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 -

Doug Clements and Alan Woolston
(the "Complainants")
and
Coastal Web Press Inc.
(the "Coastal"

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Mark Thompson

FILE NOS.: 98/338; 98/339; 98/343 & 98/344

DATE OF DECISION: November 6, 1998

DECISION

APPEARANCES

Sarah C. James	for Clements and Woolston
Doug Candy	for Coastal Web Press Inc.
Catherine Hunt	for the Director of Employment Standards.

OVERVIEW

This is an appeal by Coastal Web Press Inc. ("Coastal") and Doug P. Clements and Alan R. Woolston (the "Complainants") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") against two Determinations issued by a Delegate of the Director of Employment Standards (the "Director") dated May 11, 1998.

The Delegate found that Coastal had failed to failed to pay 13 employees overtime wages. Coastal stated that it had paid employees under the terms of a variance that it had been granted, but offered to settle the dispute for 50 per cent of the amounts of overtime wages owing to the employees, on condition that all employees must accept. In fact, the variance Coastal believed had applied to these employees had never been issued. Eleven of the 13 employees did accept the offer, but the Complainants declined. The Determination imposed the settlement on the Complainants. The Complainants argued that the Delegate had exceeded her authority by imposing the settlement. Coastal argued that funds held in trust for Clements and Woolston should be returned as the Complainants had not complied with the Determination.

ISSUES TO BE DECIDED

The primary issue in this case is whether the Delegate had the authority to impose a settlement on the Complainants. In the second instance, the issue is whether any payment should be made to the Complainants.

FACTS

The facts of the case were not in dispute. Counsel for the Complainants and the Director presented no evidence and relied on legal arguments. Doug Candy ("Candy") presented evidence from Coastal's perspective.

Coastal operates a printing business. In January 1995, Coastal and a number of its employees, including both of the Complainants, applied to the Director of Employment

Standards for a variance of hours of work. At the time, Coastal was located in Chilliwack, and the application was sent to the Employment Standards Branch in Abbotsford. The variance sought provided for overtime payment after 12 hours in a day or 40 hours in a week, with two different work schedules. While the application was under investigation, Coastal moved from Chilliwack to Surrey in March 1995. By some mishap, the application was closed in Abbotsford and never reopened in Surrey. The Employment Standards Branch notified Coastal by mail that it should re-apply to the Surrey office for a variance. Candy informed the Director's delegate that he never received a letter advising him to submit a new application for the Surrey location.

Candy stated that the move from Chilliwack was necessary for the survival of the business, but the change inconvenienced some employees, among them the Complainants. Several employees, including the Complainants, requested a compressed workweek in 1994, which caused Coastal to request the variance.

Coastal operated for over two years as though the variance had been issued, although it did not follow the prescribed schedule exactly. During that period the business grew, so a majority of the employees were not parties to the original request for a variance. In November 1996, a former employee complained about the work schedule. The subsequent investigation revealed that the Director had never issued a variance. A delegate of the Director conducted an audit of Coastal's payroll and found that 13 of 15 current employees were entitled to overtime pay in the total amount of $27,187.34. The amounts owed to the Complainants in this case were not in dispute.

No evidence or argument was offered in this proceeding that Coastal was financially unable to pay the full amount owed.

After some discussions with the Director's delegate, Coastal made an offer of settlement of 50 per cent of the overtime owed. The delegate met with the employees and explained the offer to them, including the amounts to which each would be entitled under the terms of the offer. Doug Clements, one of the Complainants, was designated by five other employees as their representative to collect all payroll records. The process was stated in the Determination in the following terms:

> The employer next made an offer of 50% and stated that this was his last offer and that all employees must accept. The offer was explained to yourself and various other employees and you were advised that, should a majority of the employees accept the offer, the Director would exercise her authority to accept the offer on behalf of all employees.

The delegate continued with her explanation of the process in the determination as follows:

> The offer was put to each employee, by mail, and eventually 11 of the thirteen (sic) employees accepted this offer. As Coastal refused to honour the settlement unless all employees accepted the offer, the Director

> exercised her authority to accept the offer on behalf of all the employees, and the wages were paid.

After the vote, the Director's delegate provided each of the eleven employees who had accepted the offer with a form entitled "Receipt of Payment and Termination of Complaint." The form contained a space for each complainant's name, and acknowledgment of the receipt of the specified amount in settlement of the complaint. It also contained the following statement:

> I am aware that certain other employees of Coastal Web Press may not accept this settlement and may appeal the Officer's findings to the Employment Standards Tribunal. As a result of this appeal, the Tribunal may order the payment in full of all wages owed to those employees. I agree that this settlement is binding on me regardless of any Tribunal decision.

Candy called Mr. Terry Coombs, a former supervisor for the company, as a witness on behalf of Coastal. Mr. Coombs stated that the employees who had worked the compressed workweek had been satisfied with the schedule. Coastal had not exerted any pressure on them to accept the schedule, and the employees had always given their best efforts for the company.

ANALYSIS

Counsel for the Complainants argued that Section 78(1) of the *Act* did not give the Director the authority to impose a settlement on her clients against their wishes. In addition, the Director's delegate did not have the authority to warn the employees that they would be bound by a majority decision regarding Coastal's offer. She also argued that most of the contents of the Determination were irrelevant to the decision so that the Determination failed to meet the standards in Section 81 of the *Act*.

Counsel for the Director argued that the *Act* gives the Director wide discretion. The Tribunal has set out the standards within which the Director must exercise her discretion. In *Gourdreau*, BC EST #D066/98, the Adjudicator stated:

> 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.

These principles were restated in a number of other Tribunal decisions, the latest of which was *Ludhiana Contractors Ltd.* BC EST #D361/98.

The thrust of the Director's argument that acceptance of an offer of settlement by a majority of employees affected constitutes a settlement. To permit a minority of

employees to block an offer of settlement accepted by the majority would undermine the Director's discretion to craft settlements. Section 2(d) of the *Act* states that one purpose of the *Act* is to "promote the fair treatment of employees and employers." Permitting the Director to make and enforce settlements advances this purpose.

The Director's authority in this case rests first with Section 78(1) of the *Act,* which states:

> The director may do one or more of the following:
>
> (a) assist in settling a complaint or a matter investigated under section 76;

In addition, Section 4 of the *Act* states:

> 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 four sections listed in Section 4 all refer to collective agreements, providing in general terms that the parties in a collective bargaining relationship may negotiate terms which, taken together, "meet or exceed" an employee's entitlement under the *Act*. During at least a portion of the period in question, Coastal's employees were represented by a trade union, but there was no argument that a collective agreement affected this case.

The terms of Section 4 are significant to the operation of the *Act*. The first purpose of the statute, stated in Section 2(a) is to:

> ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment.

Section 4 exists to support the intent of Section 2(a) in that even if one or more employees are willing to work for conditions beneath those contained in the *Act* or the *Regulation* established under the statute, such agreements are not valid. The heart of employment standards legislation is to guarantee that all employees, of any circumstances or bargaining power, receive the minimum standards established by the Legislature or the Lieutenant Governor in Council. To compromise this basic principle requires explicit language in the *Act*, which does exist, for example in Sections 43, 49 or 61.

Section 78(1) of the *Act* recognizes the practical issues arising from another purpose of the *Act*, to:

> (d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this *Act*.

Clearly, the administration of the *Act* is expedited if complainants and employers are able to agree on a settlement of a complaint without exhausting all of the procedures for enforcement. However, the limits of the statute must be respected.

The leading decision from this Tribunal on the meaning of Section 78(1) is *Takarabe,* BCEST #D160/98, also known as the *Bicycle Courier* decision. This case arose out of an audit of the bicycle courier industry. A number of complainants argued that they were employees under the *Act* and claimed statutory holiday and vacation pay arising from their status as employees. The Employment Standards Branch launched an investigation of the industry. At the conclusion of the investigation, the Branch and representatives of the industry entered into a "Self-Audit Agreement" for the industry to enable employers to bring their practices into compliance with the *Act* and to expedite the settlement of a large number of potential investigations. A delegate of the Director issued a number of determinations upholding the terms of the Industry Agreement.

The appellants in *Bicycle Courier* based their case on several grounds, the first being that the Director did not "have the statutory power to compromise the minimum entitlements of the Appellants under the *Act*." (para. 51). After an extensive review of the statutory and case law in this area, the Tribunal reached the following conclusion (at para. 76):

> 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 than 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.
>
> We are not persuaded that the circumstances of this appeal are analogous to the circumstances in which the Director may assist in bringing about a settlement of complaints from the former employees of a bankrupt

> employer. There may well be occasions where it is not possible for the Director to enforce employees' statutory entitlements because their former employer is bankrupt. However, that lack of funds is an enforcement problem rather than an issue which determines the employees' statutory entitlements.

Counsel for the Director argued that this case could be distinguished from *Bicycle Courier* on the grounds that the complaints in that case arose out of an industry-wide audit and settlement, that the complainants were told that their complaints could be investigated individually and the complainants had no opportunity to settle with their employers.

While the fact pattern in *Bicycle Courier* differed from this case, the legal principles in that decision must prevail. Section 4 of the *Act* clearly bars agreements to waive provisions of it. The language of Section 78(1) of the *Act* basically gives the Director the authority to assist in the settlement of complaints. There is nothing in that provision that confers on the Director the right to impose a settlement. Thus, the issue in this case is not a matter of the Director's discretion or the way in which she exercised her authority. The settlement proposed might have been reasonable under the circumstances of this employment relationship, but the Director exceeded her legal authority under the criteria stated in *Gourdreau, supra*.

Given the results of this analysis, it is not necessary to address the Complainants' arguments concerning the basis of the Director's decision in the Determination. Moreover, this analysis also deals with Coastal's appeal. The result of this Decision is that the Complainants will receive the full amount of the wages to which they were entitled. Their appeal did not constitute noncompliance with the Determination.

ORDER

For these reasons, pursuant to Section 115 of the *Act*, the Determinations of May 11, 1998 are cancelled. The Complainants are to receive the full amount of overtime to which they are entitled under the *Act*, plus interest accrued under Section 88 of the *Act*. I refer the matter back to the Director to calculate the wages and interest owed to the Complainants and, if necessary, to issue new Determinations in the appropriate amounts.

Mark Thompson
Adjudicator
Employment Standards Tribunal