

An appeal

- by -

Pursuit StaffReplacement Services Ltd.
(“Pursuit StaffReplacement”)

- 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.: 2002/426

DATE OF DECISION: November 19, 2002

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Pursuit StaffReplacement Services Ltd. (“Pursuit StaffReplacement”) of a Determination that was issued on July 24, 2002 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Pursuit StaffReplacement was one of four companies associated under Section 95 of the *Act* and had contravened Part 3, Section 17(1) of the *Act* in respect of the employment of David R. Cockburn, Svetlana Liaifer, Pauline O’Toole, Sarika Sandhu, Jessie Tamayo, Jennifer Upper and Monica Atley and ordered the associated companies, including Pursuit StaffReplacement, to cease contravening and to comply with the *Act* and *Regulations* and to pay an amount of \$16,563.60.

Pursuit StaffReplacement says it was never given notice of the Director’s hearing and was, as a result, unable to provide critical information to the Director. Pursuit StaffReplacement says, in any event, the Determination was wrong in concluding it was associated with Pacific Care Management Ltd. (“Pacific Care”). Pursuit StaffReplacement also says no funds were ever diverted by Gail Hewitt, a director/officer of Pacific Care, to incorporate Pursuit StaffReplacement as alleged in the Determination.

The Tribunal has decided that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

ISSUE

The issue in this case is whether Pursuit StaffReplacement has shown the Director erred in concluding it should be considered to be associated with Pacific Care for the purposes of the *Act*.

FACTS

Pacific Care is a business supplying persons to work as nurses and care aides in geriatric facilities. Pacific Care failed to pay wages to the complainants. There has been no appeal of any aspect of the Determination by Pacific Care.

During the investigation, some of the complainants alleged that the principal of Pacific Care, Gail Hewitt, was also involved in at least two other companies and that income which had been generated for Pacific Care by the work of the complainants had been diverted to establishing those other companies. Those allegations were investigated and the Determination set out the following findings in respect of them:

Gail Hewitt, director of Pacific Care Management Ltd. is listed as sole director of Pursuit Security Ltd.

The investigation also leads me to conclude that Gail Hewitt, using Pacific Care Management income, established Pursuit Investigations Ltd. and is an officer of the company although her name does not appear on the registry search and J.B. Van Vlack is listed as the sole director.

All 3 companies are doing business from the same office at 280-666 Burrard St., Vancouver.

A search of the corporate registry shows that Pursuit StaffReplacement [sic] Services Ltd. lists the only signing officer for the other 3 companies, Mr. Robert M. McKitrick, on the company documents.

Complainants have alleged that, at some point in April, Gail Hewitt commenced dispatching staff through Pursuit StaffReplacement [sic] Services and stopped dispatching them through Pacific Care Management Ltd.

In the appeal, R. Murray McKitrick, filing the appeal on behalf of Pursuit StaffReplacement, added certain facts. Mr. McKitrick, who is a practising lawyer in the province, advises the Tribunal he received instructions from Gail Hewitt on or around the 7th day of April, 2002 to incorporate a company under the name of Pursuit StaffReplacement Services Ltd. That company was incorporated on April 26, 2002, with Mr. McKitrick as the sole director, officer and shareholder. On the same day, Mr. McKitrick submitted his resignation as the sole director and officer of the company. In the statement of facts provided by Mr. McKitrick, he says the company was never activated by Gail Hewitt, she was never appointed an officer or director nor issued any shares in the company. He says she had no legal authority to carry on business under the name of Pursuit StaffReplacement and no legal authority to direct the company to do anything.

In reply to the appeal, the Director restates the information provided by to him by some employees - that Pursuit StaffReplacement dispatched some employees to facilities under that name. Three of the complainants have also filed replies, but none say they were dispatched to work at facilities by Pursuit StaffReplacement. The information alleged by the Director is not grounded in any direct or objective evidence.

ARGUMENT AND ANALYSIS

Pursuit StaffReplacement, as the appellant, has the burden in this appeal of persuading the Tribunal that the Determination was wrong, in law, in fact or in some manner of mixed law and fact (see *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96)). Where an appeal challenges a finding, or conclusion, of fact, the appellant is required to show that finding or conclusion was based on wrong information, that it was manifestly unfair or that there was no rational basis upon which it could be made (see *Mykonos Taverna, operating as the Achillion Restaurant*, BC EST #D576/98). In this case, Pursuit StaffReplacement challenges some of the findings of fact that led the Director to a conclusion that Pursuit StaffReplacement should be associated with Pacific Care for the purposes of the *Act*.

Section 95 of the *Act* states:

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 person for the purpose 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 the amount from any or all of them.*

The Tribunal has identified four preconditions to an application of Section 95 to the circumstances of any matter before a delegate of the Director of Employment Standards (see *Invicta Security Systems Corp.*, BC EST #D249/96). They are:

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.

Mr. McKittrick argues that Gail Hewitt had no legal authority to carry on business under the name Pursuit StaffReplacement or to direct the company. These statements are made on the basis that Gail Hewitt never took the necessary steps to become the director, officer and shareholder of the company, presuming that without legal control, she could not direct the company to do anything. I do not accept that argument. It is apparent on the facts that Gail Hewitt was the directing mind of Pursuit StaffReplacement, not Mr. McKittrick. Even if she was not yet formally (or legally) installed as director and officer of the company, if there was evidence she was using Pursuit StaffReplacement to participate in the business of Pacific Care, the precondition of common control and direction would be satisfied.

There is, however, no evidence that Pursuit StaffReplacement was ever “carrying on business” in the manner that led the Director to associate that company with Pacific Care.. The Director has relied on information provided by some of the complainants, who alleged they were dispatched to facilities under the name of Pursuit StaffReplacement. No complainant has confirmed that information in any submissions received by the Tribunal on this appeal nor has any documentation been provided through the Director to support the conclusion made. In the absence of some factual support for that assertion, it is neither fair nor reasonable for the Director to use those allegations as a basis for a conclusion that Pursuit StaffReplacement should be associated with Pacific Care.

The appeal succeeds.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated July 24, 2002 be cancelled as against Pursuit StaffReplacement.

David B. Stevenson
Adjudicator
Employment Standards Tribunal