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 -

Certain Employees of Total Delivery Systems Inc. and
Jasta Holdings Ltd. and Polmateer Enterprises Ltd.
(the "Employees")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: David B. Stevenson

FILE No.: 2000/154

DATE OF DECISION: September 11, 2000

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Certain Employees of Total Delivery Systems Inc. and Jasta Holdings Ltd. and Polmateer Enterprises Ltd. (the "Employees") of a Determination that was issued on February 21, 2000 by a delegate of the Director of Employment Standards (the "Director"). The Determination notified the Employees that the Director considered their complaints under the *Act* to be resolved, that the investigation had ceased, the file closed and that no further action on their complaints would be taken by the Director.

ISSUES TO BE DECIDED

The issue to be decided in this appeal is whether the decision of the Director to cease the investigation of the complaints was a proper exercise of the authority of the Director under subsection 76(2) of the *Act*.

The issue to be decided raises significant questions of law and policy under the *Act* and of the interrelationship between individual claims arising under the *Act* and collective bargaining rights arising under the *Labour Relations Code*, R.S.B.C. 1996, c. 244 (the "*Code*"). Because of this, following the filing of the appeal and the receipt of submissions on the appeal, the Tribunal sought further submissions from the parties on several questions involving the application and interpretation of the *Act* to the circumstances of this appeal.

FACTS

On the 27th of April, 1999, the Communications, Energy and Paperworkers Union of Canada, Local 2000 ("CEP") was certified under the provisions of the *Code* for a unit of employees of Polmateer Enterprises Ltd. (the "Employer") described as "employees in a unit composed of dependent contractor drivers involved in bulk delivery of the Times Colonist, except office and sales".

At the time of certification, many of the employees in the bargaining unit had complaints that were being investigated by the Director under the *Act*. CEP advised the Director that it was their intent to resolve those complaints through the collective bargaining process. The Director suspended the investigation.

On January 27, 2000, the Director was notified in writing by David Coles, a national representative for the Communications, Energy and Paperworkers Union of Canada, that CEP and the Employer had successfully negotiated a collective agreement between them, covering a period from September 21, 1999 until February 1, 2001, and that it had been ratified by a majority of employees in the unit on October 5, 1999. Mr. Coles also notified the Director that "part of the negotiations made it clear that the employees would agree to not pursue their Employment Standards complaints" and the collective agreement had been ratified on that basis.

The notification concluded with the comment that the CEP considered the complaints to be resolved.

Based on that information, the Director issued the Determination under appeal. The Determination applied only to individual complainants who were employed by the employer at the time of ratification of the collective agreement. The claims of other individual complainants, who had ceased to be employed by the Employer, were not affected by the Determination.

In their appeal, the Employees take issue with the assertion by CEP that it was made clear the matter would be resolved in negotiations. They say:

> The driver's representatives at the table, Jim Atess and Don Randall, never verbally agreed to or heard a discussion to resolve or dismiss the complaints as part the Collective Agreement, nor was it written into and voted on in the Collective Agreement. We would question the CEP's statement about how well they "made it clear" that the collective agreement would concede all existing complaints.

In response, CEP says:

> The members of the Bargaining Unit were aware that the Employment Standards complaints were "on the table" with the employer during negotiations of the Collective Agreement, ratified on October 5, 1999. This issue was brought up in several meetings with the Bargaining Unit, including a meeting during which the Union's agenda regarding issues that it would take to the employer was ratified by the members of the Bargaining Unit. The issue was also brought up at the ratification meeting of the Bargaining Unit.

The Employer confirms that the Employees' complaints were "on the table" and takes the view that they were compromised, or relinquished, during collective bargaining.

ARGUMENT AND ANALYSIS

In issuing the Determination, the Director applied subsection 76(2) of the *Act*. That provision reads:

76. (2) The director may refuse to investigate a complaint or may stop or postpone investigating a complaint if

(a) the complaint is not made within the time limit in section 74(3) or (4),

(b) this Act does not apply to the complaint,

(c) the complaint is frivolous, vexatious or trivial or is not made in good faith,

(d) there is not enough evidence to prove the complaint,

> *(e) a proceeding relating to the subject matter of the complaint has been commenced before a court, tribunal, arbitrator or mediator,*
>
> *(f) a court, tribunal or arbitrator has made a decision or award relating to the subject matter of the complaint, or*
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> *(g) the dispute that caused the complaint is resolved.*

The Determination says:

> The *Employment Standards Act* allows for employment related disputes to be resolved through processes outside of the *Act*. The law also provides that disputes which are pursued through another process, such as collective bargaining or the courts, can not later be pursued under the *Act* as well.

The reference to "such as collective bargaining" in the above statement is curious, as there is no reference in subsection 76(2), nor in any other part of the *Act*, to collective bargaining being a proceeding that is contemplated by paragraph 76(2)(e) or (f). In fact, collective bargaining is not a "proceeding" at all; it is a statutory obligation flowing from the fact of certification. If subsection 76(2) has application, it can only be in the context of paragraph 76(2)(g). That conclusion is also consistent with the basis upon which the Director has responded to this appeal. In a reply submission to the appeal, dated March 15, 2000, the Director made the following argument:

> The Union is now the bargaining agent for the complainants. They advise that the complaints were resolved through bargaining. It would be inappropriate for the Director to proceed further with the complaints in these circumstances. It is my view that Section 76 is applicable to this case. As these complaints have been resolved through collective bargaining, the Director has exercised her jurisdiction to stop investigating pursuant to Section 76(2) of the *Act*.

The perspective contained in the above argument was also adopted by CEP and by counsel for the Employer in their submissions. CEP says:

> The Union's position is that it had the authority to bargain with the employer regarding this issue, and that the members of the Bargaining Unit knew that the Union was bargaining on this issue.

Counsel for the Employer said that CEP, as the exclusive bargaining agent for the Employees under the *Code*, had all the requisite authority to bind them to the agreement to "forego their Employment Standards complaints for some other benefits under the collective agreement".

The Employer also says the decision to terminate the investigation of the complaints could have been justified under paragraph 76(2)(c), that the complaints were *"frivolous, vexatious or trivial or . . . not made in good faith"*, however, there is no indication in the Determination that the Director acted on that basis.

In correspondence dated May 11, 2000, the Tribunal requested the parties involved to consider the appeal in the context of Section 4 of the *Act* and the extent to which the process and procedure contemplated by the *Act* for dealing with complaints should defer to the collective bargaining scheme generally. The Tribunal received submissions from all the involved parties.

Counsel for the Employer maintained the position originally taken; that the Employees had consented to the resolution of their complaints; and that CEP, as the certified bargaining agent for the Employees, could be taken to have secured the consent of the Employees to settle their employment standards complaints. Counsel also submitted that:

> . . . a Union carries with it a cloak of authority for members of a bargaining unit and if that Union tells the Employer it has the authority to settle matters either pursuant to collective bargaining under the *Labour Relations Code*, as to terms of a collective agreement, or under the *Employment Standards Act*, the Employer does not look behind that declaration of authority.

For their part, the Employees submitted that a trade union does not have the authority to compromise an individual's right to the minimum standards provided in the *Act*. They stated:

> Our Employment Standards complaints existed prior to the creation of the exclusive bargaining agency and should not be used as a bargaining tool for our current collective agreement. The complaints are individual complaints and we believe that these should not be compromised without having to acquire specific approval from the individual.

The response of the Director deserves particular attention. In correspondence dated May 26, 2000, the Director stated:

> Upon review of the four questions of Adjudicator Stevenson, I understood him to be seeking an answer first from the Union to which the Director and the Employer would then respond. This assumption was based in part on my view that the scope of the Union's jurisdiction is not entirely clear.
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> It is my understanding that in fact the Adjudicator intended for the Director to respond by today's date. In order to fully respond to the questions, I am requesting an extension to June 9, 2000 to fully canvas the law and provide written submissions.

The extension was granted. On June 2, 2000, the Director wrote to the Tribunal, expressing the view that certain factual matters should be resolved before the Tribunal considered the question of the authority of CEP to compromise the Employees' complaints in collective bargaining. No other submission was received before the end of the working day, June 9, 2000. On June 14, 2000, the Director filed further correspondence to the Tribunal, once again expressing the view that the factual issue, "that the settlement of the Employment Standards complaints was not included in the collective bargaining process", ought to be determined prior to undertaking a review of the points raised by the Tribunal with the parties on May 11, 2000. The letter also stated, in reference to the Employer's comments concerning the scope of CEP's authority, that:

> The Director does not agree that the Union has the blanket jurisdiction asserted by counsel for the employer. The collective agreement must in our view provide minimum standards that meet or exceed the ESA. The Supreme Court noted the importance of meeting minimum standards in *McLeod v. Egan*.

In closing, the Director added:

> The Director considers the issues raised by the Adjudicator to be significant. Once the Adjudicator has considered the Director's submission regarding the factual issue, we respectfully request an opportunity to submit detailed argument.

The request by the Director for a further opportunity to file a submission is not granted. The extension given to the Director to file submissions on the questions posed by the Tribunal had expired 5 days before the above request was made, with no submission from the Director and no request for a further extension. There was no basis for the Director to presume the Tribunal would agree to address the "factual issue" before considering the correctness of the Determination and the Director allowed the opportunity to file submissions to pass. I accept that there appears to be a factual dispute about whether, or perhaps more correctly, to what extent, the Employees agreed to allow their individual claims to be subsumed into the negotiations for a collective agreement. However, that matter was neither considered nor addressed by the Director in the Determination and it is, after all, the correctness of the Determination that is being examined in this appeal. In any event, the position of the Director in reply to this appeal was that CEP and the Employer had the authority to resolve the complaints through collective bargaining. No qualification was placed on that position, so at least from that perspective, the potential factual dispute is irrelevant to the specific question.

Because the Determination involved an exercise of discretion by the Director under the *Act*, I will first review the basis upon which the Tribunal might review an exercise of that discretion. In *Jody L. Goudreau and another*, BC EST #D066/98, the Tribunal set out its views about the circumstances under which it would interfere with the Director's exercise of her discretion in administering the *Act*:

> The Tribunal will not interfere with the exercise of discretion unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:
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> > ... a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Associated Provincial Picture Houses v. Wednesbury Corp. [1948] 1 K.B. 223 at 229

> Absent any of these considerations, the Director even has the right to be wrong.
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> Section 81 of the Act requires the Director to include, in a determination, the reasons for it. When assessing an argument that the Director has considered immaterial factors or failed to consider material factors, the Tribunal will confine itself to an examination of the relevant determination.

In *Takarabe and others*, BC EST #D160/98, the Tribunal added the following comment:

> In *Boulis v. Minister of Manpower and Immigration* [(1972), 26 D.L.R. (3d) 216 (S.C.C.)] the Supreme Court of Canada decided that statutory discretion must be exercised within "well established legal principles". In other words, the Director must exercise her discretion for bona fide reasons, must not be arbitrary and must not base her decision on irrelevant considerations.

Under subsection 76(1), the Director has a positive duty, subject to the matters set out in subsection 76(2), to investigate a complaint. Section 79 provides the options available to the Director once the investigation has been completed. In this case, the Director refused to continue or complete the investigation, concluding instead that the Employees' complaints had been "resolved and withdrawn" through the collective bargaining process. In reaching that conclusion, the Director did not consult with the Employees, but accepted Mr. Cole's assertion on that matter. Clearly, if CEP had no authority to compromise the Employees' complaints, then the Director has misconstrued the limits of her authority, specifically her right to discontinue investigating the complaints, and the decision is reviewable.

The Employer has raised several arguments in support of the proposition that CEP had the authority to compromise the employment standards complaints of the Employees.

First, the Employer says the grant of bargaining authority to CEP on April 27, 1999 effectively provided CEP with exclusive authority to represent all the employees in the bargaining unit, including the Employees, in respect of terms and conditions of employment with the Employer.

There is no disagreement with that proposition. Once a trade union is certified, it has the exclusive authority to bargain terms and conditions of employment for the employees in the unit. That result is dictated by Section 27 of the *Code*. As well, the decision of the Supreme Court of Canada, *Syndicat Catholic des Employes de Magasin de Quebec, Inc.*, (1959) 18 D.L.R. (2d) 346 has confirmed, as a matter of law, that once a trade union is certified to represent employees, an individual's right to negotiate terms of employment different from the collective agreement is abrogated. In this case, however, we are not talking about the right of the Employees to privately negotiate terms of employment different from the collective agreement or even to negotiate individual terms of employment in the face of a statutory grant of bargaining authority. Rather, we are talking about the right of an employee to insist on compliance with the minimum statutory requirements of the *Act* in respect of terms and conditions of employment that pre-existed the grant of bargaining agency.

The Employer also argues that the exclusive bargaining authority granted to the CEP in April 1999 included the authority to settle the Employees' employment standards claims. The

basis for that position is more problematic. There is certainly nothing in the *Act* that would give CEP, or any other trade union, that authority. In my view, considering the scheme of the *Act* and its purposes and objects, it would require clear language to conclude there was any intention on the part of the legislature to allow a certified trade union the authority to compromise individual employment rights that existed before a grant of bargaining agency. In the context of this argument, counsel for the Employer also argued:

> . . . if the five drivers now feel that they were not consulted by their own bargaining agent or that the Union negotiated an improvident agreement, or that it failed to properly represent them, their complaint is with the Union through the *Labour Relations Code*, not through an appeal to this body.

I agree that the Tribunal should be sensitive to the legislative scheme established under the *Code* for regulating relationships between a trade union and its members, particularly the provisions in the *Code* establishing a duty on a trade union to not act in a manner that is arbitrary, discriminatory or in bad faith in representing employees in an appropriate bargaining unit. At the same time, however, there is nothing in the *Act* which suggests an employee claiming the minimum statutory benefits contained in the *Act* should be compelled to proceed under the duty of fair representation provisions of the *Code* in order to secure those benefits. The reality is that, except in those matters found in Sections 43, 49, 61 and 69 of the *Act*, the Director is statutorily charged with ensuring compliance with the minimum statutory terms and conditions of employment in the *Act*.

The purposes and objectives of the *Act* express a public policy objective of insuring that employees receive conditions of employment that accord with minimum standards of decency and of protecting those employees who generally lack the bargaining power in the market to effectively protect themselves. To support these purposes and objectives Section 4 of the *Act* gives no effect to an agreement to waive any of the requirements of the *Act*, subject to four provisions, none of which apply in this case. For reference, Section 4 of the *Act* reads:

> *4. The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.*

The *Act* is remedial legislation, and, as such, should be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects, see *Machtinger v. HOJ Industries Ltd.*, (1992) 91 D.L.R. (4th) 491 (S.C.C.) and *Helping Hands v. Director of Employment Standards*, (1995) 131 D.L.R. (4th) 336 (B.C.C.A.).

Except for those matters found in Sections 43, 49, 61 and 69, there is nothing in the *Act* that allows a certified trade union, or any other person, to compromise an individual's right to the minimum requirements of the *Act*. Even in respect of the exceptions allowed in the *Act*, those apply only in the context of an operative collective agreement, which, if it is to be given effect, must "meet or exceed" the minimum requirements of the *Act* of the applicable parts or sections of the *Act*. By implication, the only exclusive bargaining authority recognized by the *Act* is the authority to bargain collective agreement provisions touching on matters found in Parts 4, 5, 7

and section 63 that meet or exceed the requirements of the corresponding minimum requirements of the *Act*.

In my view, the comments of the Tribunal concerning the authority of the Director to impose a settlement in *Takarabe, supra*, are equally appropriate to this case. In *Takarabe, supra*, the Director had reached an industry wide settlement in the bike courier industry that was less than the minimum statutory requirements of the *Act*. The Director had done so without consulting the complainants. Several individuals affected by that settlement appealed. The Tribunal concluded that the Director had overstepped her statutory authority in the circumstances and, in so doing made the following comments:

> We note that one of the purposes of the Act, as set out in Section 2(a), is to " ... ensure that employees in British Columbia receive at least the basic standards of compensation and conditions of employment.". This purpose does not stand in isolation from other purposes, such as: promoting the fair treatment of employee and employer as well as providing fair and efficient dispute resolution procedures. To achieve those purposes, the Legislature has enacted the various minimum employment standards in Part 2 through 8 of the Act. In particular, Section 4 of the Act prohibits any agreement which seeks to waive any of the minimum requirement of the Act or Regulation (subject to Section 43, 49, 61 and 69 - sections which recognize the existence of collective agreements that may contain terms and conditions which differ from the requirements of the Act). But, the Act also requires that the terms and conditions of such collective agreements must, when considered together, meet or exceed the requirements of the Act.
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> When the provisions of Section 4 are read together with the discretionary powers given to the Director under Section 78(1)(a), it is our view that Section 4 should not be interpreted to limit the proper exercise of the Director's discretionary power to assist in settling a complaint. Nothing in our analysis should be construed as placing limits on the circumstances under which the Director may assist in settling complaints. Further, our analysis should not be taken to support the proposition that the Director must, in all cases, press for enforcement of 100% of statutory entitlements. The Director may assist in bringing about a settlement which provides for entitlements that are less that those proscribed by the Act. However, in our view, the discretionary authority given to the Director to assist in settling complaints does not amount to an authority to impose a settlement without consultation or over the objection of the parties to the dispute. Moreover, if the Director's assistance does not bring about a settlement and she issues a determination, she cannot issue a determination which provides for less than the statutory minimum standards.

The Employer argues that even if CEP did not have the actual authority to settle the Employees' employment standards complaints, it nevertheless carried "a cloak of authority" to do so and the Employer was entitled to rely upon that authority. This argument is little more than an extension of the above argument and it suffers from the same deficiency. There was, as I have indicated, no basis in the *Act* for concluding the CEP had the authority to compromise the Employees' complaints. As well, there is nothing to indicate that the Employees ever granted the CEP the

authority to settle or compromise their employment standards claims. I am doubtful in any event that the legal principle of apparent or ostensible authority can operate to defeat the minimum statutory rights provided in the *Act*. It presumes that some party purporting to act on behalf of an employee could accomplish indirectly what Section 4 does not allow to happen directly - make an agreement to waive the minimum requirements of the *Act*.

For the above reasons, I agree with the position of the Employees that CEP had no authority, without agreement from each Employee, to compromise their individual rights under the *Act* - even through collective bargaining. As a result, the Determination is wrong in several respects. First, it failed to consider whether the employees agreed to relinquishing or compromising their employment standards claims; second, it incorrectly considered collective bargaining to be a "proceeding" contemplated by paragraph 76(2)(e) and (f); and, third, by inference it wrongly accepts that a trade union can make agreements that allow for the payment of less than the minimum statutory terms and conditions of employment.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated February 21, 2000 be cancelled and the matter referred back to the Director.

DAVID B. STEVENSON

David B. Stevenson
Adjudicator
Employment Standards Tribunal