

An appeal

- by -

Pursuit Investigations Ltd.
("Pursuit Investigations")

- 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.: 2002/440

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 Investigations Ltd. (“Pursuit Investigations”) 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 Investigations, and two other companies, Pursuit Security Ltd. and Pursuit Staff Replacement Ltd., were associated for the purposes of the Act with Pacific Care Management Ltd. (“Pacific Care”), and the associated companies 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 (the “complainants”) and ordered the associated companies to cease contravening and to comply with the Act and Regulations and to pay an amount of \$16,563.60.

Pursuit Investigations says the notice of the Director’s hearing was never served on its registered office and, as a result, it was unable to provide critical information to the Director. Pursuit Investigations says, in any event, the Determination is wrong in concluding it was associated with Pacific Care.

Pursuit Investigations asks the Tribunal to conclude it is not associated with Pacific Care and that the Determination be cancelled against it.

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 Investigations 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 Staff Replacement [sic] Services Ltd. lists the only signing officer for the other 3 companies, Mr. Robert M. McKitrick, on the company documents.

In this appeal, Pursuit Investigations, through Mr. Van Vlack, has submitted that Gail Hewitt has never been a director, officer, employee or shareholder of Pursuit Investigations and had no authority, implied or otherwise, to represent the company. Mr Van Vlack asserts that Pursuit Investigations was incorporated about 1½ years before Pacific Care and consequently could not have used funds allegedly diverted to it by Pacific Care to incorporate. Pursuit Investigations has also filed copies of corporate documents that support the assertions made.

In reply to the appeal, the Director submits:

. . . I have been unable to find evidence that supports the complainants' original assertions that Pursuit Investigations and its directors were the principal recipients of income from Pacific Care Management Ltd. in the subject period.

Two of the complainants filed replies to the appeal, but neither addressed the issue under appeal.

ARGUMENT AND ANALYSIS

Pursuit Investigations, 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 Investigations challenges some of the findings of fact that led the Director to a conclusion that Pursuit Investigations 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.

There appears to be no dispute that the first two preconditions are met and the material indicates a statutory purpose. What is at issue is the question of common control or direction between Pursuit Investigations and Pacific Care. That question is predominantly one of fact.

On that question, while I appreciate that the circumstance of Pursuit Investigations and Pacific Care carrying on business from the same location may suggest some kind of interrelationship, the Determination contains no real evidence of common control or direction. There is no commonality of directors, officers or shareholders between the two entities. The finding of commonality in the Determination appears to flow from little more than the allegation by some complainants that Gail Hewitt, the principal of Pacific Care, established Pursuit Investigations using income derived from Pacific Care's business. The Director concedes there is no evidence to support this allegation. Mr. Van Vlack, on behalf of Pursuit Investigations, says that never happened.

Neither has the Director challenged or contradicted any other assertion of fact made by Mr. Van Vlack in support of the appeal. The Director has provided no reason why the Tribunal should not accept those assertions of fact. The assertions made by Mr. Van Vlack are supported by documentary material. The information and supporting material adequately establish that there is no commonality of control or direction. I find there was no valid evidence, and consequently no rational basis, for the Director concluding Pursuit Investigations and Pacific Care should be treated as associated entities for the purposes of the *Act*. Pursuit Investigations has demonstrated an error in the Determination.

The appeal succeeds.

ORDER

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

David B. Stevenson
Adjudicator
Employment Standards Tribunal