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-

Milan Holdings Inc.

("Milan" or the "employer")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	97/406
DATE OF HEARING:	October 21st, 1997
DATE OF DECISION:	December 9, 1997

DECISION

APPEARANCES

Lindsay M. Lyster — for Milan Holdings Inc.

Frank Woodley — on his own behalf

Catherine Hunt — for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Milan Holdings Inc. ("Milan" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from Determination No. CDET 006026 issued by the Director of Employment Standards (the "Director") on April 24th, 1997 under file number 014-656 (the "Determination").

The Director determined that Milan and another firm known as I Rock Concrete (1995) Ltd. were associated corporations as defined by section 95 of the *Act*, or, alternatively that Milan was a successor firm to I Rock Concrete (1995) Ltd. under section 97 of the *Act*. Accordingly, Milan was liable for the sum of $9,893.76 representing unpaid wages and interest (see section 88 of the *Act*) owed to one Frank Woodley. Mr. Woodley's unpaid wage claim spans the period April 23rd, 1996 to January 29th, 1997.

I understand that I Rock Concrete (1995) Ltd. is now insolvent and, so far as I can gather, has not appealed the Determination.

ISSUES TO BE DECIDED

Milan challenges the Determination on a number of grounds. Milan specifically denies that it and I Rock Concrete (1995) Ltd. were associated firms or that it was a successor to this latter firm. Milan also says that the Determination ought to be cancelled because it was not given a reasonable opportunity to respond during the investigation conducted by the Director. Finally, and of more immediate concern, Milan says that the Director's investigation is tainted by either the actual bias, or at least a reasonably apprehension of bias, on the part of the Director's delegate who conducted the investigation that resulted in the issuance of the Determination that is now before me.

With the concurrence of counsel, I indicated that I would hear the parties' submissions on the issue of bias and render a decision with respect to that issue; if necessary, the hearing would be reconvened to deal with the other matters raised by Milan's appeal.

ANALYSIS

Although, as noted above, Milan, in its written submission filed in support of its appeal, asserted that the Director's delegate was, in fact, biased, the thrust of Milan's counsel's submission before me was with respect to the issue of "reasonable apprehension of bias". In my view, Milan's counsel quite properly did not press the argument that the Director's delegate was "actually biased".

This Tribunal has previously held that the Director and her delegates are acting in a quasi-judicial capacity when conducting investigations into complaints filed under the *Act* and, accordingly, must proceed in an entirely unbiased and neutral fashion (see *BWI Business World Incorporated* [1996] B.C.E.S.T.D. 320.21.50-01).

Our Court of Appeal, in *Bennett v. British Columbia (Superintendent of Brokers)*, (1993) 87 B.C.L.R. (2d) 22, recently reiterated the long-standing principle, that flows from a well-known maxim, that justice ought to be dispensed by adjudicators who both are, and appear to be, impartial. The "reasonable apprehension of bias" test is "grounded in a firm concern that there be no lack of public confidence in the impartiality of adjudicative agencies" (see *Committee for Justice and Liberty et al. v. National Energy Board*, [1978] 1 S.C.R. 369 at 391).

In *Bennett*, the allegation of bias was directed against a member of a three-person panel appointed to investigate alleged share trading violations under the provincial *Securities Act.* The panel member in question was a director of a firm that competed with the firm whose shares were alleged to have been improperly traded by Bennett *et al.* In rendering the decision of the court, Madame Justice Southin posed the fundamental question to be answered in the following terms (at pp. 30-31):

> "Would a reasonable person think it just that a director of a company in a certain industry should sit on such an inquiry as this into the conduct of a director of another company in the same industry if the result of that inquiry might be that the director whose conduct is in issue and who is of substantial importance to his own company may be barred from the management of his company and that company may be seriously harmed by his non-participation in the management?
>
> The reasonable person is, of course, a mythical creature of the law."

It is particularly important that dual-function administrative agencies such as the Director of Employment Standards be absolutely impartial. The fact that an administrative agency has both an investigative as well as an adjudicative function does not, of itself, create an apprehension of bias [*Re E.A. Manning*, (1994) 18 O.R. (3d) 96 (Ont. Gen. Div.)], however, if a particular investigation is coloured by the potential for bias, the resulting adjudicative decision may be open to challenge.

Section 77 of the *Act* obliges the Director to "make reasonable efforts to give a person under investigation an opportunity to respond". In my view, it is implicit in this section that the investigation be conducted in such a manner so that the spectre of bias does not arise. As noted by the Supreme Court of Canada in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at 636-37:

> "Although the duty of fairness applies to all administrative bodies, the extent of that duty will depend upon the nature and the function of the particular tribunal. The duty to to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. It is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator."

Under the current *Act*, the investigative process commences with the filing of a complaint with the Director of Employment Standards under section 74. Alternatively, as apparently was the case in the concrete placing and finishing industry, the Director may conduct an investigation in the absence of a complaint [section 76(3)]. At the investigative stage, the Director must, subject to section 76(2), enquire into the complaint, receive submissions from the parties, and ultimately may issue a determination that affects the rights and interests of both the employer and the complainant employee(s). In my view, and consistent with the authorities previously discussed, a determination can only be properly issued following an unbiased investigation.

The Determination runs some 10 pages, not including various additional attachments. The Director's delegate, in the course of setting out his reasons for finding Milan liable for $9,893.76 in unpaid wages and interest, made several comments which are germane to the "reasonable apprehension of bias" issue. These comments are reproduced below:

> • "My investigation...began in June of 1993 as part of a general audit of compliance with the [*Act*] and [*Employment Standards Regulation*] in the concrete placing and finishing industry."
>
> • "The audit is ongoing and...involves in excess of seventy companies."
>
> • "I am satisfied that there are at least the equivalent of 500 full-time non-union workers that at the time the audit began were not receiving overtime or other minimum's [sic] set out in the [*Act*]".
>
> • "...as many as 1200 workers may be affected...It is estimated that as much as 6.9 million dollars is owing to workers affected by the industry audit."

• "At the time the audit began, there was almost complete non-compliance with the overtime provisions of the [*Act*] in the non-union side of the industry."

• "The workers who were subject to these violations are reluctant to give evidence publicly as even the most experienced fear retaliation. These fears are well grounded."

It should be recalled that the only issues relevant to the instant determination were:

i) Was Frank Woodley owed unpaid wages?;

ii) If so, were Milan and I Rock Concrete (1995) Ltd. associated corporations within section 95 of the *Act,* or, alternatively, was Milan a successor to I Rock Concrete (1995) Ltd. within section 97 of the *Act,* so that Milan could be said to be legally responsible for Woodley's unpaid wages?

In my view, a reasonable person, having read the above statements, all reproduced from the Determination, might well conclude that the Director's delegate had determined, on the basis of other information disclosed during the course of a much wider investigation, that nonunion firms (such as Milan) were regularly avoiding their obligations under the *Act* and were able to do so because their employees would not complain for fear of retaliation. Inasmuch as these conclusions were drawn from an audit that was well underway, if not substantially completed, prior to the filing of Woodley's complaint, would a "reasonably informed bystander" say, to paraphrase Madame Justice Southin in *Bennett:* "It does not seem quite right for this delegate to have issued this determination."

In my opinion, a reasonable person might well conclude that the Director's delegate approached the Woodley complaint with something less than a fully open mind. Woodley's claim was for, *inter alia*, unpaid overtime wages. Woodley's alleged employer, Milan, was a nonunion contractor in the concrete placing and finishing industry. The Director's delegate had, apparently, already concluded that such contractors virtually never complied with the overtime provisions of the *Act* and that would-be complainants had "well-grounded" fears of retaliation. In these circumstances, I am satisfied that Milan had a reasonable apprehension as to the neutrality of the Director's delegate.

I wish to reiterate that I am not satisfied that there was actual bias on the part of the Director's delegate; his failing, if one one chooses to characterize it as a failing, was in the use of intemperate language---language that could give rise to a reasonable concern as to his neutrality. However, again to paraphrase Madame Southin in *Bennett*, "this is a case about appearances and not about reality". According, I do not believe that the Determination ought to be cancelled; rather, I believe the more appropriate remedy is to refer the matter back to the Director for a new investigation. A new investigation should also have the salutary effect of remedying Milan's present concern with respect to section 77 of the *Act.*

It may well be that following a fresh investigation, Milan will still be held liable to Woodley; then again, Milan may be found to have no liability. As I have not heard any evidence and argument on the substantive liability question, I pass no opinion on the underlying merits of the Determination.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 006026 be referred back to the Director for re-investigation by a delegate other than the delegate who issued the Determination now under appeal. Following re-investigation the Determination may be confirmed, or pursuant to section 86 of the *Act*, may be varied or cancelled.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal