Employment Standards TRIBUNAL

An appeal

- by -

SoftSearch.com Inc. and Synergy Computer Consulting Ltd.
("SoftSearch")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Carol L. Roberts

FILE No.: 2002/516

DATE OF HEARING: December 19, 2002

DATE OF DECISION: January 21, 2003

DECISION

APPEARANCES:

Kathy Woolverton:	On behalf of SoftSearch.com and Synergy Computer Consulting Ltd.
Michelle Raye Graham:	On her own behalf
Written submissions only	On behalf of the Director

OVERVIEW

This is an appeal by SoftSearch.com ("SoftSearch"), and by Synergy Computer Consulting Ltd. (“Synergy”) pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued September 20, 2002.

The delegate determined that SoftSearch and Synergy were related companies for the purpose of s. 95 of the Act.

The Director’s delegate concluded that SoftSearch had contravened s. 66 of the Act in changing a condition of Michelle Raye Graham’s employment by failing to pay her wages within 8 days of the pay period. The delegate also determined that Ms. Graham was owed wages, vacation pay and compensation for length of service in the total amount of $5,501.27.

ISSUE TO BE DECIDED

There are two issues on appeal. The first issue is whether the delegate erred in determining that SoftSearch and Synergy were related companies.

The second issue is whether the Director's delegate erred in concluding that Ms. Graham was entitled to compensation for length of service. SoftSearch contends that Ms. Graham resigned her position, and was paid all outstanding wages on the final day of her employment.

FACTS

Ms. Graham worked as a director of marketing and marketing co-ordinator from October 6, 1997 until December 21, 2001. The company(ies) for whom she worked during this period is in dispute.

Ms. Woolverton is the founder, President and sole director of Synergy, a computer software development company, which was incorporated in British Columbia on February 4, 1992.

Softsearch is a federally incorporated company, incorporated in June, 1999. Ms. Woolverton was both a director and the President of SoftSearch.

Synergy is SoftSearch's parent company. Originally, SoftSearch was a division of Synergy. Synergy rented office space to Softsearch. At all material times, Synergy and SoftSearch had the same registered and records office, telephone and facsimilie numbers.

The delegate concluded that Synergy and SoftSearch were related.

Ms. Graham alleged that there was a pattern of late or non payment of wages commencing in June, 2000, though to her last day of work on December 21. She also alleged that she was owed vacation pay. She contended that, on December 21, 2001, she told Ms. Woolverton that she could not continue working without being paid, and that Ms. Woolverton laid her off.

On December 30, 2001, Synergy issued Ms. Graham a Record of Employment ("ROE"). Ms. Woolverton issued a revised ROE to Ms. Graham under the name SoftSearch on November 20, 2002, alleging that her bookkeeper had erred in issuing the first ROE under Synergy's name.

Ms. Woolverton advised the delegate that Ms. Graham quit voluntarily, and issued an ROE at her request, in anticipation that Ms. Graham would be recalled. Ms. Woolverton contended that, because Ms. Graham voluntarily quit her position, no compensation for length of service was owed. Ms. Woolverton also contend that, because Ms. Graham gave 2 weeks notice, and was paid for that notice period as well as two weeks' vacation, even if Ms. Graham had quit, she was paid what she was entitled to. Ms. Woolverton also advised the delegate that Ms. Graham agreed to voluntarily defer her pay rather than be laid off.

The delegate concluded, on the basis of SoftSearch's payroll records, that Ms. Graham had not been paid all wages earned within 8 days after the end of the pay period, contrary to s. 17 of the Act, starting with the pay period ending July 15, 2000. The delegate found that regular wages earned for the pay period ending August 31, 2000 were paid in November, 2000. The delegate noted that this pattern of late payment of wages continued through the pay periods ending September 30, 2001, October 31, 2001, November 11, 2001 and December 31, 2001.

The delegate found no evidence that Ms. Graham had quit her position, or that she agreed to defer her wages. The delegate concluded that Ms. Graham had not voluntarily quit her job, and that, when SoftSearch failed to pay Ms. Graham within 8 days of the pay period, SoftSearch had effectively changed the conditions of employment.

The delegate concluded that SoftSearch had terminated Ms. Graham's employment, and that Ms. Graham was entitled to 4 week's compensation for length of service.

SoftSearch issued Ms. Graham a series of 6 cheques in the total amount of $6,037.73 on December 21, 2001. Five of the cheques were in the amount of $1000.00, the sixth in the amount of $1037.73. Ms. Graham alleges that she was told not to cash the cheques until Ms. Woolverton advised her to do so. She cashed the first cheque on January 29, 2002.

Ms. Graham filed her complaint on February 26, 2002. At that time she claimed that, although Ms. Woolverton told her she would be able to cash one cheque every three weeks, she was of the view that she would not be able to do so. Ultimately, however, Ms. Graham was able to cash 3 of the cheques in the total amount of $3000.00. Ms. Graham contended that she was unable to cash the remaining cheques because the bank advised her there were no funds in the account, and gave the stale dated cheques to the delegate.

Ms. Woolverton argued that there was no reason for the banks to dishonour the cheques since SoftSearch had overdraft protection. However, she claimed that, since Ms. Graham had refused or neglected to cash the cheques when they were written, they became stale dated. SoftSearch issued Ms. Graham a replacement cheque in the amount of $3,037.73 on July 1, 2001, although it was not given to Ms. Graham until August 1, 2001. Ms. Graham provided an August 8 letter from the bank indicating there were not sufficient funds in the account on that date to certify or cash the cheque.

Ms. Woolverton submitted that SoftSearch's business account manager had contacted the delegate to advise her that the cheque should have cleared. She also contended that he could confirm that, during the period December 21, 2001 (when the cheques were issued) and when they became staledated (June 2, 2002), 103 transactions cleared SoftSearch's account and that there were no NSF transactions. No letter from the manager was provided as evidence of this assertion. However, SoftSearch issued Ms. Graham a certified cheque in the amount of $3037.73 on August 22, 2002. That cheque was provided to Ms. Graham at the hearing. I indicated that, if it cleared the account, I would consider this portion of the Determination, which is not disputed, to be satisfied.

Ms. Graham subsequently confirmed that the cheque had been successfully cashed.

ARGUMENT

I will set out the arguments on each ground of appeal separately. I note here that Ms. Woolverton made two separate submissions; one on behalf of Synergy, the other on behalf of SoftSearch. For ease of reference, I have set out the arguments without distinction as to the corporate entity.

Associated Corporations

Ms. Woolverton contends that Synergy and SoftSearch are not associated companies. She claims that Ms. Graham was a "founder" and shareholder of SoftSearch, which was "formed by a few past employees of Synergy… Their new company acquired the SoftSearch Trade name and the assets of Synergy's prior software information service. Their new company's name is SoftSearch.com, a U.S. company with a wholly owned subsidiary, SoftSearch.com Inc. (Canada)"

Ms. Woolverton submitted SoftSearch's 2000-2004 business plan in support of her appeal. That document states, in part, as follows:

> SoftSearch… acquired the software database assets from… Synergy… previously run by SoftSearch's President…Both a Delaware parent and Canadian subsidiary corporation have been established to position the company for success. This will be the third successful high tech company founded by President, Kathy Woolverton. Ms. Woolverton has handed the management of Synergy over to established members of Synergy's management team, and shifted her full focus to the role of SoftSearch President.

The document identifies Ms. Woolverton, as President, as part of the management team, along with Ms. Graham, who is identified as "Marketing Director". The document further states that "Before joining SoftSearch, [Ms.] Graham worked ... for a telephone software company".

Ms. Woolverton further contends that Synergy has never been a shareholder in SoftSearch and SoftSearch has never been a shareholder in Synergy. She further asserts that there is no corporate cross ownership

between the two companies, and that Synergy is not a proper party to Ms. Graham's claim. She contends that, although she coincidentally sits as a director of two unrelated companies, that fact is not a sufficient basis to find that the companies are related. She also contends that she is not the sole director of SoftSearch.

Further, Ms. Woolverton contends that Ms. Graham stopped working for Synergy on December 31, 1999, and began working for SoftSearch on January 1, 2000.

Ms. Woolverton further argues that Synergy is not liable for SoftSearch's liabilities.

The delegate submitted a British Columbia registry corporate search identifying Ms. Woolverton as the sole Director, President and Secretary of Synergy as of September 17, 2002, and a Canadian Corporation registry search identifying Ms. Woolverton as the sole Director of SoftSearch as of June 24, 1999, the date of the last update.

Quit/Constructive Dismissal

Although Ms. Woolverton asserted that Ms. Graham quit her employment in early December, worked through her notice period, and was paid all wages she was entitled to, she provided no evidence at the hearing that the delegate's determination was in error. When I suggested that Ms. Woolverton required documentary evidence to support her position, that it was insufficient that she merely repeated her submissions to the delegate, Ms. Woolverton said that three employees witnessed Ms. Graham's statement that she was quitting. Ms. Woolverton was given additional time to provide that evidence. On December 27, Ms. Woolverton submitted two unsworn letters; one from an individual who identified herself as Synergy's bookkeeper, the other from an individual who did not identify her position. While both individuals assert that Ms. Graham told them she was quitting, neither individual spoke to the date Ms. Graham "quit", or the reasons for it. The bookkeeper's letter states, in part, as follows "I would like to advise that, prior to terminating her employment on December 21, 2001, [Ms.] Graham provided Synergy with notice of her intention to leave her job with Synergy…" That notice, if written, was not provided as evidence.

Ms. Graham denied that she told anyone other than Ms. Woolverton the reasons why she was quitting.

Wages and Compensation for Length of Service

Ms. Woolverton claimed that she issued 5 cheques in the amount of $1000 and one in the amount of $1037 because the payroll software prevented her from paying Ms. Graham in any other way. Although I find this explanation lacks credibility in light of all the evidence, ultimately this is not a matter I need not decide, since Ms. Graham has now been paid all regular outstanding wages in full.

Ms. Woolverton also claims that because Ms. Graham left Synergy's employ in December, 1999, and went to work for SoftSearch, she is not owed 4 weeks compensation for length of service.

The delegate contended that, since Ms. Graham continued to perform the same work on January 1, 2000 for SoftSearch as she did for Synergy on December 31, 1999, and at the same location, the Director would deem Ms. Graham's employment to be continuous and uninterrupted for the purposes of the Act, pursuant to s. 97.

ANALYSIS

The burden of establishing that the Determination is incorrect rests with an Appellant. Having reviewed the submissions of the parties, I am unable to find that Ms. Woolverton has discharged that burden.

Associated Corporations

I do not accept Ms. Woolverton's assertions that Synergy and SoftSearch are unrelated.

Section 95 of the Act provides as follows:

> If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,
>
> (a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one person for the purposes of this Act, and
>
> (b) if so, they are jointly and separately liable for payment of the amount stated in a determination or in an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.

As noted by the Tribunal in *Invicta Security Systems Corp.*(BC EST #D349/96), the purpose of s. 95 is to allow the director to

> pierce the corporate veil and look behind the legal structure, or form, of a business to the relationships of various entities that in reality comprise the substance of the business. There are four preconditions to an application of Section 95 to the circumstances of any matter before the director:
>
> 1. There must be more than one corporation, individual, firm, syndicate or association;
>
> 2. Each of these entities must be carrying on a business, trade or undertaking;
>
> 3. There must be common control or direction; and
>
> 4 There must be some statutory purpose for treating the entities as one employer

There is no dispute that the companies shared office space, registered offices, telephone and fax numbers. There is also no dispute that Ms. Woolverton is a director of both companies. In her letters of appeal, she identifies herself as the President of Synergy, and Ex-President of SoftSearch. Ms. Woolverton's subsequently provided documents include a letter from an individual who identified herself as the bookkeeper for Synergy, who purported to give evidence about Ms. Graham's last day of work. This not only suggests that Synergy employees had knowledge of SoftSearch's business affairs, it also suggests that Synergy and SoftSearch also had an integrated bookkeeping and payroll system.

Ms. Woolverton provided the letter from the bookkeeper after she had advanced arguments that Synergy and SoftSearch were distinct entities, and that Ms. Graham worked for SoftSearch, not Synergy. The bookkeeper's statement, upon which Ms. Woolverton relies, is that Ms. Graham quit work for Synergy (my emphasis) on December 21, 2001. That evidence completely undermines Ms. Woolverton's argument, and supports the Determination.

Ms. Woolverton advanced a number of arguments regarding the shareholding and management teams of the two entities. The relevant indicia, for the purposes of the Act, is the control and direction of the companies. The evidence clearly indicates that the companies had a high level of integration, and that, from an employee's perspective, they were indistinguishable. On the evidence provided, Ms. Woolverton was the sole director of both. While she asserted she was only one of several directors of SoftSearch, she provided no evidence to the contrary.

One of the purposes of the *Act* is to ensure employees in the province receive the basic standards of compensation and conditions of employment. The *Act* also provides for a comprehensive enforcement scheme. Section 95, which provides a remedy to employees for unpaid wages, is a part of that enforcement scheme. As the Tribunal noted in *Invicta*, the enforcement provisions include the power of the director to make the one employer declaration for the purpose of facilitating the collection of wages owing under the *Act*.

Ms. Woolverton says that Synergy is an unpaid creditor of SoftSearch, which is now insolvent. Ms. Woolverton says that SoftSearch ceased operations in September 2002, and that there are no funds available to pay compensation for length of service in addition to the wages. Consequently, there is good reason for finding the companies related, and that is recovering the funds Ms. Graham is entitled to.

Given all of the evidence, I am not persuaded that the delegate erred in concluding that SoftSearch and Synergy were related corporations under s. 95.

Compensation for Length of Service

Section 66 provides as follows:

> If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

"Conditions of employment" is defined in Section 1 as "all matters and circumstances that in any way affect the employment relationship of employers and employees".

The test to ascertain whether a substantial alteration has occurred is an objective one (see *Task Force Building Services Inc. v. British Columbia, (Director of Employment Standards)* [1998] B.C.E.S.T.D. D047/98) In determining whether a condition of employment has been substantially altered, the director will have regard to the nature of the employment relationship, and may consider factors such as a change of working location, hours of work, a reduction of wages or a change in responsibilities.

The delegate found that, because Ms. Graham had not been paid wages within 8 days after each pay period, a condition of her employment had been substantially altered. Ms. Woolverton argued that Ms. Graham had agreed to defer her wages, but provided no written evidence this was the case.

Section 63 sets out an employer's liability for compensation for length of service. After 3 consecutive months of service, an employer becomes liable to pay an employee an amount equal to one weeks' wages as compensation for length of service. That liability is discharged if an employee is given notice, quits, retires, or is dismissed for cause. The test of whether an employee quits is a both a subjective and an objective one.

There is no evidence Ms. Graham voluntarily quit her employment. The evidence provided suggests that Ms. Graham told two other employees that she quit, but there is no evidence as to the dates or circumstances surrounding the quit. I accept that Ms. Graham quit because her employer was in breach of its statutory obligation to pay her wages. Therefore, I am unable to find either that Ms. Graham quit her employment two weeks before she actually left work on December 21, 2001, or that she "worked through her notice period".

I am unable to find that the delegate erred in concluding that Ms. Graham was constructively dismissed when she was not paid wages as required under the Act. Therefore I find that she is entitled to compensation for length of service.

Amount of Compensation

Section 97 of the Act provides that if all or part of a business or substantial part of the entire assets of a business is disposed of, the employment of an employee of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition.

Ms. Graham's employment agreement, dated March 28, 1998, is with "SoftSearch Information Services, a division of Synergy Computer Consulting Ltd."

The evidence is that SoftSearch purchased Synergy's software information services, along with its trade name. Although there is no evidence as to the date of the purchase, Ms. Woolverton's submissions indicate this occurred in 2000. However, even if the date of sale was December 31, 1999, there is no evidence the vendor, Synergy, terminated Ms. Graham's employment prior to the sale.

There is also no evidence that Ms. Graham entered into a separate employment agreement with SoftSearch at any time. Finally, there is no evidence Ms. Graham's employment duties after January 1, 2000 were different from the duties she performed before that date, or that the work location, reporting relationships or compensation were any different. Thus, her employment is deemed continuous, and she is entitled to four weeks compensation for length of service.

Ms. Woolverton also argued that, when Ms. Graham stated she was quitting, Synergy offered her employment, which she refused. There is no evidence Synergy offered Ms. Graham employment.

Although the parties made submissions regarding the uncashed cheques, I find I need not address those, as Ms. Woolverton gave Ms. Graham a certified cheque in the amount of $3,037.37 at the hearing. Ms. Graham has confirmed that this cheque has been accepted. Consequently, I find that this satisfies the balance of the unpaid wages.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated September 20, 2002 be varied as follows:

The delegate concluded that Ms. Graham was entitled to wages and interest in the amount of $5,501.27. Ms. Graham has successfully cashed a cheque in the amount of $3,037.33, bringing the outstanding liability to $2,463.94, plus whatever interest may have accrued to date, pursuant to s. 88 of the *Act*.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal