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 -

Jannex Enterprises (1980) Limited
("Jannex" or the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE No.: 2000/042 and 2000/044

DATE OF HEARING: June 15, 2000

DATE OF DECISION: October 19, 2000

DECISION

SUBMISSIONS

Mr. Robert Fleming	on behalf of Jannex
Mr. Peter Kerr	on behalf of himself
Ms. Heidi Hughes	on behalf of the Director

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against two Determinations of the Director of Employment Standards (the "Director") issued on January 13 and 14, 2000. The Determination issued on January 14 concluded that Kerr was owed $15,808.20 by the Employer on account of vacation pay, statutory holiday pay, minimum wages, and unauthorized deductions. The Determination issued on January 13, 2000 concluded that Jannex had contravened Section 46 of the *Employment Standards Regulation* (the "*Regulation*") by failing to produce proper payroll records.

PRELIMINARY MATTER

The Employer takes issue with the manner in which the delegate carried out her investigation. For the most part, as noted in the Determination, the Employer communicated with the delegate through its counsel. The Employer says that the correspondence between its counsel and the delegate was in the nature of settlement discussions. Moreover, the Employer says that the delegate sought to persuade the Employer to settle the claim by adding new issues, or suggesting that further issues could be added if the matter was not settled and a determination issued, such as a penalty. The Employer sought to have the delegate testify at the hearing and sought production of certain documents. The issue of document production was for the most part addressed in the earlier decision in *Jannex Enterprises (1980) Ltd.*, BC EST # D200/00.

The Director opposed the application to have the delegate testify. The Director's counsel noted that in *Docherty*, BC EST #D098/00, the Adjudicator stated that while the Tribunal is empowered to order the delegate to testify, there must be "particulars given as to what is alleged to be bias with sufficient notice."

There was a great deal of correspondence between the delegate and the Employer's counsel. Counsel for the Employer says that the "paper trail" lays the foundation for calling the delegate to testify:

1) A letter from the delegate to Jannex on December 21, 1998 indicates that the delegate has received a complaint from Kerr. The letter mentions non payment of wages for April 1998, failure to pay vacation pay and statutory holidays and a hold-back of wages while he was on

sick leave. The letter requests certain information, including T-4 slips for the duration of his employment.

2) On January 11, 1999 counsel advised the delegate that he had been retained to represent Jannex in the matter of the complaint by Kerr.

3) On January 26, 1999, Fleming faxed a letter to the delegate, confirming that the latter was waiting for Kerr to decide whether to abandon his claim for severance pay.

4) On January 27, 1999, the delegate faxed a request for information to Fleming regarding vacation pay and statutory holiday pay. The letter also noted that the issue of "severance pay ... can remain on hold."

5) On February 2, 1999, Fleming re-iterated his request for confirmation of whether or not Kerr had abandoned his claim for severance pay and stated that Jannex would take no further steps in the matter until a confirmation had been provided.

6) On May 17, 1999, Fleming again wrote to the delegate. He stated that Jannex would like to know Kerr's total claim before deciding whether or not to settle. Fleming requested that Kerr be put to an election as to whether he wished to proceed with his claim for severance pay under the *Act*.

7) On May 20, 1999, the delegate faxed a letter to Fleming. The letter added a "new" item to the complaint, namely an "illegal" deduction. Counsel argues that the delegate "upped the ante" on the Employer by adding this "new" issue.

8) On June 30, 1999, the delegate wrote to the Employer, enclosing a Demand for Employer Records.

9) On July 14, 1999, Fleming wrote to the delegate, advising her that he had again been instructed to assume conduct of the complaint. The letter made reference to the Employer's wish to have the total amount of the claim available to it before deciding whether to settle or not. The letter requested an extension of the time set out in the Demand for production of records and, as well, particulars of the deduction.

10) On August 11, 1999, the delegate wrote to Fleming. She re-iterated that there were three points to be resolved by her: vacation pay, statutory holiday pay and the deduction. The letter attached a copy of Kerr's commission statement when the deduction was made and set out the amount(s) owed on the three bases, approximately $14,000.

11) On August 23, 1999, Fleming wrote to the delegate enclosing five invoices for an amount owed by Kerr to Jannex.

12) On September 13, 1999, the delegate wrote to Fleming. The letter stated, among others, that "there are other issues that will have to be addressed if this complaint proceeds to a Determination." Among these issues was the payment of minimum wages and the potential for penalties (violation of Section 17 (paydays) and failure to keep records of daily hours).

She also advised that a determination could be appealed to the Tribunal. Counsel argues that the delegate improperly threatened the Employer to compel a settlement.

13) The Employer's counsel responded on September 14, 1999, stating that the delegate had added new allegations to the investigation. He also, subsequently, requested information from the delegate, including excepts from the Interpretation Manual referred to by the delegate. She provided those.

14) On November 4, 1999, the delegate again wrote to Fleming. She advised him that she wished to bring the file to a conclusion. She stated that it was her view that the parties would be better served by a settlement. She also stated that if she needed to write a determination she "will have to include all aspects of the case and decide on each issue." She advised the Employer that a determination could be appealed to the Tribunal. The Employer argues that the delegate "upped the ante" to compel a settlement.

15) On November 26, 1999, the delegate wrote to Fleming, setting out her conclusions with respect to vacation pay, statutory holiday pay and the "illegal" deduction. She was of the view that Kerr was owed some $13,772.31. She also estimated that Kerr would be owed some $1,600 on account of minimum wages for a four month period. She also stated that she was of the view that she would be in a position to issue a penalty for the Employer's failure to keep records of daily hours. The penalty was stated to be $500. The delegate re-iterated that if a "voluntary settlement were reached no determinations would be written."

16) On December 16, 1999, Fleming made a written offer to settle the various claims made by Kerr. He also stated that if Kerr did not accept that offer, he expected that Jannex would appeal the determination referred to by the delegate in her November 26 letter.

17) On January 14, 2000, the delegate issued the Determination now under appeal.

Essentially, the Employer says that the delegate improperly used her powers under the *Act* to compel the Employer to agree to a settlement. The delegate did that by "upping the ante" on the Employer by adding "new" issues to the complaint and threatening penalties unless the Employer settled the complaint.

In my view, the correspondence between the delegate and the Employer touched on a settlement of the issues between the Employer and Kerr. However, the nature of the correspondence is more properly characterized as correspondence for the purpose of investigating the complaint. I agree with counsel for the Director that–overall–the delegate communicated with the Employer advising the Employer of the investigation and the progress of the investigation.

In my opinion, there was no abuse of the delegate's authority or discretion. It is clear from the correspondence that the delegate sought a settlement of the complaint. While I agree with the Employer that the delegate was–to an extent–"upping the ante," I do not agree that the circumstances demonstrate that the delegate improperly used her discretion. In fact, Section 78 specifically authorized the delegate to "assist in settling a complaint or matter investigated under the *Act*." One of the means available to the delegate in that regard is to arrange for a compromise that is acceptable

to the parties, for example, that the claim is satisfied through the payment of a smaller amount than the complainant would be entitled to should the delegate proceed to issue a determination. The delegate is not required to issue a determination and the delegate is not required to issue a penalty (see Section 79). In my view, the delegate has the discretion not to issue a penalty determination is she is of the view that would facilitate a settlement. If the penalty is issued for an improper purpose, and in my view, there is nothing to suggest that is the case here, the Employer may appeal the penalty to the Tribunal. Similarly, if the delegate, without basis in fact or law, suggests that she may award the complainant something the complainant is not entitled to under the *Act*, the Employer may appeal that to the Tribunal. In this case, the delegate did not go beyond what she was empowered to do under the *Act*.

At the hearing, I ruled that I did not agree that the communications between the delegate and the Employer was for the purpose of settlement and that I did not find the communications to be "threatening," as argued by the Employer. My analysis above sets out the reasons for those conclusions.

FACTS AND ANALYSIS

The salient facts are–for the most part–not in dispute. I understand from the Determination that Kerr was employed by Jannex, which is a greeting card and calendar distributor based in Ontario. He was employed in British Columbia. He worked for the Employer between February 21, 1994 and November 30, 1998, as a sales representative, though he was off on medical leave between May and November 1998 and was in receipt of benefits under the Employer's benefit plan. He was paid on a commission basis and did not receive vacation pay or statutory holiday pay. Commissions were paid when the product was shipped not when the order was placed.

The appellant has the burden to show that the Determination is wrong.

The appeal submission and the response raise a number of issues. I intend to address them in the order they were raised by the appellant Employer, omitting those grounds that were abandoned.

1. Employee or Independent Contractor?

The Determination is based on the premise that Kerr was an employee. It does not appear that the Employer took issue with that until the appeal. The Employer argues that it, nevertheless, is entitled to pursue this ground of appeal based on facts not in dispute. These facts include that the Employer did not supervise Kerr, that he set his own hours, and that Jannex did not supply tools or an office. Jannex concedes that its relationship with Kerr was an exclusive one, *i.e.*, he was not permitted to work for other companies. As well, Jannex concedes that it withheld and remitted E.I. and C.P.P. It also provided disability benefits.

Counsel for the Director argues, assuming the appellant Employer is entitled to raise the issue at this time, that there was no risk of loss and chance of profit and that Kerr simply was a commissioned sales person. She also notes that the parties treated the relationship as an employment relationship, pointing to the disability benefits provided to Kerr.

I agree and refer to the definition of "employee" in Section 1 of the *Act*. As well, I approach the employee status issue with the following principles in mind. It is well established that the definitions are to be given a broad and liberal interpretation. The basic purpose of the *Act* is the protection of employees through minimum standards of employment and that an interpretation which extends that protection is to be preferred over one which does not (*Machtinger v. HOJ Industries Ltd*., <1992> 1 S.C.R. 986). Moreover, my interpretation must take into account the purposes of the *Act* (*Interpretation Act*). As noted an a recent decision of the Tribunal, *City Import Center 1997 Ltd.*, BC EST #D170/00, at page 2, QL version:

> "Deciding whether a person is an employee or not often involve complicated issues of fact. With the statutory purpose in mind, the traditional common law tests assist in filling the definitional void in Section 1. The law is well established. Typically, it involves a consideration of common law tests developed by the courts over time, including such factors as control, ownership of tools, chance of profit, risk of loss and "integration" (see, for example, *Wiebe Door Services Ltd. v. Minister of National Revenue* (1986), 87 D.T.C. 5026 (F.C.A.) and Christie et al. *Employment Law in Canada* (2nd ed.) Toronto and Vancouver: Butterworth). As noted by the Privy Council in *Montreal v. Montreal Locomotive Works*, <1947> 1 D.L.R. 161, the question of employee status can be settled, in many cases, only by examining the whole of the relationship between the parties. In some cases it is possible to decide the issue by considering the question of "whose business is it"."

Based on the evidence, the legal principles referred to above, and the burden on appeal, it is clear to me that Kerr is an employee for the purposes of the *Act*. It is reasonable to conclude that the business is Jannex' and not Kerr's.

Given that conclusion, I do not need to deal with the issue of whether the Employer ought to be permitted to raise this issue on appeal.

2. The Director failed to give adequate disclosure of statements made by the complainant and others

Counsel for the Director says that she disclosed all the notes required to be disclosed as per my May 10, 2000 order (see *Jannex, above*). While counsel for the Employer says that there are no notes of the delegate's conversations with Kerr, I am prepared to rely on counsel for the Director's statement that she has disclosed all the documents required to be disclosed.

3. The delegate failed to provide an opportunity to respond to her report upon the conclusion of her investigation

The Appellant abandoned this ground of appeal at the hearing.

4. The delegate erred by incorporating without prejudice settlement discussions into the Determination

This ground of appeal has been disposed of as part of the discussion with respect to the preliminary matter, above. In my view, the communications between the delegate and the Employer, and, for the

most part, the Employer's counsel, were in the nature of conducting an investigation into a complaint and advising of the progress of that investigation. The fact that "new" issues come to light, and are brought to the attention of the parties, in the course of an investigation is in itself neither improper nor, indeed, uncommon.

5. The delegate erred in the manner in which she applied the 2 year limitation period to vacation pay

The Employer argues that the intent of Section 80 is to impose a two year limitation period on claims.

The Director argues, correctly, in my view, that Section 80 applies to the recovery of vacation pay that becomes payable in the two year limitation period, despite the fact that it may have accrued before that time (see *All Star Dental Laboratories Ltd.*, BCEST #D148/97). As noted in the Director's submission:

> "In this case, it is clear that the Employee's vacation pay in respect of the year February 22, 1995-February 21, 1996 only 'became payable' in 1997 and that therefore those amounts are not excluded by [the] language of Section 80."

6. The delegate erred in finding that Jannex had failed to pay minimum wage to the complainant when there was no evidentiary foundation for this finding

On this point, the Employer's argument is that the delegate's finding is based on Kerr's Record of Employment. The Employer argues that the ROE shows annual hours and that there are variations in those hours when considered on the basis of pay periods. In other words, the hours vary. The Employer says that there is substantial variation. The Employer says that the delegate's calculation is "pure speculation."

The Director pointed to the fact that the Employer did not keep records of hours worked and says that it was Kerr's evidence that he worked a minimum of 8 hours per day and often more. In fact, she argues, that the delegate gave the Employer the benefit of the doubt and used the hours indicated on the ROE from which the delegate calculated average hours of 7.5 hours per day.

Perhaps the basis for the delegate's calculation is less than perfect. However, in my opinion, the Employer has not met the burden to show that the delegate erred. If the Employer says that the hours of work varied dramatically from month to month, it is incumbent upon the appellant Employer to provide evidence to that effect. The Employer did not do that and this ground of appeal fails.

7. The delegate erred in not providing any or insufficient disclosure to the Employer of Kerr's claim to minimum wages and the "illegal deduction" and in not providing an opportunity to respond

This ground of appeal was abandoned at the hearing.

8. The delegate erred in considering the minimum wage and deduction claim at all because they did not surface until September 1999 and these claims were improperly

used to compel a settlement

In view of my ruling on the preliminary issue, it is not necessary to say much further on this ground of appeal. First, in my opinion, there was nothing improper in the raising the claims for minimum wages, even though these claims were not part of the original complaint. These matters arose in the course of the investigation and were properly brought to the attention of the Employer. Second, as mentioned above, I am of the view that these claims were not improperly used to compel a settlement.

9. The delegate erred in holding that "advances" on commissions cannot satisfy minimum wage requirements under the *Act*

The Employer says that there was no failure to pay minimum wages. If anything there was a failure to pay in a timely fashion. The Employer says that Kerr, for example, in 1997 earned almost $78,000 and that it is a perverse interpretation of the *Act* to require the employer to pay more on account of minimum wages.

The Director, quite properly, pointed to conflicting decisions of the Tribunal on the issue of "advances." In support of the Director's position she cited the Tribunal's decision in *Steve Marshall Ford*, BCEST #D382/99. In that decision, the Adjudicator stated that

> "... Commission salespeople are entitled to earn minimum wage. Where the salesperson's commissions do not total at least the minimum wage for the number of hours worked in a given pay period, the employer is obligated to pay the difference between the commission earned and the the minimum wage. Therefore, each employee should be receiving at least minimum wage for all hours worked on each pay period.
>
> ....
>
> Each pay period stands on its own and the minimum requirements of the Act must be met."

The Adjudicator in *Athlone Travel (Oak Bay) Ltd.*, BCEST #D210/00 disagreed. He reviewed the decision of the Tribunal in *Wen-Di Interiors Ltd.*, BCEST #D481/99 and cited the following excerpt (in part):

> "... While I agree that employees must be *paid* at least minimum wage for all hours worked in a pay period, it does not necessarily follow that monies so earned can be characterized as an 'earned amount'–such monies may or may not be, depending on the nature of the parties' negotiated wage bargain.
>
> ....
>
> However, as long as the employee is paid at least minimum wage in each pay period, monies so paid over and above actual commission earnings may be treated as an "advance" against future commission earnings and, therefore, should not be treated as an 'earned amount'."

The Adjudicator in *Athlone Travel* concluded:

> "Where these two decisions [*Wen-Di* and *Steve Marshall Ford*] conflict I prefer the reasoning in *Re: Wen-Di Interiors Ltd.* In my view, the adjudicator in *Steve Marshall* did not distinguish the right to be 'paid' minimum wage and the requirement to be paid all of the 'earnings' in that pay period. Simply put the law requires a person to be paid minimum wage whether they have earned it or not. Where no commissions are made in a pay period the minimum wage payment cannot be considered 'earnings.' The stated purposes of the *Act* are, *inter alia*, to ensure that employee receive at least basic standards of compensation but also to promote the fair treatment of employees and employers. It would be unfair to employers to expect them to pay additional wages to a commission salesperson in a poor pay period when the very next pay period earnings may exceed the minimum by a wide margin.
>
> In this case I find that there was an express employment agreement that ensured that the employee was paid at least minimum wage in every pay period whether she earned it or not. It was a term of the employment contract that such payments were 'advances' against future commission earnings. In my opinion, such an arrangement does not offend the provisions of Sections 16 and 17 of the *Act*."

I agree with the decision in *Athlone Travel*.

In the instant case, the Determination states:

> "In the months of February and December 1997 and February and March 1998 Kerr received less than minimum wage. At the same time the employer indicated on Kerr's cheques a 'loan' amount. Kerr characterizes this a requested payroll advance that the employer recovered when the larger commission cheques were paid to him. This constitutes an offset, which is contrary to the *Act*."

In my view, the delegate erred in law. It does not appear from the Determination that she investigated the circumstances of these "loans." In any event, in this case there may or may not appear to have been an agreement similar to that in *Athlone Travel*. Kerr, in one of his submissions to the Tribunal, takes issue with the Employer's example based on his 1997 earnings. He says that:

> "During the period of January 1, 1997 to May 15, 1997, I was paid a net total of $4,287.85 including 1 month at $843.12."

It may well be, therefore, that there was no arrangement whereby Kerr was paid at least minimum wage during each pay period, whether earned or not. In the circumstances, I prefer to refer this matter back to the Director for further investigation based on the principles set out in *Athlone Travel*.

10. The delegate erred by failing to apply the 2 year limitation period from the date the minimum wage complaint was raised as opposed to the date of the original complaint

Section 80 of the Act provides (in part):

> *80. (1) The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning*
>
> *(a) in the case of a complaint, 24 months before the earlier of the date of the complaint or the termination of employment, and*
>
> *(b) in any other case, 24 months before the director first told the employer of the investigation that resulted in the determination.*

I agree with the Director's argument. In this case there was a complaint. The fact that the original complaint does not make reference to the minimum wage issue does not preclude the delegate from going back 24 months from the date of the complaint.

11. The delegate erred in failing to consider money owing by Kerr to Jannex in a set-off of the deduction complaint

The Employer abandoned this ground at the hearing.

12. The delegate erred in imposing a $500 penalty for failing to produce proper payroll records when there was no evidence that Jannex failed to cooperate with the investigation

The delegate found that the payroll records did not contain daily hours of work. She issued the penalty for failing to produce proper payroll records. She stated that the Employer had contravened Section 46 of the *Regulation* which provides:

> *46. (1) A person who is required under Section 85(1)(f) of the Act to produce or deliver records to the director must produce or deliver the records as and when required.*

Section 98 of the *Act* provides:

> *98. (1) If the director is satisfied that a person has contravened a requirement of this Act or the regulations or a requirement under section 100, the director may impose a penalty on the person in accordance with the prescribed schedule of penalties.*

As stated in *Narang Farms and Processors Ltd*., BC EST #D482/98:

> "In my view, penalty determinations involve a three-step process. First, the Director must be satisfied that a person has contravened the *Act* or the *Regulation*. Second, if that is the case, it is then necessary for the Director to exercise her discretion to determine whether a penalty is appropriate in the circumstances. Third, if the Director is of that view, the penalty must be determined in accordance with the *Regulation*."

In the same case the Tribunal also stated:

> "Section 81(1)(a) of the Act requires the Director to give reasons for the Determination to any person named in it (*Randy Chamberlin*, BCEST #D374/97). Given that the power to impose a penalty is discretionary and is not exercised for every contravention, the Determination must contain reasons which explain why the Director, or her delegate, has elected to exercise that power in the circumstances. It is not adequate to simply state that the person has contravened a specific provision of the *Act* or *Regulation*. This means that the Director must set out–however briefly–the reasons why the Director decided to exercise her discretion in the circumstances. The reasons are not required to be elaborate. It is sufficient that they explain why the Director, in the circumstances, decided to impose a penalty, for example, a second infraction of the same provision, an earlier warning, or the nature of the contravention. In this case, the Determination makes reference to a second contravention of the same Section. In my view, this is sufficient.

In my view, this penalty must be set aside. It may well be that the delegate could have issued a penalty for failing to *keep* the appropriate records (see Section 28 of the *Act*). The delegate did not do that. The delegate clearly relied on the wrong provision of the legislation as the basis for the penalty. I am troubled by the fact that the delegate issued a penalty in the circumstances where the delegate's letter to the Employer, dated November 27, 1999 states that the "employer has willingly provided the records they do have when requested." This would appear to contradict the statement in the "boiler plate" Determination that the penalty was issued to "create a disincentive against employers who frustrate investigation through failure to provide records." As well, the penalty itself Determination states that Jannex provided the record it had maintained. In brief, it does not appear that Jannex, in fact, contravened Section 46 of the *Regulation*. Moreover, I am troubled by the fact that the Determination goes no further than stating that the Employer contravened a provision of the *Act* or *Regulation*. In my view, in the circumstances, the use of a "boiler plate" explanation does not satisfy the requirement to give reason for the exercise of her discretion to issue a penalty. That is particularly so when the delegate, in fact, states that the Employer cooperated with the investigation.

13. The penalty was an abuse of process

In view of my conclusion above, there is no need for me to deal with this ground of appeal.

14. The delegate erred by failing to calculate interest on the minimum wage claim and the "illegal deduction" from the date they were made rather than from the date of the original complaint

Section 88 provides (in part):

> *88. (1) If an employer fails to pay wages or another amount to an employee, the employer must pay interest at the prescribed rate on the wages or other amount from the earlier of*

> *(a) the date the employment terminates, and*
>
> *(b) the date a complaint about wages or other amount is delivered to the director to the date of payment.*

In this case the complaint was delivered to the Director on November 30, 1998. I agree with the Director that is not required to calculate interest on an "issue-by-issue" basis as is suggested by the Employer. Section provides that interest is calculated from the earlier of the termination date and the complaint date. He was, in any event, also terminated from his employment on November 30, 1998.

ORDER

Pursuant to Section 115 of the Act, I order that Determination in this matter, dated January 14, 2000 be confirmed except to the extent that the issue of minimum wage entitlement for the period February and December 1997 and February and March 1998 is referred back to the Director for further investigation in accordance with principles set out above. The balance of the amount found to be owing to Kerr must be paid forthwith together with such interest as may have accrued.

The Determination dated January 13, 2000 is cancelled.

Ib Skov Petersen

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal