

An appeal

- by -

Drake Towing Ltd. and Christine Johnston, Associated Corporations
(“Drake”)

- 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.: 2002/606

DATE OF HEARING: February 26, 2003

DATE OF DECISION: March 4, 2003

DECISION

APPEARANCES:

J. Bird:	On behalf of Drake Towing Ltd.
E. Phillips:	On behalf of the Director of Employment Standards
M. Uyeyama:	On his own behalf

OVERVIEW

This is an appeal by Drake Towing Ltd. (“Drake”), pursuant to Section 112 of the *Employment Standards Act* (“the Act”), against a Determination of the Director of Employment Standards (“the Director”) issued November 12, 2002.

Mike Uyeyama alleged that Drake owed him regular wages and vacation pay, and that it terminated his employment without written notice, cause or compensation for length of service.

The Director’s delegate concluded, among other things, that Drake was an associated corporation with Christine Johnston (“Johnston”), and that they contravened sections 17, 18, 21, 44, 58, and 63 of the Act in failing to pay Mr. Uyeyama wages, statutory holiday and vacation pay, deducting money from his wages, and failing to pay him compensation for length of service.

The delegate Ordered that Drake and Christine Johnston pay Mr. Uyeyama the sum of \$3,930.14.

Ms. Johnston did not appeal the Determination.

ISSUE TO BE DECIDED

Whether the Director's delegate erred in determining that Drake and Johnston were associated corporations.

FACTS

The facts relevant to this appeal are as follows.

Drake is a towing company. Mr. Clearwater is a principal of the company. Ms. Johnston, who filed an assignment in bankruptcy in September, 2001, was a sole proprietor of a business that leased and operated a tow truck.

Drake entered into a contract with Ms. Johnston whereby Ms. Johnston was to make her tow truck available to Drake between 8:00 a.m. and 6:00 p.m. each Monday to Friday.

Ms. Johnston’s truck bore the Drake logo, as well as the name “B. & C. Canil (Ms. Johnston and her former husband), owner-operators” on the door. Either she or Mr. Uyeyama drove the truck, which

operated as any other Drake truck. Mr. Uyeyama drove Johnston's truck from February 5 to May 12, 2001.

Mr. Uyeyama was dispatched to jobs by Drake's dispatcher, and submitted "Drivers Sheets", which recorded his calls, to Drake's dispatch office on a daily basis. These slips formed the basis for calculating the amounts owed to Ms. Johnston pursuant to the contract.

Mr. Uyeyama, like other drivers, wore a shirt bearing a Drake company logo, and all invoices issued by him bore Drake's name.

Mr. Uyeyama contended that Drake set the drivers' schedules, and established preferred rates for certain customers. He also contended that Drake had direction and control over his work day in that it required him to be at the office at a certain time, kept records of his hours of work, and assisted him with any problems he might have. Drake disputed this assertion, contending that, although it had contractual rights to have the truck available between 8:00 a.m. and 6:00 p.m., it did not control Mr. Uyeyama's time. There was no dispute that Mr. Uyeyama was hired by Ms. Johnston, and that his employment was terminated by Ms. Johnston. There is also no dispute that Ms. Johnston issued all of Mr. Uyeyama's paycheques.

The delegate issued a demand for records to Drake. Drake asserted that Mr. Uyeyama was not an employee, and that it had no records to provide.

On August 21, 2002, the delegate advised Drake and Johnston of the possibility of finding they were associated companies.

Drake contended that Johnston owned her own truck prior to working for Drake, and that Drake paid Johnston as a "broker". Drake took the position that Johnston was paid for the work her truck did, and that she was responsible for paying the persons who drove it for her.

Ms. Johnston advised the delegate that Mr. Uyeyama had no relationship with Drake.

The delegate concluded that Drake and Ms. Johnston were associated corporations under s. 95 of the Act on the basis of the following factors:

- Ms. Johnston and Drake had a business relationship. Johnston owned the truck bearing Drake's logo, and she herself drove a truck owned by Drake while Mr. Uyeyama drove the truck she owned.
- Drake's exercised control and direction over Mr. Uyeyama by giving him jobs, and requiring that he report to them and maintain certain records. Mr. Uyeyama also reported to Ms. Johnston about the same matters. Ms. Johnston deducted money from Mr. Uyeyama's wages for accidents he had with her truck.

ARGUMENT

Drake's argues that the delegate made a number of factual errors, leading to an error in law; that being the conclusion that Drake was an associated company with Ms. Johnston.

Drake relies on the Tribunal's decision *Super Shuttle Ltd. and Local Minibus Ltd. et al.* (BC EST #D364/00) in submitting that the businesses were not under common control or direction.

Drakes submits that there is no cross ownership, directorships or business interests between Drake Towing, which is owned by Dale Clearwater, and Ms. Johnston operating as a proprietorship.

Drake contends that Ms. Johnston's truck was made available to Drake's according to the terms of the contract. Drake says that Ms. Johnston directed her driver on when to work, and that, once on duty, the driver took calls from Drake's dispatch. The driver of Ms. Johnston's truck submits towing slips to Drake's, which form the basis of calculating the amount payable to Ms. Johnston according to the contract.

Drake says that any concerns regarding the driver's performance were referred to Ms. Johnston to deal with. It says that it imposed no discipline or direction in terms of how the job was to be performed.

The delegate submits that, when customers seek to have towing services, they call Drake, not Ms. Johnston or any other owner-operator. She contends that, if there was no association between Drake and Johnston, the truck would not bear Drake's logo on the door.

She contends that Drake had an opportunity to respond to her letter indicating that she was considering finding it associated with Ms. Johnston, and did not submit any information that would lead her to conclude otherwise. She also submits that she arrived at her conclusion that Drake and Ms. Johnston were associated based on the Director's policies and interpretation guidelines.

Mr. Uyeyama contended that he underwent a training session by Drake when he first commenced working for Ms. Johnston, and was under the direction and control of Drake during his work hours of 8:00 a.m. to 6:00 p.m.. He argues that the Determination should be upheld.

ANALYSIS

The burden of establishing that the Determination is incorrect rests with an Appellant. I find that Drake has met that burden.

Associated Corporations

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), and followed by *Super Shuttle Ltd.* (*supra*), 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.

Three of these preconditions have been met. There is no dispute that there was more than one business enterprise, and that both Drake and Ms. Johnston each carried on separate businesses in the towing industry. I also find there is a statutory purpose in treating the entities as one employer, as Ms. Johnston is now bankrupt, and Mr. Uyeyama will be unable to recover wages owed from her.

Less clear is whether there was “common control and direction” of the two businesses or undertakings.

There is no evidence that there was any cross ownership or directorships between Drake and Ms. Johnston. They did not share registered offices or records offices, or bank accounts. As business entities, they operated completely independently. There is no dispute that Ms. Johnston leased her truck, and that Drake had no financial interest in it. There is no evidence Ms. Johnston owned any of Drake’s assets, or any shares in its business. That Ms. Johnston is bankrupt and Drake is not is evidence of that degree of independence.

There is also no evidence Ms. Johnston had any say in the management of Drake’s operations, or Mr. Clearwater had any input into how Ms. Johnston operated her business.

Ms. Johnston’s truck bore Drake signage in addition to her own, and Mr. Uyeyama was dispatched to jobs by Drake’s dispatcher. While suggestive of some degree of operational integration, these factors, when reviewed in conjunction with the factors noted above, cannot support a conclusion that the businesses are commonly controlled and directed.

Mr. Uyeyama was hired and fired by Ms. Johnston, who also scheduled his hours of work. I accept that, on one occasion, one of Drake’s employees admonished Mr. Uyeyama about his failure to have the truck available for work at 8:00 a.m., but there is no evidence Drake took any disciplinary actions with respect to Mr. Uyeyama. If there were any problems with Mr. Uyeyama’s performance, those were communicated by Drake to Ms. Johnston. There is no evidence that Drake had any other control over Ms. Johnston’s employee.

Common control or direction of the companies is a prerequisite to a section 95 declaration. (see: *Brunswick Avenue Holdings Ltd.*, BC EST #D705/01, *Invicta Security Systems Corp.*, BC EST #D349/96, and *International Steelworks Industries Ltd. and SWI Steelworks Inc.*, BC EST #D294/02) Given that there is no evidence of joint ownership of the enterprises, no evidence of joint ownership of the assets of

the companies, no evidence of joint or common financing and no evidence of shared directorships, I find, on balance, that there is no basis for a section 95 declaration.

I conclude that the delegate erred in finding that Drake was associated with Ms. Johnston, and allow the appeal.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated November 12, 2002, be confirmed only insofar as it relates to Christine Johnston. It is set aside with respect to Drake Towing.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal