of the Director, said counsel, is a restricted one, limited to explaining the underlying basis for the Determination. Relying on the Tribunal's decision in *BWI Business World Incorporated*, D050/96 (BCEST), the Director must not, she said, be seen to be advocating in favour of one party. To do so would put the Director's neutrality in issue and jeopardize the credibility of the Employment Standards Branch. The appellant relied upon the following comments of Vickers J. on the standing of the Director to appear before the courts to defend her decision:

> In my view, it is neither fair nor proper for the Director to actively pursue the correctness of her decision on judicial review of a tribunal decision. The Director's decision has already been reviewed and a decision made by a tribunal panel, thus fulfilling the intent of the Legislature. Decisions of the Director are subject to review by a tribunal panel and decisions of tribunals, protected by a privative clause, are subject to judicial review. The Director's presence on judicial review, advocating a particular position, places her statutory neutrality in question. *Mitchell et al. v. Director of Employment Standards* (unreported decision of the British Columbia Supreme Court, Vickers, J., dated December 23, 1998) at p. 13

The Director's argument in this case, says counsel, is outside the line because it does not attempt to explain the underlying basis for the Determination but rather attempts to prevent the Tribunal from dealing with the merits. The Director's application, submits counsel, is "unseemly and improper" and "jeopardizes the credibility of what is supposed to be a neutral statutory body determining rights as between employers and employees." The appellant submits that the Tribunal should not consider the Director's argument on this point.

As to the "merits" of the Director's argument on the time limits, the appellant says that the Director is simply wrong. The *Employment Standards Act* does not, she argues, permit the

dismissal of an appeal on the basis of the Tribunal's "expectations"; dismissal of an appeal on the basis of a lack of timeliness must be solidly grounded in the language of the *Act.* Section 112 speaks of delivering to the Tribunal "a written request that includes the reasons for the appeal." This, says counsel, is what the appellant did. The appellant delivered a written request that included the reasons for the appeal within the time limits set out in the *Act.* As for the later filing of a more complete submission, this appeal, submits counsel, is extremely complex and involves important issues with respect to the application and interpretation of the Regulations and significant calculation issues relating to the question of travel time. In particular, she says, the issues connected with the application of the Oil Patch Variance and Section 37.5 of the Regulations are significant and far-reaching and require resolution. The Director's submission is an attempt to "prevent the Tribunal from clarifying this very important issue."

The Branch's Program Advisor wrote on June 4, 1999 on behalf of the Director to reply to the appellant's May 20 submission. He submitted that the "Tribunal's view of the role and status of the Director in the appeal process has evolved and matured", pointing to recent decisions of the Tribunal in *World Project Management* (BC EST #134/97), *Traderef Software Company* (BC EST #D269/97) and most recently *Insulpro* (BC EST #D405/98). The Tribunal, he said, has decided that the Director's "neutrality" is of less importance than ensuring her meaningful participation in the process, including explaining the Determination. In the Branch's submission, it is not possible to escape an appearance of favouring one party over another, as that is an inherent consequence of explaining the correctness of the Determination. Accordingly, it says, the Tribunal's expectations are with respect to the *manner* and not the *nature* of the Director's participation. The Director, he submits, has the right to "give evidence, call and cross-examine witnesses in defence of her findings of fact, of her interpretation and application of the *Act*. She has the right to defend her Determination as vigorously as is necessary to substantiate its correctness." The essence of the Program Advisor's reply is captured in his colourful submission that "the Director does not read `neutral' to mean `neutered'."

As to the issue of the timeliness of the appellant's appeal, the Program Advisor points to Rule 5 of the Tribunal's Rules of Procedure, which states that: "The *Act* requires the written request to include the reasons for the appeal. The reasons for the appeal must do all of the following: … (iii) describe why you are appealing the Director's determination….". The Program Advisor submits that other parties to the dispute cannot be expected to reply to an appeal in the absence of knowledge of the reasons for it. If they were required to do so, this would decrease the efficiency of the system, thereby defeating one of the objectives of the Legislation. Here, says the Advisor, the appellant and its legal counsel filed appeal applications that simply stated disagreement with the Director's findings of fact and application of the applicable legislation. The appellant could have filed an application for an extension under s.109(1)(b) but did not do so. The Program Advisor submits that providing a party with the ability to file "token" appeals with submissions to follow would frustrate the effective resolution of issues under the *Act.* He seeks dismissal of the appeal on the basis that it does not meet the expectations of the *Act* or the Tribunal Rules and so should be dismissed pursuant to section 114(1)(a) of the *Act.*

ISSUES

There are two issues of a preliminary nature which will be addressed in this decision. The first is whether the submissions made in this case by the Program Advisor on behalf of the Director of Employment Standards should be received and considered by the Tribunal on the issue of timeliness. The second issue is whether the appeal filed by the appellant in these proceedings complies with the requirements of the *Act* and Rules and, if not, whether the Tribunal should exercise its discretion to permit the appeal to go forward in any event.

DECISION & ANALYSIS

Role of the Director

The nature of the Director's role in appeals under s. 112 has been extensively canvassed in previous decisions of this Tribunal. It is true, as the Program Advisor has submitted, that the law with respect to the Director's role has evolved over time. However, the fundamental principles have not changed.

The first and overriding principle is that the Director is and must remain a statutorily neutral party. The Program Advisor has argued that Tribunal decisions now place a greater value on the Director's participation in Tribunal proceedings than on her neutrality. In my view, the decisions do not support this proposition. With certain exceptions which will be discussed later, the Tribunal's expectations of the Director are that she will (through her representatives) conduct herself in Tribunal proceedings as a party which is neutral in the proceedings. This is a very important value. The maintenance of the Director's neutrality is crucial to the credibility of the Employment Standards Branch within the employment community. It is at the Branch level that the administration of employment standards law in this province is carried out. Parties to the Branch's proceedings must continue to have confidence that the Branch will administer the law in an unbiased manner. The Branch will not retain this confidence unless the Director remains strictly neutral in proceedings before the Employment Standards Tribunal, most of which will concern themselves with the correctness of a decision made by an Employment Standards Officer, the Director's own delegate.

As the Tribunal's decisions have illustrated, the requirement that the Director remain neutral has not prevented the Director from playing an important role in appeal proceedings. That is because there is no inherent inconsistency between the requirement for neutrality on the part of the Director and her active involvement in Tribunal proceedings. Indeed, the Director's participation in Tribunal decisions can be essential to ensuring that the Tribunal has a full and balanced appreciation of the facts and issues underlying an appeal. This is particularly so where the party which is responding to the appeal is unable to answer it in any meaningful way, whether this is because of a lack of knowledge, experience or resources.

The focus of the cases which have addressed the Director's role has been on the nature and extent of the Director's participation. While the Director's participation in appeals may be a welcome one in many cases, it is also of necessity a limited participation. Putting aside for a moment the special case which arises when the Tribunal is adjudicating an issue involving the Director's jurisdiction under the *Act*, the Director's attendance and participation in Tribunal proceedings is limited to "explaining the underlying basis for the determination and to show that the determination was arrived at after a full and fair consideration of the evidence and submissions of both the employer and the employee(s)": *BWI*, supra, at para. 15. This is to be distinguished from a role in which the Director may be seen to be "advocating" on behalf of one of the parties to the proceeding. The Tribunal has said that the Director must not become an adversary of the party whose interest it is to overturn or secure a modification of the Determination. Except for issues concerning her jurisdiction under the *Act*, she must not act as an advocate for the party seeking to uphold the Determination.

To the extent that the Director's participation is directed at the appropriate objectives mentioned above, she has considerable scope for participation as a matter of right in Tribunal proceedings. She may lead evidence, cross-examine witnesses and make submissions. It is apparent from a review of the August 20, 1997 decision of British Columbia's Supreme Court in *Mitchell et al. v. Director of Employment Standards*, supra, cited by counsel for the appellant, that the permissible scope for participation by the Director in Tribunal proceedings if far broader than it is before the courts.

The Tribunal in the *BWI, supra,* case observed that there may be a "fine line" between the Director's role in appearing before the Tribunal to "explain" the Determination which is under appeal and appearing as an advocate for a party in the Tribunal's proceedings. Indeed, the Program Advisor in these proceedings has argued that there is often no line at all in practice since the respondent will almost always see the Director's participation as an adversarial act so long as she is opposing the result sought by the respondent. I do not agree that the line has been blurred beyond any practical meaning. It may well be that a respondent to an appeal will subjectively consider the Director to be an adversary whenever the Director takes a position which is contrary to the respondent's interests. But the respondent's perception of the Director's participation is not what governs. What is governing is whether, on a review of the manner and content of the Director's submissions or participation, the Director has in fact over-stepped the bounds of neutrality. There is no reason to dispense with the requirement for neutrality merely because respondents may subjectively consider the Director to be an adversary no matter how she presents her arguments.

Ordinarily, the Director's role is confined to explaining a Determination and demonstrating that the Determination was arrived at after a full and fair consideration of the evidence and submissions. In explaining the Determination, the Director is, in essence, setting out for the benefit of the Tribunal why she submits that the Determination is correct. This can involve the Director in making detailed submissions on the facts and law as they relate to explaining and supporting the Determination. However, beyond this, the Director may not

go for to do so will risk her ability to carry out her statutory role. It is here that perception is important. If the Director were permitted to take a full advocacy position on behalf of a party in Tribunal proceedings, it is difficult to see how the parties could have confidence in the Director's neutrality when they appeared before her on other matters or if the current matter were referred back to her by the Tribunal.

The exception is where the Director is participating in a proceeding in which the issue before the Tribunal is the scope of the Director's jurisdiction under the *Act*. Here, the Tribunal has said that the Director has a "vital interest in advocating for a result that is perceived by her as being consistent with her jurisdiction and with the objectives of the *Act*, even if her position could also be characterized as advocating in favour of a party": *Insulpro, supra,* para. 71. As such, it is permissible and even expected that the Director will take the primary role in presenting the "jurisdictional facts" supporting her position: see *Insulpro, supra,* para. 72. In these kinds of cases, the Director's arguments, however vigorously pursued, are in favour of a jurisdictional position, and not a party. The Director remains statutorily neutral. Her advocacy in defence of her own jurisdiction does not diminish her neutrality.

To this point, I have been concerned with the issue of the *scope* of the Director's participation. It is also important to deal briefly with the *manner* of the Director's participation. If the important goal of ensuring neutrality is to be fully met, the Director must not only *be* neutral but to the extent that it is reasonably possible *appear* to be neutral. A submission which is fervent or combative will likely not meet the standard of neutrality expected by the Tribunal. A submission which is focused on issues rather than personalities (except to the extent that such a latter focus is required to explain the Determination) and which takes a purposive and tactful approach will almost certainly maintain neutrality in appearance as well as deed. Somewhere in between there is the proverbial fine line. But it is not too fine a line. The Director must not be required to *walk on eggshells* when making a submission. It is important to the resolution of the issues before the Tribunal that she feel able to make a full and persuasive submission within the scope permitted in the Tribunal's decisions. However, this can most certainly be achieved without running the risk that a respondent -- who as the Program Advisor has said may perceive any opposition by the Director to be offensive -- will have the right to complain that the Director has crossed the line and lost neutrality.

There is no doubt that it can be difficult for any participant in legal proceedings to restrain themselves from joining the fray when under very harsh attack by another party. Some appellants may file submissions which are openly contemptuous of the Determination and the officer who made it. It is important for all parties to understand that appellants who file such submissions do themselves no favour by adopting this kind of tone. An appellate tribunal like the Tribunal is moved not by the temperature of a submission but by its good sense and persuasiveness. It is obvious that submissions which are shrill and unnecessarily disrespectful of the decision below are filed at risk of their maker's credibility. There is no reason for the party answering the submission to risk its own credibility, let alone neutrality, by responding in kind.

The last point I wish to make on the general law regarding the participation by the Director is that the Tribunal decisions to this point have concerned themselves only with the participation of the Director as a matter of right. In my view, there may be instances in which the Tribunal will either invite a submission from the Director or admit one which has already been filed, even if those submissions deal with issues other than or go beyond explaining or defending a Determination.

The current case is a good example. A strict application of the foregoing principles would hold that the Director may not participate as a matter of right in the discussion on the issue of the sufficiency or timeliness of an appeal. It is quite apparent that the issue of timeliness requires no explanation about nor defence of the Determination. It is a procedural issue involving procedures at the level of the Tribunal, not the Branch. Although it is clear that the Director has an ongoing interest in ensuring that there are timely resolutions to employment standard issues, this does not extend as a matter of right to making submissions contrary to the interests of a party on the issue of the sufficiency or timeliness of appeal submissions. However, in order to ensure the proper development of law and policy before the Tribunal, a panel of the Tribunal may consider it appropriate in a given case to solicit or receive the Director's submission on the point, particularly when the successful party at the Branch level (it could be a complainant or a respondent) is unable to meaningfully contribute to the matter. This may apply, as well, to other issues which, as a matter of right, will be beyond the scope of the Director's role in Tribunal proceedings.

The frequency with which this may occur and the conditions under which the Director may be invited to make such submissions are subjects which I will leave to future panels. However, it appears clear that the Tribunal should be able to call upon the Director to make submissions wherever this may advance the interests of justice and ensure a balanced and complete discussion of the issues. When the Director chooses to make a submission under these circumstances, it will be expected that she will do so as a neutral party, albeit one which may express a position which, if accepted, may favour or dispute the position taken by one of the parties to the proceeding. The Director's role when making submissions on issues which are beyond her right to appear should be akin to that of *amicus curiae* in common law proceedings.

Having reviewed the applicable principles, I now turn to the question of whether, in view of these principles, the Director can be heard on the issues that the Program Advisor has discussed in his letter of May 5. The first observation which I might make about the May 5 letter is that it appears to be a well-constructed but patently adversarial statement of the Director's opposition to the appeal. While I do not agree with appellant's counsel that the letter is "unseemly or improper", it is simply too vigorously adversarial in parts and does not distinguish between issues on which the Director may present her position forcefully and others on which it is doubtful the Director can present her position at all.

The first part of the May 5 letter deals with the issue in question, namely, whether the appeal application is timely and complete. I agree with counsel for the appellant that the Director has no standing as a matter of right to make an argument on this issue. However,

exercising the discretion which the Tribunal has to invite or receive a submission from the Director on an issue of this kind, I am prepared in this case to receive and consider the Program Advisor's submission on the issue of timeliness of the appeal. There are surprisingly few Tribunal decisions on the questions which concern me in this case. This is a situation in which I have considered it important to have more than one point of view on the issues surrounding the sufficiency of the appeal documentation.

Sufficiency of the Appeal Documentation

The issue in this case is not the *timeliness* per se of the appeal but rather the sufficiency of the appeal documentation. This is not simply a play on words. The appeal documentation was submitted on April 13, one day before the end of appeal period. In that sense, it was timely. The question is whether the documentation filed in support the appeal complied with the requirements of the *Act* and Rules in terms of its content and, if not, whether the Tribunal should permit the appeal to proceed nonetheless. As I said earlier, this is not a question which has attracted much attention in the decisions of the Tribunal. Most of the cases on timeliness concern themselves with applications for an extension of time to file originating appeal documentation.

The statutory scheme for appeals is quite straight-forward. Section 112 (1) of the *Act* provides that: "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" (my emphasis). Section 109 (1) (c) of the *Act* provides the Tribunal with the right to "make, with the approval of the minister, rules about how appeals and reconsiderations are to be conducted … ". The Tribunal has made Rules of Procedure specifically dealing with appeals. The Rules were approved by the Minister in November, 1995. The following Rules address issues which may have a bearing on the outcome of this case:

> 3. You must appeal a Determination of the Director by filing with the Tribunal a written request within the time limits and according to the procedures set out in Sections 112 and 113 of the *Act.*
>
> 4. The written request for appeal must be in form 1 and must contain the following information:
>
> > (a) the full name, address, telephone and facsimile numbers of the person submitting the request and their representative if any;
> >
> > (b) a single address for delivery.
>
> 5. The *Act* requires the written request to include the reasons for the appeal. The reasons for the appeal must do all of the following:

(i) identify the specific Determination of the Director that you are appealing, and attach a copy of that Determination;
(ii) briefly outline the relevant facts;
(iii) describe why you are appealing the Director's Determination; and
(iv) describe the order or orders you want the Tribunal to make.

10. The Tribunal may refuse to accept a written request that does not comply with these Rules.

11. Unless otherwise permitted by the Tribunal, a written request will be processed only if it complies with the Act and these Rules.

21. Nothing in these Rules is intended to limit the power enjoyed by the Tribunal under the Act.

As can be seen, Rules 4 and 5 set out a number of specific requirements for the content of appeals. Rule 4 requires that the written request must be in form 1. Rule 5 repeats the requirement found in s. 112 of the *Act* that an appeal must include "reasons" but elaborates on this requirement by providing that these "reasons" must: (1) identify and attach the Determination; (2) briefly outline the relevant facts; (3) show why you are appealing the Determination; and (4) describe the order(s) requested.

An appellant filling out Form 1 in compliance with the Tribunal's requirements will find a slightly different formulation of the requirements. Whereas the Rules state that the appellant must "briefly outline the relevant facts" in an appeal, paragraph C of Form 1 asks the appellant to "state clearly what facts are in dispute." Arguably, this is a somewhat narrower requirement. And whereas Rule 5 (iii) requires the appellant to describe why it is appealing the determination, Form 1 appears to expand somewhat on this requirement by asking an appellant to answer the question in two ways: (1) by stating "why the Determination is wrong"; and (2) by giving "clear reasons why you are making this appeal".

It remains to be said that Rules 10 and 11 when read together do not mean that a failure to comply with the Rules will in all cases result in the dismissal of an appeal. The Tribunal retains a discretion to permit the appeal to go ahead or to dismiss it. As s. 21 of the Rules makes clear, the Rules do not fetter the discretion of the Tribunal established under the *Act.*

The issue in this case is whether the appeal should be dismissed because it has not been properly "requested" within the time limits set out in the *Act* and the content required by the Rules. This requires a consideration of the fundamental question of how strictly the requirements of the *Act* and the Rules will be applied in assessing the sufficiency of appeals which are otherwise filed in a timely manner. To answer this question, I must have in mind a number of important interests. One of these interests is in finality. It is trite law that justice delayed is justice denied. As the Director has argued, the appeal provisions of the *Act* will be brought into disrepute if it is permissible for an appellant to simply file a nominal appeal for the purposes of keeping the dispute alive. Were the

Tribunal to permit this as a matter of course, this could impair the work of the Employment Standards Branch and disrupt the administration of employment standards in this province. I fully agree with this proposition.

Dealing with a quite different fact pattern than is present in this case, the panel in *SSC Industries Ltd.* BCEST #D087/96 had the opportunity to consider the purposes of the appeal procedures and their value for ensuring a speedy conclusion to issues under the *Act*:

> The purpose for placing time limits and procedural requirements in the appeal process is twofold: first, it meets the statutory purpose of ensuring a fair and expeditious determination of disputes arising under the *Act*; second, it ensures a closure on the matters in dispute, preventing "open-ended" claims and responses which would ultimately result in an unmanageable review process." (at para.8)

To this point, the interests recited tend to favour a strict rather than permissive approach to assessing appeal documentation. But there is a very important counter-balance to the need for speed, efficiency, and finality. The counter-balance is that the process must be fair and perceived to be fair. In order for the appeal process to be fair, it must be accessible to those who are expected to use it. In many cases, those who are expected to use the appeal process are unsophisticated employees and employers, unsophisticated at least in the language of the law.

In his Report entitled *Rights & Responsibilities in a Changing Workplace, a Review of Employment Standards in British Columbia,* Professor Mark Thompson spoke about the needs of the users and the hope of the community that they would be met in the new *Act*:

> The advice the Commission received from members of the community familiar with the [previous] appeals system, the staff of the Minister and the Attorney General was almost unanimous. An appeals system should be relatively informal with the minimum possible reliance on lawyers. Cases should be decided quickly at the lowest possible cost to the parties and the Ministry. The process should not only be consistent with principles of natural justice, but be seen to meet those standards." (at p. 134)

It is obvious that there is a sensitive balance to be struck between the interest of ensuring that the process of adjudication moves quickly and with finality and the interest of ensuring that appellants are not effectively denied access to the process by an overly technical application of the rules. I am attracted to the approach taken by the panel in the Tribunal's decision in *Stohlstrom* BCEST #D453/98. In that case, the Tribunal was called on to consider the sufficiency of appeal documents in which the appellant had not expressly set out the relevant facts or relief sought but had instead referred to the Determination and other documents as those containing the necessary information. The Tribunal found that despite these apparent flaws the appeal documents sufficiently described the "reasons" for the appeal to allow both the Tribunal and the respondent to know what was at issue:

> ¶ 16 In my view, considered collectively, the appeal form and attached documents (and those incorporated by reference) contain an adequate--indeed, a very complete--summary of the relevant facts and the reasons for appeal. This is manifestly not a case where the appellant simply states that the determination is "wrong" and ought to be set aside. The appellant's position is set out in some detail in the various documents and, although at odds with the employer's view (and that of the delegate as set out in the Determination), I do not think it can be fairly said that the employer did not know why Ms. Stohlstrom was appealing the Determination. I can only add that having reviewed the appeal documents in question prior to the appeal hearing, I was of the view that I had a reasonably good understanding of the basis upon which the Determination was being challenged.
>
> ¶ 17 I therefore find that this appeal cannot be dismissed on the basis that the appeal documentation did not adequately set out the reasons for the appeal.

I must now turn to the appeal documents in this case to determine whether the appellant has complied with the *Act* and Rules (and, by extension, Form 1) or, if not, whether I should exercise my discretion to permit the appeal to go forward notwithstanding. It will be necessary to consider each ground on its own merits, as it is entirely possible that an appellant could adequately provide reasons for appeal on one issue while completing neglecting to do so on another.

Employment Standards Act Regulation 37.5 & Oil Patch Variance

It will be convenient to deal with the first two grounds for appeal together. In the company's appeal submission of April 13, 1999, it identified as one reason for the appeal the following: Grounds 1 and 2: Determination of employment position not falling under Section 37.5 Employment Standards Regulations, Oil patch exemption.

Attached to the appeal submission was a detailed submission from the Northern Society. I have referred earlier in this decision to the detailed content of this submission. In her follow-up letter of April 14, 1999 the appellant's counsel identified the formal grounds for appeal on these issues as follows:

> The Director's Delegate erred in finding that the Employee's position was not covered by s. 37.5 of the Regulation to the Employment Standards Act, and thus finding that the Employee was owed overtime pay.
>
> The Director's Delegate erred in finding that the Employee's position was not covered by the variance from the overtime provisions of the Employment Standards Act for workers working in the Oil Patch, which variance was in existence prior to October 27, 1997, and thus finding that the Employee was owed overtime pay.

On a reading of these materials as a whole, I find that they quite comfortably comply with the requirements of the *Act* and Rules. The fact that the Northern Society submission was not reproduced on Form 1 but was sent as a separate attachment to the appellant's appeal does not detract from the fact that it represents a detailed statement of the facts relied on by the appellant and the appellant's position on the application of the Regulations to the facts in dispute. There could not be any doubt in the mind of the respondent or the Director as to the nature of the issues and the appellant's position on them. Considered together, the materials filed by the appellant on these issues meet all of the requirements of the *Act* and Rules. It is therefore my conclusion that the appeal on these grounds is timely and compliant with the *Act* and Rules and may proceed to adjudication by the Tribunal.

Ground 3 - Travel Time as Part of Work Day

The appeal materials on this issue raise much more serious concerns regarding sufficiency. In considering the sufficiency of the materials on this issue, it is necessary to consider the Determination itself, the appellant's originating appeal documentation and the letter submitted by its counsel.

The Director's Delegate's reasons on this issue were quite short. They read as follows:

> With respect to the issue of Travel Time. Mr. Pedersen [the complainant] advised that he always drove to the grader, hauling fuel and tools.
>
> The employer confirmed that the grader stayed in the bush, some days Mr. Pedersen had a company vehicle, other days likely caught a ride. He used a service truck to get to the grader. He filled up a Tidy Tank every day at camp and fuelled up the grader from the service truck every day. The employer supplied a list of dates and times which they submit was solely commuting and paid at straight time. Mr. Pedersen agrees to have these hours and wages removed from the work day and calculation.
>
> I find that Mr. Pedersen is entitled to compensation on the remaining travel time and that it forms part of the work day …

In its originating documentation, the appellant identified as one of its reasons for appeal the following: "Determination of incorrect compensation for overtime on service and travel time." The formal ground of appeal as it was presented by the appellant's counsel in her letter of April 14 reads as follows:

> The Director's Delegate erred in finding, in the circumstances of this case, that the Employee was entitled to compensation for travel time and that such travel time formed part of the work day.

The substantive issue here appears to be whether the travel time should have been considered by the Director's delegate as being part of the complainant's working day. Is the documentation filed by the appellant and its counsel on or before April 14, 1999 compliant with the *Act* and Rules?

Unlike the case with the previous two issues (Regulation 37.5 and the existence of a Variance), the appellant does not have the benefit of a detailed letter from Northern Society outlining the facts, issues and arguments. Looked at in isolation from the Determination itself, the appellant's letter of April 13 and its counsel's letter of April 14 say little more than that the Determination is wrongly decided on the issue of whether the travel time awarded formed part of the complainant's working day. There is no outline of the relevant or disputed facts nor any further description of why the appellant is appealing the Determination.

While these observations would appear to favour rejection of the appellant's appeal on this ground, the matter cannot be fairly decided without considering the role played by the Determination. An appellant's ability to craft a proper statement of disputed or relevant facts can depend to an important degree on the content of the delegate's reasons for decision. Employment standards officers have neither the time nor the need to issue decisions which recite every relevant fact learned during the investigation and identify

every principle of law, statutory or otherwise, relied on for the officer's conclusions. The Determination in this case is a well-organised, sequential and reasoned decision. However, on the issue of travel time forming part of the work day, the reasons are very sparse. The delegate has made a clear finding that the travel time forms part of the complainant's work day. However, he does identify the specific legal or factual basis underlying this conclusion. He does not identify which facts were rejected and which were instrumental in reaching his conclusions. Nor does he identify the legal test which he employed in reaching his decision.

It may be difficult in these circumstances for an appellant to do any more than recite the facts that appear in the Determination. Certainly, an appellant would be hard pressed to identify disputed facts, as it was the legal finding arising from the facts rather than any disputes of fact which appear to have led to the officer's conclusions. It might be equally difficult for an appellant to say much more about the officer's finding than has in essence been said here, namely, "the Director's delegate is wrong to have concluded that the complainant's travel time forms part of his work day." In the absence of more particularity in the reasons for decision, the appellant cannot be taken to know in fullness where the officer is alleged to have erred in his or her reasoning.

In considering whether the Tribunal should take a strict or more lenient approach, it is therefore important to take into account the nature of the decision which is being appealed. An appeal to the Labour Relations Board from a decision of an arbitrator is made under quite different assumptions. In the usual course, an arbitrator under a collective agreement conducts a formal evidentiary hearing and hears submissions from counsel whose business it is to appear before such adjudicators. The arbitrator's award usually involves a detailed recital of the facts, assessments of credibility where this is in issue, and detailed explanations of the arbitrator's conclusions complete with citations of the legal authorities relied on in reaching those conclusions. In this situation, it is not unexpected that the Labour Relations Board would adopt a policy of requiring comprehensive submissions on appeal in order for the matter to proceed. By contrast, a party appealing a decision of an employment standards officer simply cannot expect in the ordinary course to receive the kind of detailed decision issued by adjudicators in the labour arbitration setting. This is not a criticism of employment standards officers. They must perform their statutory functions under much different conditions than a labour arbitrator. However, the necessity for such officers to file decisions without the detail permitted to adjudicators who conduct full evidentiary hearings will have an unavoidable effect on the ability of appellants to formulate detailed statements on appeal. Much will depend on the quality and comprehensiveness of the Determination.

Having said all that, I have concluded that, while close to the line, the appeal materials filed by the appellant on this issue, read together with the Determination attached to them, comply with the requirements of the *Act* and Rules. They clearly identify the issue in dispute and the finding under appeal. While they do not elaborate on the reasons for the appeal, the Determination under appeal did not elaborate on the reasons for the officer's basic finding. I believe that in these circumstances there is sufficient compliance with the *Act* and Rules to permit the matter to proceed. If I am wrong about that, I would exercise

my discretion to permit the matter to proceed for I believe that it is right and proper that it be permitted to do so.

Ground 4 - Just and Reasonable Cause

The appellant has purported to appeal the finding of the Officer that it did not have just and reasonable cause for termination. The Officer's reasons for this decision are quite detailed:

> With respect to the termination issue. The employer has supplied a Letter of Termination dated July 21, 1998 indicating termination as a result of failing to attend a safety meeting. The employer has also supplied an incident report dated July 20, 1998 indicating employee drinking in camp. The employer further advised that "2 or 3 times a year, he would talk to the employee and after discussion, the employee would always improve for a while, then make a down hill slide again. " During the course of speaking to him, he told him that if he did not improve he would be fired. Verbal warnings only except on July 20/98. The employer was to look through his diary to see if there was any documentation. No further information was submitted.
>
> The employee contends that he never received any type of reprimand. He wanted to quit a few times and the employer would appease him by offering a raise …
>
> In order for an employer to establish just cause, he must convey what his expectations/standards are, where that employee is with respect to those standards, how long the employee has to reach those expectations and failure or unwillingness to meet those expectations will result in termination. At the same time an employer must not deliver multiple warnings with no further consequences.
>
> I find that the employer's information on termination as submitted is lacking in the essentials to establish just cause. As such I find Mr. Pedersen is entitled to two weeks compensation for length of service in the amount of $1242.00.

In its originating appeal document filed April 13, the appellant described as one of the reasons for the appeal: "Determination of termination without cause and without compensation for length of service." Its counsel stated the ground in her April 14 correspondence as follows: "The Director's Delegate erred in finding, in the circumstances of this case, that the Employer did not have just cause for termination of the Employee."

The Determination provided all the detailed reasoning required in order for the appellant to identify in some meaningful way the dispute which it had with the Determination on this issue. The Determination not only makes a finding that the appellant had not satisfied the evidentiary requirements for just cause, it sets out the facts in detail and the legal test relied on by the Director's delegate in finding against the appellant's position. An appellant reviewing the Determination on this issue would have none of the concerns of an appellant attempting to craft a submission on the previous issue. Here, on an issue where the onus

lies with the employer to establish just cause, it has said no more in its appeal submissions than that the Determination is wrong "in the circumstances of this case." Although the amount of detail in the appellant's submission in this case is really no different than on the issue dealing with travel time, the context mentioned above leads to a different judgment about compliance with the *Act* and Rules. The appeal documentation is not in compliance with the *Act* and Rules, whether or not they are applied strictly or permissively. I am not inclined on this issue to permit the appeal to proceed given the deficiency in the materials. If the appellant wishes to continue its pursuit of the appeal on this particular issue, it must bring an application for an extension of time to file its appeal.

CONCLUSIONS

I have considered the appellant's objection to having the Tribunal receive the Director's submissions on the issue of whether the appellant's appeal submission meet the requirements of the *Act* and Rules. I have agreed with the appellant that the Director is not entitled as a matter of right to make submissions on this issue. However, I have ruled that the Tribunal has the discretion to receive such submissions in any event in an appropriate case. Given that there are very few Tribunal decisions on the issues under consideration in this decision, I have received and considered the Program Advisor's submission on the issues in dispute.

I have also reviewed the materials on file and determined that the appellant's appeal may proceed on the first three grounds identified in its counsel's letter of April 14. I have found the materials on these issues to be compliant with the *Act* and the Rules. The appeal on the fourth ground, namely, just cause, is dismissed as it does not comply with the requirements of the *Act* and Rules regarding appeals. I have declined to exercise my discretion to permit it to go forward.

The appellant's submission dated May 12, 1999 and the complainant's submission dated May 11, 1999 may now be exchanged. I did not consider the content of those decisions in reaching the judgments expressed in this decision. However, I note that in its submission the appellant seeks to raise another ground of appeal dealing with what it alleges are errors in the calculation of wages in the Determination. While the Tribunal, and I am sure also the Branch, is always concerned to ensure that an administrative or mathematical error is caught in a timely manner, I cannot prejudge whether the Tribunal will grant leave to the appellant to argue this issue. Whether or not the appellant will be granted leave to add this additional ground is a matter which can be dealt with by the Tribunal once the submissions have been exchanged.

I do not remain seized of this matter.

John L. McConchie
Adjudicator