

An appeal

- by -

Total Care Technologies Inc. and Total Care Holdings Inc.
("Total Care")

- 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: David B. Stevenson

FILE No.: 2001/820

DATE OF DECISION: April 4, 2002

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by Total Care Technologies Inc. and Total Care Holdings Inc. (“Total Care”) of a Determination that was issued on October 30, 2001 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Total Care had contravened Parts 2 and 3, Section 18(1) and Section 58(3) of the *Act* in respect of the employment of 72 employees and ordered Total Care to cease contravening and to comply with the *Act* and to pay an amount of \$207,591.47.

Total Care says the Determination is wrong in several respects, which I shall summarize as follows:

1. The Director erred in law by awarding amounts in excess of the statutory minimums;
2. The Director erred in fact in respect of the vacation pay calculations for certain employees;
3. The Director erred in law by awarding amounts to ‘extra-territorial’ employees.

The Director has raised the standing of Total Care to bring the appeal.

ISSUE

The issue in this appeal is whether Total Care has shown the Determination was wrong in a manner that justifies the intervention of the Tribunal under Section 115 of the *Act* to cancel or vary the Determination, or to refer it back to the director. There is a preliminary issue concerning whether Total Care has the standing to bring the appeal.

FACTS

The Determination provided the following information by way of background:

Total Care Technologies Inc. and Total Care Holdings Inc. operates a computer software business which is under the jurisdiction of the Act.

On August 22, 2001 Arthur Anderson Inc., Trustee, was appointed Receiver Manager to a voluntary assignment into bankruptcy of Total Care Technologies Inc. and Total Care Holdings Inc.

Numerous complaints have been filed which resulted in the investigating officer arranging through legal counsel and the trustee in bankruptcy, Arthur Anderson,

the provision of a computer generated calculation by the trustee of the annual vacation pay for all employees to the date August 21, 2001

The Determination noted that while complaints the complaints related to unpaid annual vacation entitlement and length of service compensation, the claims were investigated and decided in separate Determinations.

There is nothing in the material on file indicating the Trustee has authorized Total Care to file an appeal of the Determination. Counsel for Total Care has indicated in a reply submission that the appeal has been filed on behalf of both Total Care and the Trustee.

ARGUMENT AND ANALYSIS

I will first address the preliminary issue of the standing of Total Care to bring this appeal. In *Glen Fyfe (as agent for Canadian Neon Ltd.)*, BC EST #D080/00, the Tribunal examined the standing of a bankrupt company, or a director/officer of such company, to appeal a corporate Determination. The decision includes the following analysis:

Section 71(2) of the federal *Bankruptcy and Insolvency Act* states that “on an assignment [into bankruptcy], a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the . . . assignment . . .”. The trustee, in turn, is given wide authority to deal with the bankrupt’s property. For example, the trustee may, with the permission of the inspectors, “bring, institute or defend any action or other legal proceedings relating to the property of the bankrupt” [see section 30(1)(d)]. Thus, on bankruptcy, the bankrupt’s property (subject to certain exceptions that have no application in this case) vests in the trustee who is given, for the most part, exclusive authority to deal with that property.

Accordingly, Canadian Neon does not have the legal authority to appeal the Determination as that right lies solely with Canadian Neon's licensed trustee--in this case, KPMG Inc. Whether this appeal was filed by Fyfe in his personal capacity, or as an agent of Canadian Neon, the same result holds: the appeal is simply not properly before the Tribunal and thus this appeal must be dismissed. The matter of the complainant employees’ wage entitlements will have to be addressed in the course of the bankruptcy proceeding itself. In that latter regard, I understand each of the employees has now filed a “proof of claim” with the trustee.

I agree with the position of the Director on this issue. Total Care has no standing to bring this appeal and it must be dismissed on that basis. Counsel for Total Care says the appeal is being brought “on behalf” of the Trustee. It is however, being brought by Total Care and they have no

standing to do so unless permitted by the Trustee and there is no indication any such permission has been granted.

For future reference, however, I will comment on the two errors of law which are alleged to have been made. First, the Director is not limited to enforcing only minimum standards (see *Dusty Investments (c.o.b. as Honda North)*, BC EST #D043/99; (Reconsideration of BC EST #D101/98), *Baxter Carabetta Braun*, BC EST #D499/98). Second, the entitlement to “extra-provincial” employees should be governed by an application of the principles stated in *Can-Achieve Consultants Ltd.*, BC EST #D463/97; (Reconsideration of BC EST #D099/97).

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated October 30, 2001 be confirmed in the amount of \$207,591.47, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal