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 -

Rike Wedding
("Wedding")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 98/628

DATE OF DECISION: January 26, 1999

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Rike Wedding ("Wedding") of a Determination which was issued on September 21, 1998 by a delegate of the Director of Employment Standards (the "Director") in a matter involving Xinex Networks Inc., In Receivership ("Xinex"). In that Determination the Director found Xinex had contravened Sections 17, 18, 40 and 63 of the *Act*, concluded wages and interest were owing to a number of former employees of Xinex, including Wedding, in a total amount of $421,873.10 and ordered those wages to be paid. The Determination attached a spreadsheet which listed the names of the employees, including Wedding, and the amount of wages each were owed. Wedding was found to have been owed $32,471.33. Wedding says the Determination is in error because it failed to include $18,000.00 of a $35,000.00 incentive bonus. Xinex, through Counsel for the Receiver, has responded to the appeal, taking the position that the $18,000.00 is not wages owed by Xinex because Wedding gave up that amount in return for stock options in Xinex prior to its being placed in receivership.

The Tribunal has reviewed the appeal and has decided an oral hearing is not required in this case.

ISSUE TO BE DECIDED

The issue in this appeal is whether Wedding has shown the Director erred in determining the amount of wages owed to her by Xinex.

FACTS

There is some dispute about the facts relating to this appeal. Some areas of dispute do not bear upon the issue that must be decided. The other areas of dispute can be resolved from the material on file.

Xinex was engaged in high tech research and development. Its office and principal place of business was in Delta, British Columbia. It was placed in receivership on June 5, 1998.

Wedding was employed by Xinex to lead and manage their engineering and development functions. The contract of employment between Wedding and Xinex identified that Wedding was to receive a base salary and contemplated that additional compensation could be earned under an incentive plan based on the achievement of established objectives and targets.

In February 1998, Wedding was told the incentive plan compensation payable to her was $35,000.00 for the year 1997. That is not disputed. The Director treated the incentive bonus as wages under the *Act*. That is not disputed. The incentive bonus was not paid to Wedding at the time it was awarded due to cash constraints.

At approximately the same time, early 1998, Xinex embarked on a series of financings in the aggregate sum of $4.5 million which were intended to alleviate the cash constraints. These financings were planned to occur in three successively larger stages. The first two financings were open to Xinex employees, as well as other small investors. The circumstances surrounding the financings and how those related to the respective positions of the principal parties to this appeal warrant some analysis.

In her submission, Counsel for the Receiver describes the circumstances as follows:

> Ms. Wedding decided not to participate in the first two financings. Rather, Ms. Wedding approached Mr. Roy Leahy at the time with her proposal that led to the formation of the Option Agreement. Instead of investing cash in exchange for shares as other managers would do in the first two financings, Ms. Wedding wished to forego receipt of $18,000.00 of her $35,000.00 bonus in exchange for Xinex granting her the right to receive an extraordinary grant of the Options, which she could demand at any time she chose. Mr. Leahy agreed to her proposal, thereby creating a binding contract between Xinex and Ms. Wedding, which agreement was confirmed by Ms. Wedding in writing.
>
> Xinex was prepared to grant Ms. Wedding the Options immediately. However, pursuant to the Option Agreement, Ms. Wedding chose to delay receipt of the grant of Options.

In the context of the *Act*, the position of Counsel for the Receiver is that Wedding owed Xinex $18,000.00 as a result of the agreement between her and Leahy and Xinex is entitled to have that amount deducted or withheld from her wages.

Wedding disputes substantial portions of that statement. In reply to some of the statements, Wedding says:

> There are quite a number of unfounded and inaccurate assertions in the Oct 20-98 submission by the Receiver's Lawyer, which is the most amazing flight of imagination I have seen in some time. Not only are these assertions inaccurate, they are grossly misleading. Among these are:
>
> > That I entered into an agreement relating to financings #1 and #2; I did not. A signed agreement does not exist, relating specifically to financing closed by the end of March, 1998, as claimed in the Oct 20 note.

> That I entered into some agreement for an "extraordinary grant of Options, which she (Ms. Wedding) could demand at any time she chose", as per statement in the Oct 20-98 note. (my emphasis)
> This is news to me.
> There was no discussion of my getting any Options before the final and Failed Financing or of my having any discretion on the timing of the Option award. No one gave me a choice on timing. (more on this below)

> The flight of imagination continues with a long discussion by the Receiver's Lawyer stating as "facts" that: I "chose to delay" Options. That I "understood" the 12 month rule by the ASE, that I "chose to hold off demanding". That "her plan" was to avoid the 12 month period.

Wedding also says there is no agreement in writing confirming the terms of the extraordinary grant of options, as suggested by Counsel for the Receiver in her submission, although she concedes she "did write an informal note, outlining option parameters, [which] referred exclusively [to] the Management Options of the Failed Financing."

Counsel for the Receiver makes several references in her submission to a written confirmation of the agreement pursuant to which Wedding assigned $18,000.00 of her incentive bonus in return for an extraordinary stock option (as opposed to the management stock option contemplated in the employment contract). However, no such document was produced by either party during their submissions to the Tribunal. As a result of a specific request made by the Tribunal to the parties, two documents were produced by Wedding, together with a submission on the documents, and Counsel for the Receiver was provided with the documents and the submission and given an opportunity to respond.

The documents are two memos, a handwritten memo from Wedding to John Andrew dated February 19, 1998, notifying him of an "agreement in concept" reached between her and Leahy to trade "bonus for stock options", and a typed memo from Wedding to Leahy of the same date outlining the "concept agreement" which, Wedding says in the memo, was made between her and Leahy on February 19, 1998. Both memos contain substantially the same information, although the typed memo is the relevant document for the purposes of this appeal, as it identifies the terms of the agreement in concept to Leahy, the individual with whom Wedding made the agreement. The typed memo commences:

> Dear Roy:
>
> This is a note to capture our concept agreement of earlier today, wherein I would trade around half of my performance bonus for stock options to be

> issued on the next, larger round of financing by Xinex, for up to 40,000,000 shares.

The memo then lays out the details of the trade of the bonus for the stock options. It supports Wedding's version of the facts, in the sense that the memo quite clearly refers to a trade of $18,000.00 of the bonus payable to Wedding for stock options which were supposed to be issued following the last stage of financing. These stock options were never issued because that financing failed. I also note the memo invites Leahy to sign it, indicating his agreement to it, but he never did.

ANALYSIS

I reiterate, it is agreed that the incentive bonus, when declared, was wages under the *Act*. Under the *Act*:

"wages" *includes . . .*

> *(b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency, . . .*

Under Section 17 of the *Act*, wages are payable within 8 days of the end of the pay period in which they are earned. The material on file does not indicate the exact date the incentive bonus became payable by Xinex, but I conclude from the material on file that it was payable, *in its entirety*, prior to the February 19 discussion between Wedding and Leahy in which Wedding says it was agreed to allow her to trade a portion of her wages, $18,000.00 of her incentive bonus, in return for stock options. The decision by Wedding to allow Xinex to defer payment of the incentive bonus does not alter the statutory requirement of Section 17 or the effect of the *Act*. Counsel for the Receiver says that following the February 19, 1998 agreement the $18,000.00 was no longer "payable", as Wedding had spent it to acquire stock options in Xinex. I do not agree. Under the *Act* wages are payable by an employer 8 days following the pay period in which they are earned and are required to be paid in their entirety to the employee unless the employer is permitted or required by the *Act* to retain all or part of them.

That is the effect of Section 21 of the *Act*, which reads:

> *21. (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.*

> *(2) An employer must not require an employee to pay any part of the employer's business costs except as permitted by this regulations.*
>
> *(3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.*

For the purposes of this appeal, the question is not whether Wedding and Xinex had an enforceable agreement but whether the *Act* allows Xinex to *"directly or indirectly, withhold, deduct or require payment"* of $18,000.00 of the wages owed to Wedding by them.

The onus is on Xinex to show the deduction or withholding of part of Wedding's wages is permitted by the *Act* or by some other enactment. In the circumstances present in this appeal, subsection 22(4) provides the only basis upon which the deduction could be allowed:

> *22. (4) An employer may honour an employee's written assignment of wages to meet a credit obligation.*

In the circumstances of this case, I conclude this provision does not apply. The Tribunal has narrowly construed the application of Section 22(4). The rationale for that approach is explained in *Craftsman Collision (6th Ave.) Ltd.*, BC EST #D377/96:

> The *Employment Standards Act* is remedial legislation; according to Section 8 of the *Interpretation Act*, R.S.B.C. 1979, c. 206 it must be given a fair, large and liberal interpretation which best ensures the attainment of its objects. The purpose of the *Act* is to give employees wage protection not available to them at common law (*Helping Hands Agency Ltd. and Director of Employment Standards* (December 1, 1995) Vancouver CA018751, B.C.C.A.). Thus exceptions to the general prohibition must be strictly construed; it will be an exceptional case where a "credit obligation" can form the basis of an assignment of wages.
> (page 4)

The Tribunal requires, at a minimum, a written document by an employee which clearly represents an assignment of that employee's wages . In this case, the critical document is the typed memo written by Wedding to Leahy on February 19, 1998. In order for me to give effect to that memo as a *"written assignment of wages to meet a credit obligation"*, I would have to be able to read that document as saying:

> I, Rike Wedding, acknowledge that upon acceptance by Xinex of this concept agreement I will owe Xinex $18,000.00, regardless of whether the stock

> options contemplated by this memo are ever issued, and I immediately assign that amount of my wages to Xinex.

I do not accept the memo, reasonably construed, can be read in that way and, consequently, I do not accept the memo meets the requirements of Section 22(4). I have several reasons for this conclusion.

First, I am not persuaded there was any 'credit obligation' at all owed by Wedding to Xinex. The memo neither establishes nor acknowledges a valid and enforceable contractual obligation that Wedding would immediately pay $18,000.00 to Xinex *upon acceptance* by Leahy of the 'concept agreement', as argued by Counsel for the Receiver. In fact, a plain reading of the memo, which refers to *trading* part of the bonus for "stock options *to be* issued on the next, larger round of financing, . . . for up to 40,000,000 shares", is inconsistent with the existence of such an obligation. There is no doubt that the 'concept agreement' tied the offer by Wedding to trade part of her wages to the final stage of financing. The final stage of financing was never accomplished and the shares, which the memo contemplates would be one component of the 'trade', were never issued. Second, the completion of the final stage of financing appears to be a direct and important aspect of what Wedding describes as the "concept agreement" between her and Leahy. The precarious financial position of Xinex was no secret to Wedding. It makes no sense that Wedding would agree to pay for stock options she may never receive, having already decided not to participate in the stock options associated with the first two stages of financing because of the risk.

Third, I am not satisfied that either the typed memo or the handwritten memo, or even both in combination, constitute a "written assignment of wages" for the purposes of the *Act*. Neither memo authorizes Xinex to deduct or withhold any wages owed to Wedding. At best, the memos indicate only a future intention ("Bonus to be waived . . .") on the part of Wedding to waive part of her incentive bonus when the stock options were issued. Finally, Leahy did not sign the typed memo indicating his agreement and thus both memos are only one party's understanding of a verbal agreement which may not accord with the other party's understanding of that agreement. In fact, that seems to be the case here as Wedding takes quite a different view of what was discussed and agreed in respect of the exchange of wages for stock options than does Counsel for the Receiver.

In the absence of any basis upon which Xinex was permitted to deduct $18,000.00 from the wages owed to Wedding, such a deduction is not permitted and the wages continue to be payable and should have been included in the Determination when calculating the amount of wages owed to the employees listed in the Determination.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated September 21, 1998 be varied to show the aggregate amount of the Determination as $439,873.10, reflecting the conclusion that Wedding is owed wages in an amount of $50,471.33, together with whatever interest has accrued on that amount since the date of issuance pursuant to Section 88 of the *Act*.

David Stevenson
Adjudicator
Employment Standards Tribunal