

September 28, 1998

Tribunal File No. 98/451

CDET

TO INTERESTED PARTIES

**Re: Employment Standards Act - Part 13
Appeal of a Determination issued by the Director of Employment Standards date
June 18, 1998
Pipe-Eye Video Inspection & Services Ltd. -and- K. Brownschlaigle, P. Stanley
Decision Number: BC EST #D436/98**

This hearing commenced on September 4, 1998, and witnesses were called by the employer. On September 4, 1998 the employer and its counsel was present, as was Paul Stanley. The Director's delegate and Kevin Brownschlaigle were absent. The case was adjourned after the examination in chief of Ken Pelligren.

When the hearing re-commenced on September 23, 1998, the employer and counsel, Paul Stanley, Kevin Brownschlaigle and the Director's delegate were present. Both of the employees indicated that they did not wish to cross-examine Mr. Pelligren. The Director's delegate commenced his cross examination of Mr. Pelligren. During the course of that cross-examination, the Director's delegate suggested that the matter should be referred back to him. The parties are in agreement that some errors have been made in the Determination. Since I have not heard all of the evidence in this hearing, I will not comment on the errors.

All parties agreed that the matter should be referred to the Director's delegate, with the liberty of any party to re-set this matter for hearing by contacting the Tribunal Offices. The parties appear to think that this might take up to 45 days. Mr. Pelligren of the employer will meet and discuss this matter with the Director's delegate. The major issues appear to be:

- (a) the rate of pay for work performed by the employees when working on City of Nanaimo, Highway Contractors Ltd., and other jobs;
- (b) overtime and statutory pay entitlement of the employees;
- (c) the extent to which an employer may set off amounts which it says are due and owing by an employee for use of a cellular telephone and gas credit card.

As part of the adjournment arrangement the parties agreed that the deposit placed by the employer with the Director, in the amount of \$20,000, could be reduced to \$10,000. I indicated that I would consider the issue of jurisdiction in a written decision.

The employer raised a jurisdictional point during the hearing, which I reserved to a conclusion of the hearing of evidence, and which I will deal with in my written decision at the end of the case.

REASONS

I have considered this matter, and have concluded that I have no jurisdiction to make any order concerning the reduction of the deposit which presumably remains in the Director's trust account.

The jurisdiction of the Tribunal is set out in the *Employment Standards Act*. The *Act* does not give the Tribunal any power with regard to deposits made. While I do have discretion with regard to the procedures to be followed in the hearing of an appeal, in order to ensure the parties are given a fair hearing, the request with regard to the deposit goes beyond a procedural issue in the conduct of a hearing. I do not think that the parties can enlarge the jurisdiction of a statutory tribunal by agreement. Clearly, if the Determination were cancelled or varied than there would be implications for the deposit.

If the Determination were cancelled the deposit would be returned to the employer. The employer is not, however, asking that the Determination be cancelled. It is clear that there will be some monies owing by the employer to the employees, but the parties take divergent views as to the amount.

I make no order with regard to the deposit placed by the employer with the Director.

ORDER

I order, under Section 115 of the *Act*, that the Determination be referred back to the Director's delegate for further investigation.

Paul Love
Adjudicator
Employment Standards Tribunal

Interested Parties:

Pipe-Eye Video Inspection & Services Ltd.
Hunter Garrett Lobay, Barristers and Solicitors, Attention: G. E. Beaubier
K. Brownschlaigle, P. Stanley
Director of Employment Standards (Officer: Peter Gelmnitz)