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 -

International Energy Systems
(the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Mark Thompson
FILE NO.:	97/113
DATE OF HEARINGS:	May 28, October 21, 1997
DATE OF DECISION:	December 4, 1997

DECISION

APPEARANCES

Brian Davis	For himself
Diane MacLean	For the Director of Employment Standards
Ian Plumbley	For the Employer
Ralph Struve	For himself

OVERVIEW

This is an appeal by International Energy Systems Corporation (the "Employer") pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) against a Determination issued by a Delegate of the Director of Employment Standards on February 7, 1997. The Determination found that the Employer owed Mr. Brian Davis ("Davis") a total of $18,562.02 for vacation pay, unpaid wages, statutory holiday pay, compensation for length of service, benefits repayment and return of unremitted pension contributions, plus interest. The Determination further found that the Employer owed Mr. Ralph Struve ("Struve") a total of $9,455.78 for unpaid wages, compensation for length of service, vacation pay, unremitted RRSP contributions, plus interest.

The Employer, represented by Mr. Ian Plumbley "Plumbley" filed an appeal with the Tribunal on February 19, 1997 on several grounds. The most significant basis for the appeal was the assertion that Davis and Struve left the Employer to work for another company that was a successor to the Employer in the Determination. According to the appeal, Davis and Struve took instructions from the successor company prior to leaving the Employer, and the successor company should be liable for some of the wages and benefits owed to Davis and Struve. Because of a dispute among the directors of International Energy systems Corp., Plumbley did not have access to all the records necessary to support this appeal.

The appeal also disputed the amount of vacation pay owed to Davis from August 1, 1996 to January 17, 1997, claimed an overpayment to Davis for his pension contribution and contested the calculation of wages owed to Struve and his RRSP contribution.

Evidence and argument were presented at the May 21, 1997 hearing. Plumbley and Ms. Diane MacLean ("MacLean"), the Director's Delegate, agreed that they might be able to resolve some of Plumbley's objections to the Determination if they had additional time to review the records. Struve did not attend the hearing because he and Plumbley had reached agreement in settlement of his complaint. However, at the hearing Plumbley withdrew his offer of settlement on the grounds that at least part of the funds owed to Struve should be assigned to a successor company. In addition, the Director's Delegate asked to review the issue of a possible successor to the Employer, which had not been before her when she made her Determination.

On July 9, 1997, MacLean wrote to Ms. Norma Edelman, Registrar of the Tribunal, to report on the results of her discussions with Plumbley. After obtaining the Employer's payroll records and reviewing them with Plumbley, she concluded that she and Plumbley had reached agreement on the basis for calculating wages owed to Davis and Struve, leaving three issues to be decided: the basis for calculating Davis's vacation pay, wages allegedly owed Davis for "layover days" in Taiwan and the successorship status of the Employer. Plumbley did not contest the calculation of wages owed to Struve in the Determination, but if the argument on successorship were successful, the Employer's liability to Struve would be affected. The revised calculations, including interest to February 7, 1997 found that the Employer owed Davis $19,029.23. Struve's entitlement remained the same as the Determination. MacLean also calculated the reductions in the amounts that the Employer would owe both Struve and Davis if the Tribunal found that they had been employed by a successor company and the reductions in Davis's entitlement if Plumbley's arguments on Davis's vacation pay and layover time were successful.

ISSUE TO BE DECIDED

At the October 21, 1997 hearing, the parties agreed that there were three issues to be decided: the basis of Davis's entitlement to vacation pay; Davis's entitlement to pay for "layover days" while he was working in Taiwan and the successor status of another company that would affect any liability of the Employer for wages and benefits owed to Davis and Struve.

FACTS

The Employer builds gas turbine generators. According to Struve, the company was incorporated in 1992. The three principals were Plumbley, Mr. Doug Cullen ("Cullen") and Mr. Wayne Ryan ("Ryan"). Davis began employment for the Employer as a field service technician on August 1, 1993. He continued to work for the Employer until January 17, 1997, although his last pay cheque was December 21, 1996. Struve started with the Employer as a project manager on August 1, 1993, and his circumstances were similar to Davis. His last pay cheque was December 30, 1996, although he continued to work for the Employer until January 24, 1996. Both Davis and Struve considered themselves dismissed when the Employer missed two pay cheques. Neither resigned his position with the Employer.

Davis and Ryan, then the president of the Employer, exchanged correspondence in 1995 concerning Davis's terms of employment. Two proposals from Ryan and a draft contract were presented in evidence. Davis and Plumbley signed an employment contract on August 11, 1995, covering the period August 1, 1995 to July 31, 1996. The contract covered rates of pay, boot and tool allowances, repayment of benefit deductions, long term disability, vacation and an "out of town per diem." The provision covering vacations was:

> Vacation entitlement for period of August 1st, 1995 to July 31st, 1996 shall be 5 weeks (10%). Excess vacation pay due on August 1st of each year.

Plumbley stated that the contract meant that Davis would receive five weeks of vacation based on a normal work week. Davis was receiving double time for overtime, which covered any additional vacation entitlement. Davis testified that previously his vacation pay was based on his overtime worked. Had he reverted to vacation pay based on straight time when he signed a new contract, he would have been worse off, despite the increase in vacation entitlement. Davis presented payroll records showing that in 1994 and 1995 his vacation pay had been based on total wages, i.e., including overtime. MacLean verified that the only difference between the Employer and Davis on the issue of his vacation entitlement on October 21 was the basis of calculation, i.e., five weeks of straight time wages or ten per cent of gross wages. Other aspects of the original complaint, including the amount of vacation time Davis had taken in 1996 were resolved by mutual agreement with MacLean's assistance.

The August 1995 contract did not mention "layover time," i.e., payment for nonworking days Davis spent out of the country. Plumbley asserted that Davis raised the matter of payment for layover time shortly before he left for a job in Taiwan and after preparations for the work in Taiwan had been completed. According to Plumbley, Davis refused to go to Taiwan unless an addendum was added to his contract covering weekends.

On April 18, 1996, Davis and an officer of the Employer signed an addendum to the employment contract which stated:

> When required, layover time on a Saturday or Sunday shall be banked as 8 hours straight time per day. This banked time can be taken at a time mutually agreed to by both IES and B.C. Any banked time not used up by December 31st will be payable at the current rate of pay.

Davis stated that he left for Taiwan on May 18, 1996, one month after signing the addendum to his employment contract, although he admitted telling Plumbley that he would not go to Taiwan unless he was paid for the weekends he spent there. In the end, he and the Employer agreed that he could bank the weekend time. Davis claimed overtime when he worked on weekends at the client's request. Otherwise, he claimed layover time. The Determination included credit for banked time Davis had accrued in Taiwan.

Evidence concerning the status of the Employer in 1996 was not clear. All parties accepted that some time in October 1996, a dispute among the shareholders of the company occurred. Other shareholders had the locks changed at the Employer's premises in late October, effectively denying Plumbley access. Cullen told Davis that the board of directors had taken control of the company away from Plumbley, and Davis did not see Plumbley again. Davis and Struve continued to work under Cullen's direction, and Plumbley signed pay cheques until December 1996.

Davis stated that there was no change in the firm's operations except that Plumbley was not on the premises. Davis recalled doing two jobs for Methenex in October, but did not remember the contract or submitting an invoice. Davis also remembered going to Drummondville, Quebec in September or October and doing work for Air Canada in

September. Davis also used some of his banked time off in this period, since the office was only working four days per week. He gave his hours and expenses to the accountant.

Cullen started a new company, and Davis was hired after the date of his complaint against the Employer. Plumbley alleged that the new company controlled by Cullen received the benefit of the work of Davis and Struve between October 1996 and January 1997, although he had no documentary evidence to support this statement.

In January 1997, the Employer's bank account was frozen. Davis testified that Cullen told him to come to work that month. Davis was not sure if the work he performed was reimbursed by a customer. He moved a number of manuals, product catalogues and distributors' brochures, plus mufflers, all of which had been in Cullen's possession before 1993. He denied removing any items that were the property of International Energy Systems, in particular a laptop computer. Struve also testified that he worked in January under Cullen's instructions at International Energy Systems, but considered his employment terminated when the company failed to pay him two pay cheques.

Plumbley testified that Cullen set up International Energy Systems (1983) (IES (1983)) and incorporated it federally. Plumbley alleged that IES (1983) was using the same telephone and facsimile numbers and took over a contract with Kawasaki Heavy Industries that the Employer formerly held. According to Plumbley, the new company is carrying own the same business and representing itself as the same company as the Employer. Plumbley also stated that the new company had given directions to Struve and Davis.

Struve presented a statement that the assets of International Energy Systems Corp. had been placed in storage by a majority of the shareholders pending dispersal by a trustee in bankruptcy. He also asserted that no assets of International Energy Systems Corp. have been transferred to any other company. Materials moved from the Employer's premises to IES (1983) had been Cullen's property from a previous business and were not the Employer's property. This operation took place under Cullen's direction.

After January 17, 1997, Davis worked for Cullen for two weeks and then was employed by North American Energy Systems under a contract of employment. Struve worked for International Energy Systems until January 24, 1997, after which he began work for North American Energy Systems Corp, whose president was Ryan, until May 30, 1997. Struve worked for IES (1983), whose principal appears to have been Cullen after his employment with the Employer ended. Plumbley alleged that Davis signed a contract with Cullen after leaving the Employer. Davis denied that any such contract existed, and Plumbley did not present any evidence in support of his allegation.

Davis testified that after leaving the Employer, he worked for North American Energy Systems to the time of the hearing, but only for five days under Cullen's direction. In October Plumbley told him to work four days a week, and he took one day a week from his time bank in the fall.

MacLean found that the Registrar of Companies listed Plumbley as the secretary of the International Energy Systems and signatory on the bank account until January 1997. Struve

introduced a July 15, 1997 letter from a Kathleen Winton, who identified herself as a director of "International Energy systems (VCC) Corp., a member of International Energy Systems Corp. to the Corporate and Personal Property Registries . The letter stated that there were no directors of IES at that time and that Plumbley was not elected as a director of International Energy systems Corp. Ms. Winton requested that filings with the Corporate and Personal Property Registries on June 23, 1997 be disregarded. Records of the Registrar of Companies contained a document signed by Plumbley listing himself as a new director of International Energy Systems Corp. as of November 27, 1995, signed on June 17, 1997. The Registrar further contained a notification of change of offices of International Energy Systems Corp from Annacis Island in Delta to a private residence in Vancouver.

ANALYSIS

At the October 21, 1997 hearing, the Employer accepted that Struve was entitled to compensation for length of service, regular wages, vacation pay and unremitted RRSP contributions as set out in the Determination, subject to a finding on the issue of successorship. The Employer also accepted that Davis was entitled to compensation for length of service, unremitted pension contributions, benefit repayments and unpaid wages, as set out in MacLean's memorandum of July 9, 1997, again subject to a decision on successorship, the vacation formula and Davis's entitlement to banked time accrued on layover in Taiwan.

On the issue of Davis's vacation time, the Employer argued that Davis's contract of employment provided for five weeks of vacation, not ten per cent of total wages. Davis's entitlement to double time for overtime work covered his vacation entitlement. It further argued that the *Act* did not require it to pay even five weeks.

The contract of employment between the Employer and Davis stated that he would be paid for "5 weeks (10%)." Davis demonstrated that in the past his vacation pay was based on total wages, not straight time wages. The *Act* permits a Determination to order an employer to pay wages or vacation pay above the minimum standards set out in the statute. The definition of "wages" in Section 1 of the *Act* includes "salaries, commissions or money, paid or payable by an employer to an employee for work." In this case, the evidence presented demonstrated that Davis's contract with the Employer intended that he should be paid for vacation at the rate of ten per cent of his wages. There was no evidence to support the contention that his rate of pay for overtime work was meant to offset the language in his contract covering vacation entitlement.

Plumbley argued on behalf of the Employer that the addendum to Davis's contract covering pay for layover days while he was in Taiwan was signed under duress and thus should be declared null and void. The Employer did not argue that the contract presented in evidence was not genuine. It was signed a month before Davis actually went to Taiwan. If the addendum was in any way improper, the Employer had the right to discipline Davis. It is trite to say that parties sign employment contracts under circumstances they find unpleasant

or distasteful. Despite such sentiments, however fervently held by one party, this Tribunal has no authority to declare a valid contract void.

The Employer argued that most, if not all, of its liability for vacation pay and length of service compensation payable to Davis and Struve should be transferred to a successor company, International Energy Systems (1983), effective from October 1996. In particular, Plumbley acknowledged that the Determination was correct in respect of wages, compensation for length of service, vacation pay and unremitted RRSP contributions owed to Struve. However, he argued that IES (1983) was liable for those funds.

The basis for this argument was that IES (1983) had the same employees as IES, the same telephone and facsimile numbers and that it received payment for work Davis performed for IES. The argument continued that IES (1983) had the same shareholders as IES and had taken up a distribution agreement with Kawasaki Heavy Industries. Moreover, IES assets have been transferred to the new company. Finally, Davis took direction from IES (1983) beginning in October 1996.

This Tribunal is a creature of the *Employment Standards Act*. In general its jurisdiction should be confined to matters of fact or law arising under that *Act*. The only provision of the *Act* that deals with the concept of successorship is Section 97, which states:

> If all or part of a business or a substantial part of the entire assets of a business is disposed of, the employment of an employee of the business is deemed, for purposes of this Act, to be continuous and uninterrupted by the disposition.

In this case, the only direct evidence of the disposal of any assets of the Employer was the testimony of Struve and Davis that materials they moved from the premises of International Energy Systems to Cullen's new company, presumably International Energy Systems (1983), belonged to Cullen, plus Struve's hearsay statement that other assets of the Employer were in storage. The Tribunal had no direct evidence of the transfer of the Kawasaki Heavy Industries agreement or even of the continuation of telephone and facsimile numbers. Davis testified that he worked for Cullen only briefly after he left International Energy Systems, although both admitted that they took instructions from Cullen after Plumbley was denied access to the Employer's premises in October 1996 until they ceased working for the Employer in January 1997.

In addition Section 95 of the *Act* covers "associated corporations," essentially undertakings carried on through more than one firm under common control or direction. Although the Employer did not argue that International Energy Systems and International Energy Systems (1983) were associated corporations, it is possible that such a relationship existed. The Tribunal did not have enough evidence to conclude that the two companies were associated, but such a relationship might be established in another forum.

Essentially, Plumbley was left alone to argue the Employer's case. He did not have access to the Employer's records, which obviously put him at a severe disadvantage. None the less, the Employer bore the onus of presenting evidence to persuade the Tribunal that the

liability should be assigned to another firm, since he raised the issue in his appeal. In fact, very little direct evidence on this point was presented, apart from the statements of Davis, Struve and Plumbley. In her July 9, 1997 memorandum, MacLean acknowledged that she could not determine what had happened between International Energy Systems and International Energy Systems (1983) or any other companies. The Employer failed to present enough evidence to prove to this Tribunal that the requirements of Section 97 were met. If the Employer wishes to establish successorship status for another company, it will be necessary to utilize another forum.

ORDER

The circumstances of this case made the Decision unusually complex. For the reasons stated above, further to Section 115 of the *Act*, the portions of the Determination of February 7, 1997, as amended by MacLean's memorandum of July 9, 1997 concerning Davis's wages, vacation pay, including wages for the layover days in Taiwan, compensation for length of service, benefits repayments and return of unremitted pension contributions are confirmed. The portions of the Determination covering Struve's wages, compensation for length of service, vacation pay and unremitted RRSP contributions are confirmed.

Mark Thompson
Adjudicator
Employment Standards Tribunal