

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the

*Employment Standards Act* R.S.B.C. 1996, C.113

- by -

543501 B.C. Ltd. and 491659 B.C. Ltd. operating as Terrace Fitness Zone  
(the "Employer")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Mark Thompson

**FILE No.:** 2000/486

**DATE OF DECISION:** December 22, 2000

## DECISION

### OVERVIEW

This is an appeal by 491659 B. C. Ltd. (the "Employer") pursuant to Section 112 of the *Employment Standards Act* (the "Act") against a Determination by a delegate of the Director of Employment Standards (the "Director") issued on April 4, 2000. The Determination found that the Employer owed a former employee, Graceland Mitchell ("Mitchell") \$1394.92 for unpaid wages due to a violation of the minimum hours provisions of the *Act*, vacation pay and interest.

The Employer's appeal alleged that Mitchell had been paid according to a contract with the Employer, that she was a contractor under the *Act* and that 491659 B. C. Ltd. was not an associated corporation with 543501 B. C. Ltd. as the Director's delegate had concluded.

This decision is based on written submissions.

### ISSUES TO BE DECIDED

The issues to be decided in this case are first whether Mitchell was covered by the *Act*. If that issue is decided in Mitchell's favour, the issue of the link between 543501 B. C. Ltd. and 491659 B. C. Ltd. must be decided.

### FACTS

The Employer formerly operated two fitness centers, one in Terrace, and another in Prince Rupert. The business license for the Terrace Fitness Zone was issued to 543501 B. C. Ltd. Mitchell worked as a babysitter at the Terrace Fitness Zone from September 1998 until January 1999. The Terrace Fitness Zone ceased operations in April 1999. The Director's delegate issued determinations with respect to three complainants on April 4, 2000. The Employer filed appeals against two of the determinations, Cynthia Peck ("Peck") and Mitchell. The Tribunal found that the appeals were deficient because Mr. Dwayne Rae ("Rae"), a director of both companies, did not include a copy of the Determinations with the appeals within the time limits established by the Tribunal. Rae then appealed to the Tribunal to extend the deadlines for filing an appeal. In a decision issued on July 7, 2000, the Tribunal extended the time limits until the date when Rae eliminated the deficiencies of the original appeal by providing copies of the determinations.

The appeal in this case concerns only Mitchell, although the arguments advanced by the Employer appear to be identical with those also advanced for the Peck appeal. The Peck appeal was decided by the Tribunal in BC EST #D479/00. Certain aspects of this decision, in particular the link between 543501 B. C. Ltd. and 491659 B. C. Ltd., are identical to the decision in BC EST #D479/00.

The Determination found that Mitchell received pay for 1.5 hours each day she came to work at Terrace Fitness Zone. The Employer agreed that she worked that time. The Employer did not maintain payroll records, so the Director's delegate relied on Mitchell's records of the time she

worked. In its appeal, the Employer alleged that Mitchell worked pursuant to a personal contract for a fixed amount each day she worked. It further stated that Mitchell had never mentioned any minimum number of daily hours while she was employed. Had she raised the issue, work would have been found for her.

Initially, the Employer maintained that Mitchell was not covered by the act because she was a “sitter” under Section 32(1) of the Regulations. The Determination found that Mitchell did not fall under Section 32(1), and the appeal did dispute that conclusion.

The Determination also found that 543501 B. C. Ltd. and 491659 B. C. Ltd. were financially linked, as 491659 B. C. Ltd. was the secured party for the assets of 543501 B. C. Ltd. The assets of 543501 B. C. Ltd. reverted to 491695 B. C. Ltd. after the Terrace Fitness Zone closed.

In support of its appeal, the Employer stated that Revenue Canada had audited its payroll and found that all monies owed, including Mitchell’s vacation pay, had been paid out. This was the same argument the Employer made to the delegate on March 20, 2000 in response to the original complaints.

The Employer also stated that Rae had been informed by his counsel that liabilities for 543501 B.C. Ltd. could not be transferred to 491659 B. C. Ltd., although Rae was the owner of both companies. Rae explained that his “other company” (apparently 491659 B. C. Ltd.) purchased the assets of 543501 B. C. Ltd. from the bank that had foreclosed the mortgage on the building in which the Terrace Fitness Zone was located. In his view, this purchase did not include any liabilities for wages remaining from 543501 B. C. Ltd. Rae stated that 543501 B. C. Ltd. had been “absolved” prior to the purchase. In its appeal, the Employer acknowledged that Rae was the owner of both companies. The Director’s delegate provided evidence of a corporation search indicating that Rae was the president of both companies, and both had the same address as their registered offices.

## **ANALYSIS**

Section 34 of the *Act* covers minimum daily hours as follows:

- (1) If an employee reports for work on any day as required by an employer, the employer must pay the employee for
  - (a) at least the minimum hours for which the employee is entitled to be paid under this section, or
  - (b) if longer, the entire period the employee is required to be at the workplace.
- (2) An employee is entitled to be paid for a minimum of
  - (a) 4 hours at the regular wage, if the employee starts work unless the work is suspended for a reason completely beyond the employer’s control, including unsuitable weather conditions, or

- (b) 2 hours at the regular wage, in any other case, unless the employee is unfit to work or fails to comply with the Industrial Health and Safety Regulation of the Workers' Compensation Board.

This provision covered Mitchell if she was an employee under the *Act*. The Employer argued that Mitchell worked under a contract, presumably meaning that she was not an employee. It did not present evidence or point to any error of law in the Determination to prove that Mitchell was not an employee. In a letter to the Director's delegate dated April 15, 1999, Rae stated that the Terrace Fitness Zone had paid Employment Insurance and Canada Pension Plan premiums for Mitchell's employment. The appeal commented on Mitchell's performance, but did not allege that she was terminated for cause. The record was not clear about the circumstances under which Mitchell ceased to be an employee, but the Determination did not find that Mitchell was entitled to compensation for length of service. That issue was not before the Tribunal, and the allegations about Mitchell's performance, to which she objected vigorously, were not relevant to this decision.

Therefore, I conclude that Mitchell was an "employee" as defined in the *Act*. It is thus necessary to turn to the issue of the link between 543501 B. C. Ltd. and 491659 B. C. Ltd.

Another interpretation of the Employer's appeal was that Mitchell had contracted to work 1.5 hours per day to care for clients' children for a fixed amount per shift. Section 4 of the *Act* states that the requirements of the *Act* cannot be waived. An employer cannot contract with an employee for terms contrary to the provisions of the statute, so any agreement between the Employer and Mitchell cannot be enforced.

Section 95 of the *Act* deals with associated corporations as follows:

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 purposes 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 that amount from any or all of them.

The circumstances of this case fall squarely under the rule of Section 95 of the *Act*. One individual, Rae, controlled and directed both companies, so the *Act* regards them as a single entity for the recovery of money owed to former employees, Mitchell in this case. The common owner cannot transfer assets from one of his companies to another in order to avoid the liabilities to former employees for the company that had been sold.

**ORDER**

For these reasons, the Determination of April 4, 2000 is confirmed. Mitchell is owed \$1394.92 for minimum daily pay, vacation pay, and interest, plus additional interest accrued since the date of the Determination pursuant to Section 88 of the *Act*.

***Mark Thompson***  

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**Mark Thompson**  
**Adjudicator**  
**Employment Standards Tribunal**