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 -

Harbour Gondola Victoria Ltd and
Bertram, Logan & Bertram Holdings Ltd

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	John M. Orr
FILE NO.:	97/507
DATE OF HEARING:	October 09, 1997
DATE OF DECISION:	October 29, 1997

DECISION

APPEARANCES

Ron Corrigal	For the Director
Eric M. Logan	For himself
Kevin Bertram	by telephone

OVERVIEW

This is an appeal by Harbour Gondola Victoria Ltd ("Harbour Gondola") pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination (File No. 063575) dated June 16, 1997 by the Director of Employment Standards (the "Director").

The Determination found that Eric Logan ("Logan") was retained to manage the operations of Harbour Gondola during the period of April 1, 1996 to July 8, 1996 at which time he was advised that his services were no longer required. Logan was hired by Kevin Bertram ("Bertram") who was the sole Director of Harbour Gondola. Harbour Gondola leased the boats from Bertram, Logan & Bertram Ltd ("BLB") in order to operate a small boat tour business in Victoria Harbour. Although the assets of the business were owned by BLB the employees were hired by Harbour Gondola. The Director's delegate found that Harbour Gondola and BLB were under the common control and direction of Bertram and therefore associated corporations pursuant to Section 95 of the *Act.* The Determination found that Logan was owed wages at the time of his termination which with vacation pay and interest amounted to $12,362.50.

Harbour Gondola has appealed on the basis that (1) the two companies were not associated companies,(2) that the Director's delegate had not made reasonable efforts to hear the evidence of the employer (3) that there was a release signed by Logan and (4) that the quantum of salary, if any, owing was incorrectly calculated.

ISSUES TO BE DECIDED

The issues to be decided in this case are:

1. Whether the two companies were associated within the meaning of S.95 of the *Act;*

2. Whether the evidence offered on behalf of the companies should be admitted when such evidence was available at the time of the investigation;

3. Whether there was a release given by Logan and whether, if so, it is effective to discharge the statutory obligations of the Companies;

4. Whether the quantum of salary owed was calculated correctly;

5. What is the effect of non appearance by the Companies ?

FACTS

One Notice of Appeal in this case was handwritten by Bertram and signed by him in the name of himself and on behalf of one of the companies, Harbour Gondola. Another notice of Appeal was filed by a Kenneth Rusnak, Barrister and Solicitor, on behalf of Harbour Gondola and BLB.
However at the Hearing no-one appeared on behalf of either company. Bertram appeared by telephone to give evidence on behalf of the companies but stated that he no longer had any interest in either of the appellant companies and was not an authorised agent for either.
Bertram did wish to give evidence on behalf of the Appellants and as he was calling long distance I heard his evidence and he was cross examined by Logan and the Director's delegate.

Bertram's evidence in a large part dealt with the grounds for dismissal of Logan but he also testified that the Determination had misinterpreted the salary structure for Logan. The Determination based the quantum of wages on a $30,000.00 wage over 6 months but Bertram testified that this was an annual salary. Bertram further testified that he had reached a settlement with Logan in which Logan received $1000.00 and a promissory note for $1000.00. The promissory note apparently set out in writing the terms of the settlement and a release of all claims. However, Bertram could not produce a copy of the note and testified that Logan had the only copy. Logan did not offer to tender the note.

Bertram testified that, although he had moved from his Victoria address, he was always available to be contacted by the Director and that Logan could have provided Bertram's address and phone number.

ANALYSIS

I advised those appearing that an Appeal under S.112 of the *Act* was not a trial *de novo* but that the process was intended to be flexible to ensure fairness and efficiency. I decided to admit the evidence of Bertram in light of the fact that Logan may not have been as forthcoming with the Director's delegate as he might have been in terms of supplying the address and phone number for Bertram to the delegate.

However, as no representative of either of the corporate appellants appeared, I have no evidence upon which to depart from the finding of the Director's delegate that the two companies are associated companies having common direction and control to come within the provisions of Section 95 of the *Act*. Based on the evidence available to the Director's delegate the finding was proper.

I am not persuaded that there was a release signed as no document was produced to witness such. There was indeed a cheque issued for $1000.00 to Logan which stated on its face, and Bertram testified, that it was in final settlement of all wages. Logan said that the $1000.00 was something to do with a rental deposit but I did not find him credible on this point. The $1000.00 should have been credited to wages owing. In any case, even if there was a release signed, the parties may not agree to avoid the provisions of the *Act* in regard to the payment of wages.

In terms of the quantum of wages I am satisfied that the salary for Logan was $30,000.00 per annum despite Logan's claims that the tourist season was only six months. Bertram testified and I accept that the company would have had other work to do in the off-season such as boat repairs and maintenance, marketing for the next season and attempting to generate some off-season income. The contractual document indicates clearly that the intention was for Logan to remain with the company for at least 4 years. He would receive shares in the company so that at the end of 4 years he would have 49% of the shares. This is not consistent with a six month contract. The document states that in the "1st year 10% + $30,000 Salary" and each of the 4 years are likewise described. Logan's version is not consistent with the probabilities surrounding the terms of this agreement and the circumstances of the business.

I find therefore that the Determination should be confirmed in so far as the companies being associated companies but I would vary the quantum as follows:

Wages:	3 months x $2500.00/mo	=	$7500.00
	1 week x $ 576.92	=	576.92
			$8076.92
Annual vacation pay:	4% x $8076.92	=	$ 323.07
Wages earned:			$8399.99
Wages received:		=	<$5040.00>
Wages owed:			$3359.99
Less Settlement			<$1000.00>
Balance owing			**$2359.99**

ORDER

I order, under Section 115 of the *Act*, that the Determination is varied to the extent that the amount to be paid by Harbour Gondola Victoria Ltd and Bertram, Logan & Bertram Holdings Ltd jointly and severally is $2359.99 plus accrued interest pursuant to Section 88. In all other respects the determination is confirmed.

John Orr
Adjudicator
Employment Standards Truibunal