

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.: 2002/263

DATE OF DECISION: September 25, 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, but it has been established to the satisfaction of the Tribunal that the appeal has been prepared and submitted on behalf of the Trustee in Bankruptcy.

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.

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.

The only other fact that needs to be recited is that while the Determination related to the claims of 72 former employees of Total Care, all but one of the claims, that relating to Elaine Watson, have been settled or resolved. It follows that, at a minimum, the Determination must be varied to reflect those settlements and resolutions. Whether the variance goes further than the settlements and resolutions that have been achieved or whether the Tribunal is justified in cancelling the Determination altogether will depend on the validity of the appeal as it relates to Ms. Watson's claim. The Determination indicated Ms. Watson was owed \$852.97 in wages and interest.

ARGUMENT AND ANALYSIS

There is nothing in the appeal that specifically relates the grounds of appeal to the claim made by Ms. Watson. In other words, the appeal does not show that Ms. Watson was awarded more than statutory minimums, it does not identify Ms. Watson as an "extra-provincial" employee or allege that she was one of the 'certain employees' in respect of which the Director was alleged to have erred in the vacation pay calculation.

The burden is on Total Care, as the appellant, to persuade the Tribunal that the Determination was wrong, in law, in fact or in some manner of mixed law and fact. Specifically, the burden on Total care in this case is to show Ms. Watson was not entitled, either in whole or in part and for the reasons set out in the appeal, to what the Director found she was owed under the *Act*. I am not persuaded that burden has been met.

The appeal does not allege that Ms. Watson was an "extra-provincial" employee. Total Care has not shown the amount found owing to Ms. Watson was more than the statutory minimums, but even if it was, the Director is not precluded from issuing a Determination requiring the payment of wages that might exceed the statutory minimums, see *Dusty Investments, c.o.b. as Honda North*, BC EST #D043/99 (Reconsideration of BC EST #D101/98). Finally, Total Care has not shown that Ms. Watson was one of the 'certain employees' whose annual vacation entitlement was wrongly either calculated or paid.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated October 30, 2001 be varied to show an amount owing of \$852.97, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal