Employment Standards TRIBUNAL

An appeal

- by -

Pro-Active Personnel Inc.
("Pro-Active")
-and-
Olympic Enterprises Ltd.
("Olympic Enterprises")

- 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 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2011A/90

DATE OF DECISION: October 14, 2011

DECISION

SUBMISSIONS

Justin G. Lam	counsel for Pro-Active Personnel Inc. and Olympic Enterprises Ltd.
Rod Bianchini	on behalf of the Director of Employment Standards

INTRODUCTION

1. This appeal concerns the interpretation and application of the so-called "common employer" provision contained in section 95 of the *Employment Standards Act* (the "*Act*"). Section 95 provides as follows:

> Associated employers
> 95. 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 employer 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, a settlement agreement or an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.

2. Sometime during April 2008, 13 former employees of Acropolis Contracting Ltd. ("Acropolis Contracting") filed complaints with the Employment Standards Branch alleging that their employment had been summarily terminated and they had not been paid all of their earned wages. The complaints were investigated and on January 2, 2009, a determination was issued against Acropolis Contracting in the total amount of $54,693.18 representing $53,193.18 in unpaid wages (including regular wages, overtime, vacation pay and section 88 interest) owed to the 13 complainants and three separate $500 monetary penalties levied against Acropolis Contracting (see *Act*, section 98). I understand that Acropolis Contracting never appealed the determination issued against it (the appeal period expired on February 9, 2009) and that the entire amount of the determination remains unpaid.

3. On March 26, 2009, a second determination in the total amount of $51,365.18 (the "Section 96 Determination") was issued against Mr. Theodoros Kefalas in his capacity as an officer and director of Acropolis Contracting. The Section 96 Determination relates to the very same unpaid wages (adjusted to account for the 2-month liability ceiling set out in section 96(1) of the *Act*) that were the subject of the determination issued against Acropolis Contracting. The Section 96 Determination was not appealed and the appeal period has now expired (as of May 4, 2009). I understand that the Director of Employment Standards has not collected any monies due under the Section 96 Determination.

4. In light of this situation, and as a result of information the Employment Standards Branch apparently received in April 2010, a further investigation was undertaken with a view to determining if four other corporations – namely, Acropolis Forming Inc. ("Acropolis Forming"), Acropolis Ventures Ltd. ("Acropolis Ventures"), Olympic Enterprises Ltd. ("Olympic Enterprises") and Pro-Active Personnel Inc. ("Pro-Active Personnel") – should be the subject of a section 95 declaration that would include these firms together with Acropolis Contracting. Ultimately, on June 2, 2011, the Determination now under appeal (the "Section 95

Determination") was issued declaring all four firms to be "associated corporations" with Acropolis Contracting. By way of the Section 95 Determination, all four associated corporations were held "jointly and separately liable" for $54,432.86 in unpaid wages and interest owed to the 13 complainants together with a further $1,500 in monetary penalties for a total amount of $55,932.86.

5. Pro-Active Personnel and Olympic Enterprises have appealed the Section 95 Determination on the grounds that the Director's delegate who issued it, together with the accompanying "Reasons for the Determination" (the "delegate's reasons"), erred in law and failed to observe the principles of natural justice in making the Section 95 Determination (see subsections 112(1)(a) and (b)). I note that the delegate's reasons are dated June 1, 2011 (one day before the Determination) but I do not think anything turns on this discrepancy.

6. I am adjudicating this appeal based on the parties' written submissions and, in that regard, have submissions from legal counsel for the two appellants and from the delegate. Although invited to do so, none of the complainants filed a submission in this matter. In adjudicating this appeal, I have also reviewed the section 112(5) "record" that was before the delegate when he was making the Section 95 Determination.

7. Counsel for the appellants applied for a section 113 suspension and subsequently the delegate advised, by letter dated July 27, 2011, that he would "suspend" (and, by that, I understand the delegate to mean that he would not take any enforcement proceedings) the wage payment orders made under the Section 95 Determination "pending the outcome of the appeal filed with the Employment Standards Tribunal". On August 8, 2011, Tribunal Member Stevenson issued written reasons for decision regarding the suspension application (see BC EST # D081/11) and gave the following directions (at para. 12): "Accordingly, the Tribunal will give effect to the Director's agreement and will make no order on the application at this time, but reserves jurisdiction to reconsider the matter if circumstances warrant it."

THE DETERMINATION

8. According to the information set out in the delegate's reasons, Acropolis Contracting operated residential, commercial, landscape and industrial concrete forming and wood framing businesses. The complainants all worked on two particular projects at the University of British Columbia during the period between October 2007 and April 2008. On or about April 11, 2008, the complainants were informed that Acropolis Contracting had "gone bankrupt" and that their employment was thus terminated. I should note that I do not have before me any record showing that formal bankruptcy proceedings were ever filed. The complainants were apparently also informed that they would not be receiving cheques for their final payment period.

9. Subsequent to issuing the determination against Acropolis Contracting and the Section 96 Determination, the delegate identified four corporations, including the two appellants, that seemingly were connected with Acropolis Contracting and thus he undertook an investigation to determine if a section 95 declaration affecting those corporations would be appropriate. At the conclusion of that investigation, the Section 95 Determination was issued. The delegate determined that all four corporations were "associated" with Acropolis Contracting.

10. The delegate's key findings regarding each appellant are summarized out, below:

Olympic Enterprises

The delegate's investigation showed that Olympic Enterprises rented tower cranes to Acropolis Contracting and Acropolis Forming for use at the U.B.C. construction sites during the period from December 1, 2007, to

March 26, 2008. There was a common director, namely, Mr. Theodoros Kefalas, who was Olympic Enterprise's sole director and officer and both a director and officer of Acropolis Contracting, Acropolis Forming and Acropolis Ventures. The delegate's reasons state (page R10):

> [Acropolis Contracting] and [Acropolis Forming] needed the equipment to complete the work and Olympic [Enterprises] needed to rent the equipment to succeed in the business they were in. In essence, Olympic's existence was reliant on [Acropolis Contracting] and [Acropolis Forming] and Mr. Kefalas had intimate contact and control of all companies listed. Mr. Kefalas as a Director of all the Acropolis companies would have knowledge of the equipment and labour needs of [Acropolis Contracting] as they related to The [U.B.C. construction] Projects.
>
> Testimony from the complainants is consistent that Mr. Kefalas was on the job sites and was seen as being the controlling mind of [all four corporations]. The integration of the businesses, the commonalities in the types of businesses run by each entity, the movement of labour across the Acropolis companies and the access to important equipment (tower Cranes) supports the common control and direction of the companies.
>
> Olympic was candid in confirming that all of its equipment was being used by [Acropolis Contracting] and [Acropolis Forming] and did not provide any evidence to support any other significant business activities. There has been no evidence provided that indicates Olympic performed business with other entities other than [Acropolis Contracting] and [Acropolis Forming] from the date of Olympics' [sic] incorporation up to the time period under review here, or after April 11, 2008 (the last day worked by the complainants for which wages were found to be owed).

Pro-Active Personnel

The delegate noted that some of the complainants, although hired by Pro-Active Personnel, actually worked for Acropolis Contracting and Acropolis Forming and that their payroll records variously showed their paymaster to be Pro-Active Personnel, Acropolis Contracting and Acropolis Forming (pages R7/R10). There was evidence that Mr. Kefalas indicated that Pro-Active Personnel would move workers to job sites as required regardless of the particular identity of the firm contacted to do the work at the site and Pro-Active Personnel's records included invoices to all three Acropolis firms (pages R7/R10). Although the delegate accepted that Pro-Active Personnel had "other [i.e., "non-Acropolis"] clients some of which do a significant amount of business with Pro-Active", because there was overarching common direction and control (in the person of Mr. Kefalas), there did not need to be "perfect alignment" between Pro-Active and the other Acropolis firms (page R11). The delegate concluded (page R11):

> … Mr. Kefalas through Pro-Active exercised considerable direction and control of [Acropolis Contracting] and [Acropolis Forming] on the [U.B.C.] Projects by having the ability to supply and control the movement of labour. This would put Pro-Active and the remaining Acropolis entities in an advantageous position from their interrelatedness.
>
> When you couple this with the fact that Mr. Kafalas [sic] is a director of the corporations listed it supports the conclusion that the Acropolis companies were run at and through one another. Equipment in the form of cranes was provided by Olympic, labour in the form of labourers and tradesmen were supplied by Pro-Active to the Acropolis Companies who were awarded the contact. In turn this was all controlled and driven entirely or partially by Mr. Kafalas [sic] who would have intimate business information about the Acropolis companies and the projects they were involved in.

11. The delegate ultimately concluded that it was necessary to "associate" all four corporations with Acropolis Contracting under section 95 of the *Act* so that the complainants' unpaid wage claims could be satisfied (page R12).

THE APPEAL

12. As noted above, the two appellant corporations appeal the Section 95 Determination on the grounds that the delegate erred in law and failed to observe the principles of natural justice in making the determination. The appellants ask the Tribunal to cancel the Section 95 Determination outright or, alternatively, seek to have it varied by removing both appellant firms from the scope of the section 95 declaration. I would not be prepared to order an outright cancellation of the Section 95 Determination given that, so far as I am aware, neither of the other two corporations has contested the appropriateness of being included within the section 95 declaration. In the further alternative, the appellants say that the entire matter should be referred back to the Director of Employment Standards to be reconsidered. The appellants also seek costs but the Tribunal has no statutory authority to award costs – section 47 of the *Administrative Tribunals Act* deals with costs orders but this power has not been given to the Tribunal by section 103 of the *Act*.

13. In his submission legal counsel for the appellants asserts the following facts with respect to Pro-Active Personnel:

- It was incorporated on August 28, 1998, and has carried on business as a labour contractor since the late 1990s.
- With respect to the "Beaty Biodiversity" building at U.B.C., in April 2007 it contracted with Acropolis Forming to provide labourers and tradespeople for this project and continued to do so until April 11, 2008, when Acropolis Forming ceased work resulting in a billing shortfall owed by Acropolis Forming to Pro-Active Personnel of $23,774.26.
- With respect to the "Marine Residence" project at U.B.C., the situation was much the same as with the Beaty building, namely, that Pro-Active was contracted to provide labour to Acropolis Forming but when this latter firm ceased working on April 11, 2008, there was a billing shortfall ($175,125.72 in this case).

14. Counsel made the following factual assertions regarding Olympic Enterprises:

- It was incorporated on October 12, 2004, to carry on business as a leasing firm for cranes and other related construction equipment.
- With respect to the "Beaty Biodiversity" building project at U.B.C., Olympic Enterprises rented a tower crane to Acropolis Forming and also provided labour as needed to maintain the crane. The crane was apparently initially provided to Acropolis Forming and, after April 11, 2008, to U.B.C. directly until the crane was repossessed by the lessor under the lease agreement between it and Olympic Enterprises. Olympic says that it is owed about $177,193.12 from Acropolis Forming and a further $68,670.00 from U.B.C. It is also asserted that Olympic Enterprises supplied other office equipment, tools and supplies to U.B.C. and that there is a further outstanding balance owed by U.B.C. to Olympic Enterprises of $135,199.30 on this account.
- With respect to the "Marine Residence" project, Olympic Enterprises supplied a tower crane and related equipment and also supplied maintenance services and personnel to Acropolis Forming until April 11, 2008, and thereafter continued on-site until June 16, 2008, when the project was substantially completed. Counsel asserts that Acropolis Forming owes Olympic Enterprises $74,188.12 and that U.B.C. has an outstanding account of $34,256.25.

15. Counsel says that, at all material times, both appellants were merely subcontractors to Acropolis Forming or were contracted directly by U.B.C. and that the equipment and services "were not rendered by virtue of any relationship with [Acropolis Contracting]".

Alleged Errors of Law

16. Counsel says that the delegate erred in law in issuing a section 95 declaration "associating" the two appellants with each other and with the other three "Acropolis" firms. More particularly, counsel says that the section 95 declaration was issued based "largely on the fact that Mr. Kefalas was a common director" but that the facts showed the firms operated independently.

17. With respect to Pro-Active Personnel, counsel says that the evidence shows that it had many clients and that its operations were not reliant on any of the Acropolis companies and that there was no "operational overlap" between Pro-Active Personnel and any of the Acropolis companies with respect to the U.B.C. construction projects. Further, Acropolis Forming had many suppliers who also supplied labour to it and none of these other companies was declared to be an "associated corporation". Counsel says that Acropolis Construction was not even a Pro-Active Personnel client during the time when the complainants' unpaid wage claims crystallized. Finally, counsel asserts: "…[Pro-Active Personnel] operated independently of [Acropolis Forming], but supplied labour to [Acropolis Forming] for the purposes of the [U.B.C.] Projects [and] to apply the Act as the Director has done with respect to [Pro-Active Personnel] is an unreasonable restraint on free enterprise and a harmful disincentive for companies to do business as may best suit them in a competitive marketplace."

18. Counsel says that the delegate erred in law by including Olympic Enterprises within the ambit of the section 95 declaration. He says that a section 95 declaration cannot be issued simply because: i) Olympic Enterprises supplied construction cranes to Acropolis Forming (as did other companies not included within the section 95 declaration); and ii) Mr. Kefalas was a common director as between the two firms.

Failure to Observe the Principles of Natural Justice

19. Counsel for the appellants concedes that the delegate "provided [the appellants] with [an] opportunity to makes [sic] submissions prior to issuing the [Section 95] Determination" but failed, prior to issuing it, to provide copies of certain documents (such as witness statements and internal "Acropolis" payroll records and invoices) that counsel says were critical to the delegate's ultimate decision.

FINDINGS AND ANALYSIS

20. Since the "natural justice" ground could be characterized as a "threshold issue" – in the sense that if this ground succeeds, I might not find it necessary to address the alleged errors of law – I propose to address this issue at the outset of my analysis.

Was there a breach of the principles of natural justice?

21. As noted above, the appellants' central concern is that the delegate issued the Section 95 Determination without first giving the appellants the opportunity to receive, review and comment on certain information that the appellants say was critical to the delegate's ultimate decision. In essence, and although this section was not referred to in the appellants' counsel's submission, the appellants say that the delegate failed to comply with section 77 of the *Act*: "If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond."

22. The record before me shows that Mr. Kefalas was, at all material times, one of two directors of Acropolis Contracting, Acropolis Forming and the president of both firms; and the sole director and officer of Acropolis Ventures, Pro-Active Personnel and Olympic Enterprises. The Employment Standards Branch wrote letters to Acropolis Contracting on April 24, May 16, May 30 and June 30, 2008, with respect to the unpaid wage claims filed by the complainants. Further, Mr. Kefalas was personally served with information relating to the complainants on July 9, 2008. Acropolis did not respond to the delegate's various requests for information and documents and on January 2, 2009, a determination was issued against Acropolis Contracting. On March 26, 2009, the Section 96 Determination was issued against Mr. Kefalas. As previously noted, neither determination was appealed.

23. On May 18, 2010, the delegate wrote to Acropolis Contracting (with copies to its two directors) advising that he was investigating whether Acropolis Contracting could be "associated" with Acropolis Forming and Acropolis Ventures and asked for a response by no later than June 2, 2010. On May 21, 2010, the delegate once again wrote to Acropolis (with copies to its two directors) advising that the "investigation has expanded to include Pro-Active Personnel Inc. and Olympic Enterprises Ltd." and asked that any response to be delivered by no later than the previous June 2, 2010, deadline. However, it was not until September 28, 2010, that legal counsel for the two appellants replied to the delegate's May 21, 2010, letter.

24. The appellants' counsel's September 28, 2010, letter suggested that there was "no basis" for associating either firm with Acropolis Contracting but did not directly speak to the issues raised by the delegate in his May 21 letter. On October 18, 2010, the delegate sent an e-mail to the appellants' counsel seeking answers to certain questions and the production of certain documents by October 22, 2010. The appellants' counsel replied by letter dated October 22, 2010, to the delegate and enclosed a number of documents but did not make any specific submissions regarding the question of whether a section 95 declaration would be appropriate as it related to the appellants.

25. On November 12, 2010, the delegate wrote to the appellants setting out his preliminary findings regarding whether either firm could be associated with the "Acropolis" firms. The delegate summarized the evidence in his possession including invoices, payroll records and "evidence and testimony from some of the complainants". The delegate concluded by noting that, on a preliminary basis, he was satisfied that it would be appropriate to "associate" the appellants with the "Acropolis" firms but asked for a written response by November 18, 2010. On November 19, 2010 (i.e., one day after the deadline), legal counsel for the appellants wrote the delegate setting out the appellants' position that a section 95 declaration should not be issued. Counsel did *not* request copies of the complainants' statements or for copies of any other documents held by the delegate.

26. On November 22, 2010, the delegate sent an e-mail to the appellants' counsel seeking information about the role of Olympic Enterprises in the Beaty construction project at U.B.C. and counsel provided this information in a letter to the delegate dated November 25, 2010. On April 13, 2011, the delegate sent an e-mail to the appellants' counsel advising of his intention to issue a section 95 declaration and on June 2, 2011, the Section 95 Determination was issued.

27. My review of the record shows that the delegate made a reasonable effort to advise the appellants – and their counsel – of the fact that he was considering issuing a section 95 declaration that would include the appellant firms. He summarized the nature of the evidence he had in his possession and provided ample opportunity for the appellants to respond to that information. The appellants now say that they were not provided with copies of certain documents but, for the most part, these documents were already in the possession and control of Mr. Kefalas and/or the appellants. Further, the delegate indicated that he had copies of witness statements, he summarized the thrust of those statements in his correspondence, however the appellants'

counsel never requested actual copies of the statements. In the circumstances, I am fully satisfied that the delegate complied with section 77 of the *Act* and did not otherwise fail to observe the principles of natural justice in making the Determination.

Did the delegate err in law in issuing the Section 95 Determination?

28. Section 95 states that if firms are associated they constitute "one employer" for purposes of the *Act*. An "employer", as defined in section 1 of the *Act*, includes a person who was directly or indirectly responsible for the employment of an "employee" (also defined in section 1). The Section 95 Determination only deals with the complainants' unpaid wage claims for work undertaken at the two U.B.C. construction projects. The arrangement appears to have been, based on the position advanced by counsel for the appellants, that Pro-Active Personnel supplied the employees (i.e., it was the "employer") and, in turn, invoiced Acropolis Forming for their services. If, in fact, Pro-Active Personnel dispatched some or all of the complainants to work at the U.B.C. job sites, then this company was their "employer" (although this does not mean that other entities might not also be so characterized) and thus is liable for their unpaid wages. Thus, under this approach, a section 95 declaration was not required since Pro-Active was already liable as the direct employer.

29. That said, however, I am nonetheless of the view that the delegate did not err in finding that Pro-Active Personnel should be brought within the ambit of a section 95 declaration involving it, Olympic Enterprises and the "Acropolis" firms.

30. The record before me shows that there was a high degree of business reciprocity and integration among the firms. For example, Acropolis Forming apparently secured the construction contracts but had no personnel or equipment. It was thus reliant on Pro-Active Personnel to supply the former and Olympic Enterprises to supply the latter. I note that some invoices in the record emanate from Pro-Active Personnel for certain employees' services that were "sold" and "shipped" to Acropolis Forming and that the invoices reflect the actual earnings of the employees in question (for example, regular wages, overtime and statutory holiday pay) plus GST. In effect, Pro-Active Personnel was the nominal employer but Acropolis Forming was the true paymaster. This is reinforced by the fact that when Pro-Active was no longer being paid, the complainants were no longer being paid.

31. Apparently, Pro-Active was so reliant on Acropolis Forming that when the latter failed to pay invoices relating to the complainants' services, Pro-Active was unable to pay their wages. Mr. Kefalas solely controlled the two appellants and was one of two controlling principals of the "Acropolis" firms. Clearly, Mr. Kefalas was a "directing mind" of all firms named in the Section 95 Determination.

32. The evidence shows that several of the complainants were offered employment with Acropolis Contracting although, according to counsel for the appellants, the actual employer was Pro-Active Personnel. Their time cards also identified the employer as Acropolis Contracting. In some instances, payroll cheques were issued on an Acropolis Contracting bank account and at least one complainant had pay cheques variously issued from bank accounts held by Acropolis Contracting, Acropolis Forming and Pro-Active Personnel. In other words, the "Acropolis Group" itself was not too concerned about the legal identity of the employer.

33. Although Olympic Enterprises was incorporated in 2004, according to counsel for the appellants, it was a "shell company" until April 2007 when it acquired equipment (I understand by way of a lease arrangement) that, in turn, would be sub-leased to other entities. In his September 28, 2010, letter to the delegate, counsel for the appellants stated: "…its first significant engagements were for the Marine Residences and Biodiversity projects at UBC, to which virtually all of its capital equipment was devoted until about mid-2008". According to counsel, the crane lessor repossessed it on August 21, 2008, thus bringing an end to Acropolis Forming's

involvement in the Beaty project. The only reasonable inference to be drawn is since Acropolis Forming failed to pay the invoices, Olympic Enterprises in turn was unable to meet its obligations to the lessor. Thus, Olympic Enterprises business activities and financial fortunes were apparently inextricably linked to those of one of the firms in the "Acropolis Group" of companies. This state of affairs suggests a state of reliance and integration that supports, rather than undermines, the section 95 declaration.

34. According to counsel for the appellants, Acropolis Forming accumulated invoice arrears in the amount of approximately $200,000 to Pro-Active Personnel and over $250,000 to Olympic Enterprises. Counsel has not explained how such arrears could have accumulated without some dispensation having been granted by the two appellants. These invoices state that payment was to be made within 2 weeks of the invoice date. The only logical inference to be drawn from this state of affairs is that the two appellants were prepared to allow the arrears to accumulate in the best interests of other firms in the "Acropolis Group" (most obviously, Acropolis Forming) and, in this respect, Olympic Enterprises did not act as one would have expected a truly independent third party creditor to have acted.

35. While it may be true that Pro-Active Personnel dealt with clients outside the "Acropolis Group" of companies, that fact is not fatal to a section 95 declaration. The key question is whether the delegate had sufficient evidence before him of integration and common direction and control with respect to the work at issue here, namely, the U.B.C. construction projects. In my judgment, the delegate did not error in finding that there was such evidence.

36. Counsel for the appellants noted that other firms also supplied labour and equipment to Acropolis Forming, however, there is no evidence before me that Mr. Kefalas controlled any of these other firms or that there was any integration regarding the business operations of these firms and the firms within the "Acropolis Group" of companies.

ORDER

37. Pursuant to section 115(1)(a) of the *Act*, the Section 95 Determination is confirmed as issued in the amount of $55,932.86 together with whatever further interest that may have accrued pursuant to section 88 of the *Act* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal