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-

541809 B.C. Ltd. and Cruisers Pit Stop Diner Ltd.
operating as Cruisers Pit Stop Diner

("Cruisers" or the "employer")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	98/802
DATE OF DECISION:	February 11th, 1999

DECISION

OVERVIEW

This is an appeal brought by 541809 B.C. Ltd. and Cruisers Pit Stop Diner Ltd. operating as Cruisers Pit Stop Diner ("Cruisers" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on December 8th, 1998 (the "Determination").

The Director's delegate investigated a complaint filed by 14 former Cruisers employees and ultimately determined that the former employees were owed $18,251.64 on account of unpaid wages (including, in many instances, compensation for length of service) and interest. The 14 complainant employees are Karen Beck, Jason Bell, Tina Connors, Corey Foster, Ben Howanyk, Ian McClellan, Jordan McClelland, Lisa Perepalkin, Denis Pitre, Michele Saraceni, Erin Veitch, Tammy Verwey, Charlene Whitaker and Shaun Wilson.

In addition, by way of the Determination, a penalty in the amount of $0 was levied pursuant to sections 98 of the *Act* and 29 of the *Employment Standards Regulation.*

ISSUES TO BE DECIDED

In its appeal documents filed with the Tribunal on December 18th, 1998 the employer set out, as best as I can gather, the following reasons for appeal:

- "Cruisers Pit Stop Diner Ltd. is a separate co. from 541809 Ltd. and should this portion of any claim dealt with separately" (sic);

- The claims of Tina Connors and Tammy Verwey do not have any merit;

- While the unpaid wage claims of Karen Beck, Denis and Tina Connors have merit, their respective claims are overstated; and

- Cruisers says the the Director's delegate failed to give it an adequate opportunity to respond, during the investigation, to the various claims advanced by the former employees.

In addition to the foregoing, Cruisers also states in its appeal documents that Tarra Baron is not a director of 541809 B.C. Ltd. and thus "should not be a party to the claim". This ground of appeal is irrelevant inasmuch as the Determination does not name Ms. Baron as a party who is liable under the Determination. Ms. Baron's claim that she is not a director or officer of 541809 B.C. Ltd. will be relevant only if and when a separate determination is issued against her under section 96 of the *Act* (director/officer liability).

FACTS AND ANALYSIS

According to the information set out in the Determination, the employer's Kelowna operation "closed the doors to business...on May 7, 1998" without giving written notice to the employees and without paying their accrued wages or any compensation for length of service (where appropriate). The delegate noted that "the employer continues to operate the business in the Langley, B.C. area".

The employer's position appears to be that the Kelowna and Langley operations are separate and distinct, each being operated by a separate legal entity. While it is not specifically stated, I understand that the Kelowna "Cruisers Pit Stop Diner" was operated by 541809 B.C. Ltd. whereas the "Langley Cruisers Pit Stop Diner" was and continues to be operated by Cruisers Pit Stop Diner Ltd.

It would appear that the vast majority of the employees' unpaid wage claims arise from the Kelowna operation. It would further appear that the Kelowna operation is, if not bankrupt, at least insolvent. For that reason, the delegate may have thought it best to name both companies in order that there would be a pool of assets against which execution proceedings could be taken. However, and in my view this is a critical omission, the delegate never made a specific finding in the Determination that the two corporate entities were "associated corporations", as defined in section 95 of the *Act*, such that both corporations would be "jointly and separately liable" for the employees' unpaid wages.

In my opinion, it is not appropriate for me to simply vary the Determination and make a declaration under section 95 as to whether or not the two firms are, or are not, associated corporations. First, such a declaration, in the first instance, is for the Director to make (the Tribunal can only review the appropriateness of the Director's declaration via an appeal from a section 95 determination). Second, and in any event, I do not have the necessary evidentiary record before me upon which I could determine whether or not the firms are associated corporations as defined by section 95.

While it is quite possible for an employee to be hired by two separate employers, provide services to both and thereby create a joint liability on the part of both employers, once again, there is nothing in the Determination or in the material before me to suggest that the 14 complainant employees were hired by, and provided services to, both 541809 B.C. Ltd. and Cruisers Pit Stop Diner Ltd.

In light of the foregoing, I believe the most appropriate order is to simply refer the entire matter back to the Director for further investigation. Such an order will also have the salutary effect of remedying the appellants' apparent concern regarding section 77 of the the *Act*. I do not, however, wish to be taken as endorsing the validity of the employer's submission under section 77--indeed, based on the rather limited information before me, I am not able to conclude with any confidence that there was a denial of the appellants' rights under section 77.

ORDER

Pursuant to section 115(1)(b) of the *Act*, I order that this matter be referred back to the Director for further investigation and, if appropriate, further order under section 86 of the *Act*.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal